



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**ENVIRONMENT AND LAND SUIT NO. 68 OF 2014**

**STEPHEN MICHUKI KIUNGA.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF MERU.....DEFENDANT**

**RULING**

This application is dated 12<sup>th</sup> May, 2014. The applicant states that it is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 63 (e) of the Civil Procedure Act. The application seeks the following orders:

- 1. THAT this application be certified urgent and the same be heard exparte in the first instance.***
- 2. THAT pending interpartes hearing of this application, an order of temporary injunction be issued, restraining the Defendant, its servants, Licencees, agents, employees or anybody else acting at its behest or direction from interfering, entering, constructing, leasing, allocating or in any manner whatsoever from preventing the Plaintiff from occupying, fencing, developing and enjoying the use of L. R. NO. MERU MUNICIPALITY BLOCK II/287.***
- 3. THAT pending the hearing and determination of this suit an order of temporary injunction be issued, restraining the Defendant, its servants, Licencees, agents, employees or anybody else acting at its behest or direction from interfering, entering, constructing, leasing, allocating or in any manner whatsoever from preventing the Plaintiff from occupying, fencing, developing and enjoying the use of L. R. NO. MERU MUNICIPALITY BLOCK II/287.***
- 4. THAT the orders issued herein be served upon the O.C.S. Meru Police Station to ensure enforcement and compliance with this order.***
- 5. THAT costs of the application be provided for.***

It is supported by the affidavit of the applicant and has the following grounds:

- a. The Plaintiff is the registered owner of the suit land**
- b. The Defendant has accepted land rates from the Plaintiff including for the year 2014.**
- c. The Defendant has no right over the suit land.**

**d. The Plaintiff stands to suffer irreparable harm and damage if the Defendant continues to licence people to enter and stay on the suit land.**

Prayers 1 and 2 are spent.

The Plaintiff/Applicant has submitted that he purchased L. R. NO MERU Municipality Block II/287 through a public auction and that he was registered as the owner on 23.7.2009 and a Certificate of Lease was issued to him on 24.7.2009. He states that he is still in occupation and that at the time of filing this suit, he had already paid rates for the year 2014. He has vide his supplementary affidavit dated 17.7.2014 supplied documents purporting to show the origin of the suit land and also including a ruling in Meru HCCC NO. 141 OF 2008 concerning the suit land delivered by the Hon. M. J. Anyara Emukule, Judge on 12<sup>th</sup> June, 2009 and which confirmed that he purchased the suit land in a public auction. He contends that he is a bona fide purchaser for value and argues that the Defendant/Respondent has not laid any basis to buttress his intention to interfere with the suit land.

The plaintiff submits that he is the registered owner, he bought the suit land through a public auction conducted by the Kenya Commercial Bank, he is in possession and that the Municipal Council of Meru, the predecessor of the Defendant/Respondent had never challenged his ownership of land. He contends that through these assertions he has demonstrated that he has got a prima facie case and that the balance of convenience tilts in his favour as he is in occupation and has possession of the suit land.

Part of his submissions touch on the defendant's defence and I decline to comment on matters that will be heard during the hearing of the suit and determined then.

The defendant submits that the suit land is trust land initially held by the Municipal Council of Meru in trust for the extension of the Public bus park, public toilets and a refuse disposal center etc. He tells the Court that as at the time the Plaintiff obtained temporary injunctive orders, there were small scale traders who had been eking their living on the suit land since 2002. The applicant claims that he filed this suit because the Respondent had allowed traders to move into the suit land and had also allowed them to set up temporary shacks. He claims this was done just before this suit was filed.

The Respondent submits that the Commissioner of Lands had no powers to allocate the suit land to the applicant and as such any lease issued to the applicant was a nullity. He further tells the court that the applicant had never occupied the suit land and that several public amenities such as underground power cables and a sewer line passed through the suit land.

The respondent says that damages were an adequate remedy and that it was in a financial position to pay damages, if it eventually lost the suit. It says no interlocutory injunction should be granted however strong the plaintiff's claim appeared to be at the interlocutory stage. It concludes as follows:

***“The upshot of all this is that if this instant suit is decided in the plaintiff's favour, and he will have suffered any damage, the defendant would be in a position to compensate him.”***

The defendant, primarily for this reason, submits that the plaintiff's application should be dismissed.

I totally disagree with the defendant's submission that ability to compensate for damages was a main and deciding determinant when injunctive orders are considered by courts. If this position is embraced by courts, every mischievous, adventurous and bold billionaire would, without following due process, invade properties belonging to poorer members of society. This would spawn confusion and veritable uncertainty and would be a threat to the rule of law.

I have carefully examined the pleadings, submissions and the authorities proffered by the parties. Confronted with a situation such as I am considering, I do not have to reinvent the wheel. I will have recourse to the wise words of the Court of Appeal in the Case of Mbuthia versus Jimba Credit Corporation, [1988] KLRI. The court opined as follows:

***“The correct approach in dealing with an application for interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower court judge in this case had gone far beyond his proper duties and made final facts on disputed affidavits.”***

The question of whether or not the applicant, who has ownership documents over the suit land, obtained his ownership procedurally, and thus legally, can only be determined after the suit is heard. Regarding who is in occupation and possession, the parties have proffered diametrically opposed positions. The respondent has not controverted the assertion that the plaintiff bought the suit land through a public auction conducted at the behest of Kenya Commercial Bank.

As I have already said, I will not allow myself to be drawn into deciding final facts at this interlocutory stage. However, weighing up the relevant weight of the parties’ propositions, I tilt to the opinion that this application should be allowed. In the circumstances, I allow the application. Costs shall be in the cause. The effect of this decision is that prayer 3 is confirmed and an order issued accordingly. I direct that the order be served upon the O.C.S. Meru Police Station to ensure its enforcement and compliance.

Considering that this is a matter between a County Government and a Citizen, I am of the view that this suit should be heard on priority basis. I direct/order as follows:

- 1. The plaintiff should comply with order 11 of the Civil Procedure Rules within 30 days.***
- 2. The defendant should comply with order 11 of the Civil Procedure Rules within 30 days after the plaintiff’s compliance documents are served upon it.***
- 3. After the 60 days contemplated in 1 and 2 above, the plaintiff should set down this suit for hearing within 30 days.***

It is so ordered.

***Delivered in Open Court at Meru this 9<sup>th</sup> day of July, 2015 in the presence of:***

CC. Daniel/Lilian

Mburugu h/b Mwirigi Kaburu for Plaintiff/Applicant

Dickson Kimathi for Defendant/Respondent

**P. M. NJOROGE**

**JUDGE**