



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 5 OF 2020**

**PAUL KIMONDIU..... PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MAKUENI..... DEFENDANT/RESPONDENT**

**RULING**

1. What is before this court for ruling is the Plaintiff's/Applicant's notice of motion application dated 30<sup>th</sup> January, 2020 and filed in court on 31<sup>st</sup> January, 2020 by his Counsel under certificate of urgency for orders: -

**1) Spent.**

**2) Spent.**

**3) THAT this Honourable Court be pleased to make an order of injunction restraining the Defendants/Respondents, their agents, servants, Licencees and/or invitees from further trespassing and/or encroaching on, constructing a dumping site on, wasting and/or in any other manner whatsoever from interfering with Land Parcel MAKUENI/UNOA/1396 pending the hearing and determination of the main suit.**

**4) THAT the cost of this application be provided for by the Defendants/Respondents.**

2. The application is expressed to be brought under sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rules 1(a) & 4, and Order 51 Rules 1 of the Civil Procedure Rules and all other enabling provisions of the law. The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Paul Kimondiu Songolo, the Plaintiff/Applicant herein, sworn at Nairobi and Makueni on 30<sup>th</sup> January, 2020 and 4<sup>th</sup> March, 2020 respectively.

3. The Defendant/Respondent has opposed the application vide the replying affidavit of B.K. Ng'eny, its Director of Lands and Physical Planning, sworn at Wote on 07<sup>th</sup> February, 2020 and filed in court on even date.

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

5. In paragraphs 2, 3, 4, 5, 6 and 9 of his supporting affidavit, the Plaintiff/Applicant has deposed that he is the sole registered proprietor of Land Parcel Makueni/Unoa/1396, that he acquired the aforesaid Parcel of Land through transmission from his late wife, one Annah Nthoki Kimondiu, vide Makueni Senior Principal Magistrate's Court Succession Cause No.35 of 2012, that he has quietly enjoyed the use of the aforementioned parcel of land until recently when he was informed that the County Government of Makueni was constructing a dumping site on the land meant for the upcoming Makueni Peoples Park, that he immediately rushed to the plot and found some people constructing on his plot and upon inquiry of what they were upto, they informed him that they had been contracted by the County Government of Makueni to construct at the dumping site, that he contacted the office of Lands in

Makueni where a Surveyor visited the site and found that it was indeed true that the dumping site had been constructed on his private land, that he has been denied the right to use and enjoyment of his private property by the acts of the Defendants/Respondents who with impunity are out to deprive him his legally acquired property.

6. The Defendant's/Respondent's Director of Lands and Physical Planning has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of his replying affidavit that, that he is advised by his advocate on record Mr. Judah K. Kioko, 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 the County Government of Makueni is constructing a Green Park on land parcel number Makueni/Unoa/1395 which was originally reserved for a stadium as per the unapproved Local Physical Development Plan for Wote Township prepared in 2006, that during the demarcation of the land for purposes of constructing of the Green Park, the entire land parcel measuring approximately 5 acres was beaconsignifying the extent of the public land and it was noted that there are resultant sub plots curved out of land, that going by the Plaintiffs/Applicant's supporting affidavit and annexures thereto, the Applicant deposed that he owns the land through transmission from his late wife one Annah Nthoki Kimondiu but he has curiously avoided disclosing to how the late wife acquired the land, that records obtained from the Makueni Lands Registry and survey office indicate that the site previously reserved for the stadium has been interfered with subdivisions of the entire land curving out a further (8) plots from the original number, that the application for a proposed replanning of stadium land dated the 9<sup>th</sup> day of March in the year 1998 although unapproved by the registered owner of the parcel and the District Lands Officer was used as basis to subdivide the land which was unprocedural, that before any amendment is done on the registered Index Map as a procedure the following must be adhered to; a) *obtain a consent from the Land Control Board for subdivision and transfer*, b) *Pay for the amendments of the Registered Index Maps to Survey Office*, c) *Mutation form to be duly signed by District Surveyor and Licensed Surveyor*. From the Plaintiff affidavit and annexures thereto the application before this court, it's clear that the above procedure was not followed in procuring the Land Parcel Number Makueni/Unoa/1396 and the same should revert back to the County Government, that in the light of the foregoing averment's, this is not a good case for grant of an interlocutory injunction. This court should hear the County Government of Makueni and the Plaintiff/Applicant during full hearing of the suit before granting any orders but not at the interlocutory stage. Suffice to say that at this interlocutory stage, the Plaintiff/Applicant has not demonstrated what right (if any) is likely to be infringed on him to warrant a grant of interlocutory injunction against the county Government that that is working for the interest of the people of Makueni and that as averred earlier in this affidavit, the Plaintiff/Applicant has not demonstrated how his wife acquired the suitland.

7. In rejoinder, the Plaintiff/Applicant has deposed in paragraphs 2 and 3 of his further affidavit that..... he wished to reiterate further that his late wife one Anna Nthoki Kimondiu purchased the disputed plot from Joseph Mutuku Masilia in the year 2002 and the same was transferred into her names, that he followed all the due processes of the law of acquiring the disputed plot and at no time did he connive to defraud or acquire the said plot illegally as alleged by the Respondent.

8. Counsel for the Plaintiff/Applicant and the Defendant/Respondent are in agreement that in order for this court to grant an order of temporary injunction, the Applicant must satisfy the three principles enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358** which are: -

*(a) An Applicant must show a prima facie case with probability of success.*

*(b) An 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.*

*(c) When the court is in doubt, it will decide the application on the balance of convenience.*

9. In his submissions, the Counsel for the Plaintiff/Applicant submitted that the latter is the proprietor of land parcel number Makueni/Unoa/1396 having been issued with certificate of title on 28<sup>th</sup> June, 2018 (PKS-1(a)). The Counsel added that the position is confirmed by the certificate of official search issued on 30<sup>th</sup> January, 2020 (PKS-1(b)) and application for transmission (PKS 2(b)).

10. The Counsel went on to submit that the Plaintiff/Applicant acquired the suit property from his late wife by way of transmission in Makueni SPM succession cause No.35 of 2012.

11. The Counsel submitted that the Plaintiff/Applicant had established a prima facie case and that the Applicant's parcel of land will be wasted if the Respondent is not enjoined from carrying out construction. Regarding the principle that if the court is in doubt, then decide the application on the balance of convenience, the Counsel submitted that it is only the Plaintiff/Applicant who can be

said to be the proprietor of the suit property.

12. On the other hand, the Counsel for the Defendant/Respondent submitted that the title document held by the Plaintiff/Applicant is questioned thus the former has not established a prima facie case with probability of success.

13. Regarding the second principle that an 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 Counsel submitted that the Respondent is the one that will suffer irreparable injury and that the damage to be suffered by the Plaintiff/Applicant can adequately be compensated.

14. As for the third principle, the Counsel urged the court to take whichever course that appears to carry a lower risk if it turns out that injunction ought not to have been issued.

15. Having carefully evaluated the evidence on record and the rival submissions, it is clear that there is a serious conflict of facts regarding the ownership of the suit property herein. Whereas the Plaintiff/Applicant claims ownership of the suit property has annexed a title document, the Defendant/Respondent on the other hand contends that the suitland was originally reserved for a stadium as per the unapproved Local Physical Development Plan of Wote Township prepared in the year 2006. That would therefore raise the issue of whether or not the suitland is public and if so, whether it was available for alienation. This question cannot be determined at this interlocutory stage as it will have to await substantive hearing.

16. In the case of **Ogo & Another vs. Otieno [1987] KLR**, the Court of Appeal stated thus:-

*“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute is decided in a trial.”*

17. It is not lost on me that this application was initially filed in January, 2020 and by March, 2020, the court downscaled its operations due to covid 19 pandemic. The Plaintiff/Applicant however filed his submissions on 10<sup>th</sup> March, 2020. The Defendant/Respondent only filed its submissions on 14<sup>th</sup> October, 2020. It would have been appropriate for the parties to file supplementary submissions and affidavits regarding the current status of the suit property so as to enable the court to clearly indicate what the status quo would ensue under the circumstances. There being no evidence on this issue, the Court will not go out of its way to elaborate what status quo would amount in the present application. In the circumstances, therefore, I hereby proceed to issue an order of status quo until the dispute is decided in a trial before this court on priority basis.

**Signed, dated and delivered at Makueni via email this 23<sup>rd</sup> day of December, 2020.**

**MBOGO C. G.,**

**JUDGE.**

Mr. Muchuku – Court Assistant



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