



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 37 OF 2016**

**IN THE MATTER OF THE PROTECTION OF PROPERTY UNDER ARTICLE 40 OF THE  
CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 OF THE LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES ORDER 37**

**BETWEEN**

**NJUGUNA MACHARIA..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH MATU NDIAGA.....DEFENDANT/RESPONDENT**

**R U L I N G**

**BACKGROUND**

1. This is a ruling in respect of two separate applications both seeking orders of injunction. One of the applications is brought by the plaintiff and the other is by the defendant.
2. The plaintiff had filed an originating summons against the defendant in which he sought orders that he had acquired a plot measuring **50 x 100ft** out of **Plot No. Trans-Nzoia/Mito Mbili Settlement Scheme/79** which is registered in the name of the defendant. The plaintiff contemporaneously filed an application for injunction in which he sought to restrain the defendant from interfering with his enjoyment of the 50 x 100ft plot (suitland).
3. The defendant responded to the plaintiff's application and went ahead to file his own application for injunction in the same file. The defendant had filed a separate suit against the plaintiff in **Kitale Environment & Land Court Case No. 27 of 2016** in which he seeks an order declaring the agreement between him and the plaintiff as null and void for lack of consent of the Land Control Board.

**PLAINTIFF'S CONTENTION IN THE APPLICATION DATED 10/2/2016**

4. The plaintiff contends that on **26/3/1995**, he entered into an agreement with the defendant whereby the defendant sold to him the suitland at a consideration of **Kshs.29,000/=**. He took immediate possession and constructed a semi-permanent house in which he resides to date. He later bought building materials and wanted to put up a permanent house.

5. The plaintiff further contends that the defendant has since then threatened to evict him from the suitland where he has been staying for the last 20 years.

#### **DEFENDANT'S CONTENTION IN APPLICATION DATED 1/3/2016**

6. The defendant contends that he is the owner of **LR. No. Trans-Nzoia/Mito Mbili Settlement Scheme/79** measuring about **4.0 hectares**. That he had intended to sell a plot measuring **50 x 100ft** to the plaintiff. That instead of the plaintiff occupying the portion he had sold to him, he went and settled in a portion which contains his homestead. That the plaintiff used the area administration in his bid to have him forced to transfer the suitland to him.

7. The defendant further contends that the plaintiff has concealed the fact that he filed a claim before the defunct Cherangany Land Disputes Tribunal which award was adopted as judgement of the court in **Kitale SPM Land Case No. 89 of 2003**. That the plaintiff was aggrieved with the decision of the Tribunal. He proceeded to the High Court where he filed an application for judicial review which application was dismissed by the High Court in a ruling delivered on **17/5/2012**.

8. The defendant further contends that he has filed **Kitale ELC No. 27 of 2016** in which he seeks among other prayers a mandatory injunction seeking to remove the plaintiff from the suitland.

#### **ANALYSIS**

9. I have carefully gone through the two applications. I must point out at the outset that what is contained in the defendant's application of 1/3/2016 is a replica of the response which he filed in answer to the plaintiff's application of 10/2/2016 save to say that he has contradicted himself in the application.

10. The only issue for determination in both applications is whether any of the applicants have demonstrated grounds for grant of injunction. The principles for grant of temporary injunction were well set out in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358**. Firstly an applicant has to demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the applicant might suffer injury which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

11. In the instant case, there is no contention that the plaintiff bought the suitland. The defendant concedes that he indeed sold a plot measuring 50 x 100ft to the plaintiff. The only contention according to the defendant is on the location of the suitland.

12. The plaintiff has demonstrated that he took possession and constructed a semi-permanent house where he has been residing. The problem started when he wanted to put up a permanent building. He has accumulated materials and wants to put up a permanent house. It cannot be true as the defendant claims that the plaintiff wants to put up his house where his (defendant's) homestead is. The plaintiff has been staying on the suitland for over 20 years. Whether the stay has been peaceful or not is not a matter to be decided now. This will be a matter of evidence.

13. A prima facie case in a civil application does not mean a case which will succeed. It means a case where the applicant demonstrates that there is a right which has been infringed as to call for rebuttal from the respondent. See **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The plaintiff has demonstrated that he bought the suitland and that the defendant is intent on evicting him. He has been in possession since 1995 a period of over 20 years. I find that the plaintiff has demonstrated that he has a prima facie case with probability of success.

14. The plaintiff has lived on the land for 20 years. It will be unfair to let him be evicted before the case is heard and concluded. There is no amount of money which can compensate loss of land which one has held for 20 years. He cannot find land elsewhere which is the same as the one he is occupying.

15. Even if the court were to consider the balance of convenience, the balance of convenience will tilt in favour of the plaintiff. He is the one in possession. I therefore find that the plaintiff's application has merits.

16. A look at the defendant's application shows that it was drawn either in haste or the defendant's counsel was not serious in what he/she was doing. What is deponed in paragraphs 7 and 8 is not true. The defendant claims that it is the plaintiff who filed a claim before Cherangany Land Disputes Tribunal and that he was aggrieved with the verdict which was thereafter adopted as a judgement of the court. That he (plaintiff) moved to the High Court where he filed an application for judicial review which was dismissed.

17. The truth of the matter is that it is the defendant who filed a claim against the plaintiff in the Tribunal. He did not serve the claim upon the plaintiff. The Tribunal proceeded to order that the plaintiff moves out of the suitland. The plaintiff was aggrieved with the decision of the Tribunal. He filed an application for judicial review in the High Court. That application succeeded and the Tribunal verdict was quashed. The application was never dismissed as the defendant claims.

18. The defendant's application is misconceived. It was filed in this suit where the defendant has no counter-claim. I have demonstrated hereinabove that the defendant does not even know what he wants. If he wanted to apply for injunction, he should have done so in **Kitale ELC No. 27 of 2016** where he is the plaintiff. The filing of the application for injunction in this case is therefore an abuse of the process of the court.

19. For the reasons given hereinabove, I find that the plaintiff's application is well merited. The same is allowed with the result that an injunction is hereby issued restraining the defendant by himself, his servants and/or agents from alienating, trespassing, constructing or entering upon parcel measuring **50 x 100ft** comprised in **LR. No. Trans-Nzoia/Mito Mbili Settlement Scheme/79** until the hearing and determination of this suit. The defendant shall bear the costs of this application. On the other hand, I find that the defendant's application dated 1/3/2016 lacks merit. The same is hereby dismissed with costs to the plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **21<sup>st</sup>** day of **September, 2016**.

**E. OBAGA**

**JUDGE**

**COURT**

Ruling signed in the absence of parties who were aware of date and delivery of ruling.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**21/9/2016**