



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1550 OF 2013**

**ALBANUS MWENDWA MBALUKA.....PLAINTIFF**

**VERSUS**

**MUTUA NGULI.....DEFENDANT**

**RULING**

**The Plaintiff's Application**

The Plaintiff filed the present application in Machakos High Court Civil Case No 50 of 2011, which suit was transferred to this court for lack of an Environment and Land Court at Machakos, and given a new case number. The Plaintiff's application is by way of a Notice of Motion dated 3<sup>rd</sup> October 2011, and he is seeking an order for a temporary injunction pending the hearing and determination of this suit restraining the Defendant from trespassing on, claiming ownership or possession of, erecting any development on, wasting, alienating or otherwise interfering in any manner with, or preventing the Plaintiff from using the land known as L.R No. 9731/1/6a – (9731/1 – portion 6) situated in Emali in Nzau District (hereinafter referred to as “the suit property”).

The grounds for the application are that the Plaintiff is the lawful owner of the suit property through purchase, and that the Defendant has interfered with said plot by trespassing and cultivating thereon and claiming ownership without any legal justification. The grounds for the application are detailed in the supporting affidavit sworn by the Plaintiff on 3<sup>rd</sup> October 2011. The Plaintiff stated that he purchased the suit property from the owner, one Mutisya Mulu, by way of a sale agreement dated 1<sup>st</sup> April 2008 which he attached. Further, that he took possession by fencing the said property and had quiet enjoyment of the same until 2009 when the Defendant trespassed on the said property, cut down trees, and cultivated thereon. The Plaintiff averred that the Defendant had prevented him from accessing the suit property to carry out his developments, and had degraded the suit property.

The Plaintiff's counsel in submissions dated 9<sup>th</sup> January 2012 contended that the Defendant's sale agreements were with respect to L.R No. 9731/1/ Plot 6D which is different from the suit property, which is L.R No. 9731/1/ Plot 6A. Further, that the Plaintiff had beacon certificates processed by Geo-info Surveys Ltd, whereas the Defendant had not attached a sub-division plan to show where plot 6D is situated. The counsel submitted that the Plaintiff had therefore shown an arguable case and that the balance of convenience tilted in his favour

**The Defendant's Response**

The Defendant's response is in a Replying Affidavit sworn on 6<sup>th</sup> December 2011. He states that on 12<sup>th</sup> March 2008, he purchased the suit property measuring 10 acres and which was described in the subdivision Plan as L.R No. 9731/1/ Plot No. 6D from one Mutisya Mulu as the legal representative of Mulu Mutisya (Deceased). Further, that on 28<sup>th</sup> October 2010 he sold 5 acres of the said plot to one Domitila Katila. The Defendant attached copies of the two sale agreements and of the title to the suit property. The Defendant denied that the Plaintiff had fenced the suit property, and claimed to have been in occupation of the property from the date he purchased the same.

The Defendant's counsel filed submissions dated 21<sup>st</sup> February 2012 wherein he argued that the suit property is different from the one in the sale agreement produced in evidence by the Plaintiff, in that whereas the Plaintiff's pleadings describe the suit property as L.R No. 9731/1/6a, the said sale agreement refers to portion 6 within L.R No. 9731/1. Further, that the Defendant is claiming the same property, and the sale agreement he entered into with the same vendor is earlier in time, having been entered into on 12<sup>th</sup> March 2008, as opposed to that of the Plaintiff which is dated 1<sup>st</sup> April 2008.

### **The Issues and Determination**

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The issue to be determined is whether the Plaintiff has met the threshold for the grant of the temporary injunction sought. The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff has availed evidence of the sale agreement dated 1<sup>st</sup> April 2008 entered into with the one Mutisya Mulu with respect to portion no 6 within LR No 9371/1 of 10 acres. He also relies on a Beacon Certificate issued by a firm of surveyors with respect to land referred to as 9731/1/6A. He claims that the two parcels of land described as portion 6 of LR No 9371/1 and LR No 9371/1 /6A are one and the same. The Defendant also relies on a sale agreement entered into with the same vendor dated 12<sup>th</sup> March 2008 which is for 10 acres of LR No 9371/1 described as Plot No.6D . He did not bring any evidence to show the existence and location of the said plot D.

The Plaintiff and Defendant both have a beneficial interest in a portion of LR No 9371/1 as a result of their respective sale agreements. What is in dispute is the location of the said portion, with both claiming the same land. It is my view that the dispute between the parties herein can only be effectively resolved by undertaking a survey of the disputed plots to determine their existence and location, and if there has been any double allocation in this regard.

In the circumstances I am of the view that the Plaintiff's application is one that can only be determined on the basis of a balance of convenience. In this regard I note that the Defendant has taken possession of the disputed property, and has also entered into a sale agreement with a third party with respect to a portion of the said property. To this extent the balance of convenience tilts in his favour, as he is the party who will be most inconvenienced by any adverse orders made herein. I however also note the allegations by the Plaintiff on the use and degradation of the said land by the Defendant.

I accordingly order as follows pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. That the *status quo* to be maintained by the Plaintiff and Defendant with regard to the properties known as portion 6 of LR No 9371/1 , LR No 9371/1 /6A and/or plot 6D of LR No 9371/1 pending the conduct of the survey as hereinafter ordered shall be as follows:

a. Both the Plaintiff and Defendant shall not sell, transfer or otherwise dispose of the said properties.

b. The Plaintiff shall not interfere with occupation and possession of the said properties by the Defendant's or the Defendant's agents and assigns.

c. The Defendant, his agents and or assigns shall not undertake any further cultivation, construction and/or development on the said properties.

2. The Plaintiff and Defendant shall undertake independent separate surveys on the existence and location of the properties known as portion 6 of LR No 9371/1, LR No 9371/1 /6A and/or plot 6D of LR No 9371/1, and on the features and structures that are presently situated on the said parcels of land, and shall file and serve their survey reports in Court within 120 days of this ruling. Upon default the *status quo* orders herein shall lapse.

3. The Parties shall be at liberty to apply.

4. The costs of the Plaintiff's Notice of Motion dated 3<sup>rd</sup> October 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_31<sup>st</sup>\_\_\_\_ day of \_\_\_\_July\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**