



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.249 OF 2013

PETER TOMITO KORINKO1ST PLAINTIFF

JOSPEH S. KETERE.....2ND PLAINTIFF

MICHAEL O. KIRUSUA.....3RD PLAINITFF

VERSUS

KORINKO N. NKOLIAI1ST DEFENDANT

JONATHAN K. KETERE.....2ND DEFENDANT

BENARD KETERE.....3RD DEFENDANT

STEPHEN M. OLOLTULET.....4TH DEFENDANT

DAVID KIRIONKI.....5TH DEFENDANT

SAMSON LIMPAI.....6TH DEFENDANT

OLE NANYUKIE KITIAPI.....7TH DEFENDANT

LESHAN KUKUU.....8TH DEFENDANT

SAMSON KALAMAYO.....9TH DEFENDANT

OLOELEBOI KAIKAI.....10TH DEFENDANT

OLOMISMIS GROUP RANCH.....11TH DEFENDANT

THE DISTRICT LAND REGISTRAR, TRANSMARA.....12TH DEFENDANT

THE NATIONAL LAND COMMISIION.....13TH DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendants on 6th June 2013. Together with the plaint, the plaintiffs brought an application under certificate of urgency by way of Notice of Motion dated 31st May 2013 seeking among others, an order for a temporary injunction restraining the defendants from proceeding with and/or completing any survey and/or sub-division and/or transfer and/or processing and/or issuance of titles on parcels arising from effecting the sub-division of all that parcel of land known as **LR No. Transmara/Olomisimis/1** (hereinafter referred to as “**the suit property**”) or any resultant titles pending the hearing and determination of this suit. The application came up for hearing before me ex parte on 6th June 2013 when I granted the order sought ex parte on an interim basis on condition that the plaintiffs deposit in court a sum of kshs.250,000/= as a security for any damages that the defendants could suffer as a result of the said ex parte order. The plaintiffs deposited the said amount of Ksh. 250,000/=(hereinafter referred to only as “**the security**” where the context so admits) within the time that was fixed by the court. The order for security was made pursuant to the provisions of **Order 40 Rule2(2)** of the Civil Procedure Rules.
2. The plaintiffs’ application was heard inter parties and dismissed with costs on 4th April 2014. The plaintiffs have preferred an appeal against the said decision to the Court of Appeal. The said appeal is pending hearing and determination. What is now before me is an application by the defendants that was brought by way of Notice of Motion dated 24th June 2014 seeking an order for the release of the security that the plaintiffs had deposited herein as aforesaid to the 1st to 6th, 9th and 11th defendants through their advocates on record and for such other or further orders as the court may deem fit to grant. The defendants’ application was brought under **Order 51 rules 1 and 2** of the Civil Procedure Rules, **section 1A, B, 3A and 63(e)** of the Civil Procedure Act, **Section 19** of the Environment and Land Court Act, **Article 159(2) (d)** of the Constitution of Kenya and all other enabling provisions of the law.
3. The defendants’ application was supported by the affidavit of the defendants’ advocate, Mr. Joseph Mboya Oguttu sworn on 24th June, 2014. The defendants contended in their application that; the sum of kshs.250,000/= aforesaid was deposited in court by the plaintiffs as a security for any damages that could be occasioned to the defendants as a result of the ex parte interim order of injunction that was issued by the court in favour of the plaintiffs. The plaintiffs’ application for injunction was heard inter partes and dismissed by the court on 4th April 2014. In its ruling, the court found the said application to have been induced by ulterior motives and as such lacked bona fides. The defendants contended that the ex parte injunction that was issued by the court in favour of the plaintiffs subjected them to extreme prejudice and that they suffered damages for which they hold the plaintiffs liable. The defendants contended that the release of the security that was deposited herein by the plaintiffs to them would go a long way in mitigating the aforesaid damage.
4. The defendants’ application was opposed by the plaintiffs through a replying affidavit sworn by the 1st plaintiff, Peter Tomito Korinko on 21st October 2014. The plaintiffs contended that the defendants have not demonstrated that they have suffered any damage as a result of the ex parte injunction that was issued by the court herein on 6th June 2013. The plaintiffs contended that the defendants have not placed any evidence before the court in proof of damages which they claim to have incurred. The plaintiffs contended that the defendants did not incur any damages as claimed or at all arising from the said ex parte injunction because they proceeded with the acts that had been restrained by the court the said ex parte injunction notwithstanding. The plaintiffs contended further that the defendants’ application is premature because this suit is still pending hearing and determination.
5. When the defendants’ application came up for hearing before me on 30th October 2014, Mr. Oguttu, advocate appeared for the defendants and Mr. Ndolo, advocate appeared for the plaintiffs. In his submission, Mr. Oguttu adopted the grounds set out on the face of the said application and the contents of his affidavit filed in support thereof. Mr. Oguttu submitted that the fate of any security ordered by the court to be furnished under **Order 40 Rule2 (2)** of the Civil Procedure Rules depends on the outcome of the application in which the order is made. Mr. Oguttu submitted that since the defendants had succeeded in their opposition to the application dated 31st May 2013, they are entitled to have the security deposited herein released to them. Counsel submitted further that an order for security is always made to put in check applications which are

- brought in bad faith. He submitted that the court had in its ruling of 4th April 2014 made a finding that the plaintiffs' application was brought in bad faith. Finally, Mr. Oguttu submitted that the defendants have no obligation to prove that they have incurred damages before they can have the amount deposited as a security released to them. Counsel submitted that in any event, the fact that the defendants have suffered damages is clear from the ruling made by the court on 4th April 2014.
6. In his submission in reply, Mr. Ndolo adopted the contents of the 1st plaintiff's affidavit filed in opposition to the application. Mr. Ndolo submitted that before the amount deposited as a security for damages is released to the opposite party, the party seeking such release must prove that it has suffered damages which condition the defendants herein have not met. Counsel submitted that the defendants did not incur any damages as a result of the ex parte injunction that was issued herein and as such they are not entitled to the orders sought.
 7. I have considered the defendants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit that was filed by the plaintiffs in opposition to the application. Finally, I have considered the submissions that were made before me by the learned counsels for the parties. There is no dispute that the court had on 6th June 2013 ordered the plaintiffs to deposit in court a sum of kshs.250,000/= as a condition for the ex parte interim injunction that was granted to the plaintiffs on that day. It is also not in dispute that the said amount was to secure any damage that the defendants could incur as a result of the said ex parte injunction. I am not in agreement with the submission by the defendants' advocate that the fate of security deposited in the circumstances stated above depends on the outcome of the application in which the order for such security is given; so that, whoever wins the application gets the security.
 8. I am more inclined to accept the plaintiffs' advocate's argument that because the security was deposited in court on account of damages likely to be incurred, the same can only be released upon proof of damages suffered. That being my view, the defendants' application cannot succeed. The defendants have not placed any evidence before the court in proof of the fact that they incurred any damages arising from the ex parte injunction that was granted herein on 6th June 2013. There is also no evidence of the quantum of such damages if any was incurred.
 9. I would wish to add that the defendant's application should have been brought under section 64 of the Civil Procedure Act. If the defendants felt that the plaintiffs had obtained ex parte injunction wrongfully and, that they had suffered damages as a result of such injunction, they had two options to seek compensation. The first option that was open to them was to move the court in these proceedings for compensation for any injury that they may have suffered as a result of the said injunction. In such application, the defendants have a duty to prove that the injunction resulted in an injury to them. The court would only award compensation for proved injury. The award that the Court can grant under section 64 of the Civil Procedure Act is limited to Ksh.2000/=. The court has no power to award any amount in excess of the said sum in an application brought under or falling within the provisions of section 64 of the Civil Procedure Rules. The defendants could not therefore have been awarded a sum of Ksh. 250,000/= by this court even if they had proved that they suffered damages of that magnitude.
 10. See, **Mayers and Another vs. Akira Ranch Ltd.(No.2), [1972]E.A.347.** The other option that was open to the defendants was to file a separate suit alluded to in section 64(2) of the Civil Procedure Act for compensation for injury if any that they suffered as a result of the ex parte injunction that was granted herein. Even in such suit, the defendants could not be awarded compensation without proof of damages suffered. Security furnished pursuant to an order by the court under Order 40 rule 2 (2) of the Civil Procedure Rules would secure any award that may be made by the court pursuant to an application made under section 64 of the Civil Procedure Act aforesaid or in a separate suit. The court has no power to order that such security be released to a defendant simply because he has had the injunction discharged. The deposit herein was made as a security for damages and as such, proof of such damages through one of the two ways that I have mention above is a condition precedent to the release of the same to the opposite party.
 11. The upshot of the foregoing is that the defendants' application dated 24th June 2014 has no merit. The same is accordingly dismissed with costs to the plaintiffs.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo h/b for M'limbiine for the plaintiffs

Mr. Nyamweya h/b for Oguttu for the defendants

Mr. Mobisa court clerk

S. OKONG'O

JUDGE