



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 77 OF 2019**

**PATRICK BENIDO MUTINDA.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHRISTOPHER MATATA LATI.....DEFENDANT/RESPONDENT**

**RULING**

1. What is before this court for ruling is the Plaintiff's/Applicant's notice of motion application expressed to be brought under section 157 of the Land Act, Order 40 Rule 1(a) and (b) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya together with any other enabling provisions of the law for orders: -

**1) Spent.**

**2) Spent.**

**3) That a temporary injunction do issue restraining the Respondents by themselves, servants and/or employees or agents or any other person acting through them from fencing, cutting trees, excavating, building a wall or otherwise interfering in any way with the suit property being Makueni/Nguu Ranch/88 and Makueni/Nguu Ranch/89 or in any way blocking the Applicants constitutional right of ownership, possession, access, ingress and egress to the same pending the hearing and determination of the main suit.**

**4) That costs be borne by the Defendant.**

2. The application is dated 24<sup>th</sup> October, 2019 and was filed in court on 25<sup>th</sup> October, 2019. It is predicated on the grounds on its face and is supported by the replying affidavit of Patrick Benido Mutinda, the Plaintiff/Applicant herein sworn at Wote on the 24<sup>th</sup> October, 2019.

3. Christopher Matata Lati, the Defendant/Respondent herein has opposed the application vide his replying affidavit sworn at Emali on 28<sup>th</sup> November, 2019 and filed in court on even date.

4. The application was canvassed by way of written submissions.

5. The Plaintiff/Applicant has deposed in paragraphs 1, 2, 3, 4 and 5 of his supporting affidavit that he is a purchaser for value for all that land known as Makueni/Nguu Ranch/88 registered in the name of Ruth Mukulu Kioko and Makueni/Nguu Ranch/89 registered in the name of Mutunga King'oo Mutua, that the parcels of land known as Makueni/Nguu Ranch/88 are registered in the name of Ruth Mukulu Kioko and Makueni/Nguu Ranch/89 registered in the name of Mutunga King'oo Mutua, that he is advised by his advocate on record, advice of which he verily believes to be true that, upon the successful registration of the parcels of land in the

name of Ruth Mukulu Kioko and Mutunga King'oo Mutua, they acquired an indefeasible title under our system of land registration, that neither the Respondent nor any other person can lay a claim on this land unless ownership of the property is legally passed to them as it happened in his case, that accordingly, he is entitled to quiet enjoyment as well as exclusive use, occupation and dealership on land registration Title Makueni/Nguu Ranch/88 and Makueni/Nguu Ranch/89, that the Respondent has fraudulently entered his (Plaintiff's) property and is in the process of erecting a fence and beacons which if not stopped will expose the Plaintiff and its members to irreparable loss and damage.

6. On the other hand, the Defendant/Respondent has deposed in paragraphs 3, 4, 5, 6 and 8 of his replying affidavit that he is advised by his Advocate on record, Mr. Alfred O. Nyandieka, which he verily believes, that the said application is devoid of merit and does not meet the threshold for grant of an injunction and as such should be dismissed, that even going by the Plaintiff's/Applicant's supporting affidavit and annexures thereto, it is absolutely clear that the Applicant is neither the owner nor is he in possession of the suit premises. The annexures marked "PBM1" & "PBM2" annexed to the supporting affidavit by the Applicant provide at paragraphs; 2(c) *"The balance of Kenya shillings one million nine hundred and fifty thousand (Kshs. 1,950,000/=) to be paid by the purchaser to the vendor upon successful transfer of the title to the purchaser"*. Which clearly shows that all the Applicant did was to pay a down payment. The balance of the purchase price was to be paid by Applicant upon successful transfer of title to the Applicant. The vendor was to give vacant possession to the Applicant upon payment of the full purchase price, that the Applicant has curiously avoided to disclose to this Court that the sale is not complete and as such "ownership" and "possession" have not passed to him. Without the sale being complete, the Applicant has no proprietary rights to the suit premises capable of being protected by way of an injunction, that there was no privity of contract between the Plaintiff/Applicant and himself and as such, if the Plaintiff/Applicant has any grievances regarding and arising out of the sale agreements in respect of the suit premises, the same lie as against the respective vendors therein and not against him, that if really Ruth Mukulu Kioko and Mutunga King'oo Mutua were the owners of the suit premises herein, nothing would have easier than to annex the official search certificates in respect of the same. The truth is that the said persons are part of a land cartel working in collusion with people in the department of Land Adjudication and Settlement to defraud him of the suit premises.

7. In his brief submissions, the Counsel for the Plaintiff/Applicant cited the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** and pointed out that the Plaintiff/Applicant has satisfied the three principles enunciated in the aforementioned case for the grant of interlocutory injunctions. The Counsel went on to submit that the Plaintiff/Applicant is a purchaser for value from the registered owners of the suit property and that he has shown that the Defendant/Respondent has encroached into the suit property thus establishing a prima facie case with probability of success. As for the second and third limbs, the Counsel submitted that the Plaintiff's/Applicant's right has crystalized and it ought to be protected by an order of injunction and that the Court should not be in doubt in light of the evidence of ownership which remains unchallenged.

8. On the other hand, the Counsel for the Defendant/Respondent told the Court that the Plaintiff/Applicant has failed to establish that he has a prima facie case with probability of success. The Counsel went on to submit that the Applicant ought to show the Court that he has a right to the suit premises capable of being protected by way of injunction. The Counsel added that the Applicant is neither the owner or is in possession of the suit premises and what he has brought to court are sale agreements which clearly show that transaction is incomplete thus the ownership of the suit premises has not passed from the vendors to him. It was further submitted by the Counsel that the Defendant/Respondent has deposed in his replying affidavit that he is the one in actual possession of the suit premises.

9. As regards the second principle that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Defendant's/Respondent's Counsel submitted that the Plaintiff/Applicant has annexed agreements to his supporting affidavit (*emphasis are mine*) which show the monetary value of the suit premises. The Counsel added that the Plaintiff/Applicant has not said that he attaches sentimental value to the suit premises thus he can be compensated by an award of damages which would be easily ascertainable from the sale agreements.

10. As for the principle that if the Court is in doubt, it will decide the application on the balance of convenience, the Counsel submitted that the same hangs in favour of the Defendant/Respondent who is in actual physical possession of the suit premises, a fact which is not denied.

11. Having read the application, the replying affidavit and rival submissions by the Counsel on record for the Parties, my finding is as follows: -

a) Firstly, it would appear that the Plaintiff/Applicant has based his claim to the suit premises on the two sale agreements (PBM 1 & 2) annexed to paragraph 1 of his supporting affidavit that he had with one Ruth Mukulu Kioko and one Mutunga King'oo Mutua. As was submitted by the Counsel for the Defendant/Respondent, there is nothing to show that the Plaintiff/Applicant has paid in full the purchase price for land parcels numbers Makueni/Nguu Ranch/88 and Makueni/Nguu Ranch/89 thus the issue of ownership and possession of the two parcels of land is put into question. The disposition by the Plaintiff/Applicant that he is the owner of the two land parcels has not been supported by the two registered owners and in my view, therefore, the Applicant has not established a prima facie case with probability of success.

b) As for the second principle in Giella's case (supra), I am in agreement that with the Defendant's/Respondent's Counsel that the two sale agreements that the Plaintiff/Applicant has relied on show the monetary value of the suit premises and which value can adequately be compensated by an award of damages. Suffice it to say, the Plaintiff/Applicant has not satisfied the second principle.

c) For the reasons that I have given in grounds one and two herein, it is clear that this Court is not in doubt as to where the balance of convenience lies. The same lies in favour of the Defendant/Respondent.

12. The upshot of the foregoing is that the application lacks merit and same is dismissed with costs to the Defendant/Respondent.

**Signed, dated and delivered at Makueni via email this 17<sup>th</sup> day of December, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi



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