



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CIVIL CAUSE NO. 67 OF 2014

AMOS MWANIKI MBUTI 1ST APPLICANT
ABIUD BNJUE MBUTI 2ND APPLICANT
JOSEPH NJAGI 3RD APPLICANT
JAMES MUTHEE 4TH APPLICANT
ISAAC MUGAMBI MUGO 5TH APPLICANT
JOSEPH MUTURI MBUTI 6TH APPLICANT
MARCUS KARIUKI NJUE 7TH APPLICANT

VERSUS

MUNUNGA TEA FACTORY COMPANY LTDRESPONDENT

RULING

By their plaint filed herein on 6th March 2014, the plaintiffs/applicants sought for judgment against the defendants/respondents in the following terms:-

1. *A declaration that the defendant holds in trust for the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants/plaintiffs the portion measuring approximately 20 acres that each of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs respectively occupy and have developed out of parcel of land No. MBEERE/KIRIMA/3186*
2. *An order that the trust so held by the defendant in respect of parcel of land No. MBEERE/KIRIMA/3186 be determined and the register of the said parcel be rectified*
3. *Costs of the suit.*

Simultaneously with the filing of the said suit, the plaintiffs/applicants filed a Notice of Motion under **Section 63(e) and Order 40 Rule 1, 2, 3 and 10 of the Civil Procedure Act and Rules** respectively seeking the following orders:-

1. *Spent*
2. *Spent*
3. *Spent*
4. *That the defendant by itself, its servants, agents or workers be restraining from entering upon,*

taking possession of, cultivating or fencing, cutting down trees or causing acts of wastage on the portions measuring approximately 20 acres each occupied and developed by each of the plaintiffs/applicants out of parcel No. MBEERE/KIRIMA/3186 or evicting attempting to evict, preventing or in any way interfering with the plaintiffs' use and occupation of the said portions out of parcel No. MBEERE/KIRIMA/3186 pending the hearing and determination of the case.

5. ***That costs be provided for.***

That application is the subject of this ruling. The same is supported by the affidavit of AMOS MWANIKI MBUTI the 1st plaintiff/applicant in which he depones, inter alia, that although the land parcel No. MBEERE/KIRIMA/3186 (hereinafter the suit land) measuring 303.5 acres is registered in the names of the defendant/respondent, the applicants were all born and brought up on that land where they have established their homes and buried their relatives with each plaintiff occupying approximately 20 acres of the suit land which was a resultant sub-division of land parcel No. MBEERE/KIRIMA/2244 measuring approximately 7000 Hectares which was owned by the 17 Mbeere clans including the applicants Mangu clan. However during the sub-division of the suit land, the people in occupation, including the applicants, were ignored and the land was sold to 3rd parties and that is how the defendant was registered as proprietor of the suit land. That in January 2014, the respondents asked the applicants to vacate the suit land which it then started fencing. If that is allowed to happen, the applicants will be rendered homeless hence the suit and application.

The application is opposed and in the replying affidavit of KENNETH NGATIA MWALE the Factory Unit Manager of the respondent, it is deponed as follows:-

- ***That the respondent, desirous of developing wood fuel plantations , embarked on identifying suitable parcels of land to purchase and on 27th July 2012 recovered an offer from one JENARD JOSIAH NYAGA (vender) for the suit land***
- ***That prior to accepting the aforesaid offer to purchase the suit land, the respondent conducted a search and confirmed that it belonged to the vendor without any encumbrances and a purchase price of Ksh. 54,750,000/= was agreed upon and a sale agreement was executed and the title of the suit property was transferred and registered in the respondent's name. The respondent is therefore a stranger to the events that may have occurred prior to 2012 with regard to the suit land.***
- ***The applicants therefore have no cause of action against the respondent and are infact trespassers on the suit land.***

Submissions have been filed by the firm of Rose Njeru Advocates for the applicants and Milimo Muthomi Advocates for the respondents.

I have considered the application, the rival affidavits and annexures and the submissions by counsel. I have also considered the law.

Being an application for an interlocutory injunction, I must consider it in light of the usual principles as enunciated in **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must show that he has a prima facie case with a probability of success***
2. ***The applicant must show that if no injunction is granted, he will suffer irreparable loss which cannot be adequately compensated by an award of damages and,***
3. ***In case of doubt, the Court shall decide the application on a balance of convenience***

What is a prima facie case? In **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS, C.A CIVIL APPEAL NO. 39 of 2002 (2003 e K.L.R)** the Court defined it in the following terms:-

“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 property 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”.

It is not in dispute that the respondent is the registered proprietor of the suit land since 2012 having purchased the same from one JENARD JOSIAH NYAGA. Following the purchase, a title deed (annexture KN 3(a) was issued to the respondent on 13th September 2012 under the ***Registered Land Act*** (now repealed). Once that title deed was issued, it became conclusive proof that the respondent as named therein is the absolute proprietor of the suit land subject only to the encumbrances, restrictions and other overriding interests stipulated under ***Section 27 and 30*** of the said ***Registered Land Act***. Such title may only be challenged if obtained through fraud or misrepresentation. Further, such registration does not relieve the registered proprietor from any duty or obligation to which he is subject as a trustee.

From the pleadings herein, it is not suggested by the applicants that the respondent obtained registration of the suit land through fraudulent means or by misrepresentation. From their plaint, the applicants plead that the respondent holds approximately 20 acres of the suit for each of them. At this point, I must bear in mind that I should not make definite findings of facts or law. However, it is difficult from the pleadings to see how there can be a relationship of trustee between the parties herein with relation to the suit land or the 20 acres of it as claimed by each of the applicants. Trust is a matter of evidence and that will be established at the trial. For now, I must only concern myself with finding out whether, on the material available to me, the applicant has a prima facie case with a probability of success. From the evidence on record, I am not persuaded that the applicants have established a prima facie case with a probability of success as against the respondent. The respondent is the registered proprietor of the suit land having bought it from a third party and there is no suggestion that the said registration was obtained through fraudulent means or misrepresentation. It is clear from the replying affidavit of KENNETH NGATIA MAVALE the respondent's Factory Unit Manager that the defendant purchased the suit land so as to develop its fuel plantations. The applicants have no relationship with the respondents and it is therefore un-likely that the respondent would be holding the suit land or any part thereof for the benefit of the applicants.

In the circumstances, I find that the applicant have failed to establish a prima facie case with a probability of success against the respondent herein with respect to the suit land. I therefore dismiss the Notice of Motion dated 6th March 2014.

Costs in the cause.

I further direct that as the suit land is within Embu where we now have an Environment and Land Court, this case be transferred to that Court where it will be mentioned on 17th March 2015 together with ELC Case No. 96 of 2014 as the two suits were ordered consolidated by consent of the parties on 30th April 2014.

B.N. OLAO

JUDGE

12TH MARCH, 2015

12/3/2015

Before

B.N. Olao – Judge

Gichira – CC

Mr. Kagio for Njeru for Plaintiff – present

Mr. Bundi for Defendant – present

COURT: Ruling delivered this 12th day of March 2015 in open Court

Mr. Kagio for Ms Njeru for Plaintiff present

Mr. Bundi for Defendant present.

B.N. OLAO

JUDGE

12TH MARCH, 2015