



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

ENVIRONMENT AND LAND CASE NO. 542 OF 2011

DAVID I. GITHUKU & OTHERS.....PLAINTIFF/RESPONDENT

-VERSUS-

GEORGE MUNYUA MBIRA.....1ST DEFENDANT/APPLICANT

KIAMBU DISTRICT LANDS REGISTRAR.....2ND DEFENDANT

HON.ATTORNEY GENERAL.....3RD DEFENDANT

RULING

By a Notice of Motion dated 20th August, 2013 brought under Section 3A of the *Civil Procedure Act and Order 40 Rule 1(a) (b) and Rule 4(1) (2) (3)* and any other enabling provisions of the law, the Plaintiffs/Applicants have sought for these orders.

- i. *That the Court be pleased to issue a temporary injunction to prevent the 1st Respondent, either by himself, his agents /Servants/employees and/or proxies and or any parties claiming through him from selling, alienating, sub-dividing, leasing, charging, transferring and/or in whatsoever manner from interfering and/or dealing with LR No.Ndeiya/Ndeiya 615 pending the hearing and determination of this suit.*
- ii. *That upon hearing this application, the court be pleased to order that the 1st Respondent or any party claiming through him to maintain status quo on Ndeiya/Ndeiya 615 pending the hearing and determination over the said suit property.*
- iii. *Costs of the suit be provided for.*

The application was premised on the following grounds and also supported by the annexed affidavit of **Josephat Muthama Mbutia**.

- a. *That applicants have filed a suit against the Defendants over land parcel No.Ndeiya/Ndeiya 615 which is pending hearing.*
- b. *That the 1st Defendant has exhibited a behaviour that suggests he wants to dispose or otherwise alter the land to the detriment of the Plaintiffs herein.*

- c. ***That the 1st Defendant has cut down trees and crops belonging and planted by the Plaintiffs/Applicants.***
- d. ***That the 1st Defendant has sub-divided, transferred and/or sold the resultant subdivisions to third parties.***
- e. ***That due to the aforesaid , if such orders are not granted , the plaintiffs applicants may suffer grave prejudice and injustice and render their pending suit against the Defendants a mere academic exercise.***

The Deponent, **Josephat Muthama Mbuthia** averred that land parcel No. **Ndeiya/Ndeiya 615** is subject of this suit and that the 1st Defendant in order to defeat the ends of justice has begun to interfere with the law. He further averred that the 1st Defendant either by himself, agents and/or servants has already begun cutting down trees and crops planted by and belonging to the Plaintiffs. Further the 1st Defendant has started to subdivide and transfer and/or sell the resultant sub-divisions to third parties.

Therefore, unless the 1st Defendant is stopped or restrained from partaking in the activities of the said land, pending determination of the suit, the Plaintiffs will suffer irreparable harm and injustice .The deponent further stated that they have a prima-facie case and it is only in the interest of justice that this application should be allowed.

The Notice of Motion was vehemently opposed by the 1st Defendant, **George Munyua Mbira**. He averred in his Replying Affidavit that the subject matter herein is parcels of land known as **Ndeiya/Ndeiya /615 and Ndeiya/Ndeiya /721**. He further stated that land parcel **No. Ndeiya/Ndeiya/615** was allocated to his late father, **Joshua Mbira Githathu** during the land demarcation and consolidation. However, their father did not obtain a title deed to the said land parcel in his life time.

1st Defendant further averred that upon the death of their late father, the Public Trustee duly petitioned for Grant in respect of his estate which Grant was confirmed on 9/2/2000. Land parcels **No. 615 Ndeiya** was one of the administrable assets of the deceased. The same was distributed equally among the deceased eight (8) houses as per the confirmed Grant **GMM2**.

Therefore Land Parcel **No. Ndeiya/Ndeiya/615** ceased to exist and as such it is impossible and not tenable to issue an injunction against a non-existence parcel of land. That new titles have been issued to the respective beneficiaries.

He further deponed that land parcel **No. 721** is the property of Kiambu County Council as per **annexture GMM4**. The Respondent denied that he has encroached upon the said title number **Ndeiya/Ndeiya/ 721** which the Plaintiffs have no legal possession or proprietary rights. He also stated that the Plaintiffs had encroached on the parcel of land which was formerly known as **Ndeiya/Ndeiya /615** but 1st Respondent obtained Court Order in **Limuru, court civil suit No. 291 of 2005** which ordered them to vacate the suit land. The 1st Respondent denied cutting down crops and trees belonging to the Plaintiffs and he asked the court to dismiss the Plaintiffs application as it has no merit.

The parties herein canvassed this application through written submissions which I have considered. The Applicants brought this Notice of Motion under **Order 40 Rule 1 (a) (b)** of the **Civil Procedure Rules** which states as follows:-

1. ***where in any suit it is proved by affidavit or otherwise-***
 - a. ***That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit ,or wrongly sold in execution of a degree; or***
 - b. ***That the defendant threatens or intends to remove or dispose of his property in circumstances***

affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

The applicants also brought the application under **Section 3A** of the **Civil Procedure Code** which states as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

The applicants have sought for injunctive relief. The granting of interim injunction is an exercise of judicial discretion and the applicant must satisfy the principles laid down to guide the court in deciding whether or not to grant the injunction sought. These principles were laid down in the case of **Giella Vs Cassman Brown and Co.ltd (1973) EA 358.**

These principles are:, Firstly , that the applicant must show a **prima-facie case** with probability of success. Secondly 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. Thirdly, if the court is in doubt, it will decide an application on the balance of probabilities (See **also EA Industries Vs Trufoods (1972) EA 420.**

The applicants in the Plaint and also in the application alleged that the 1st Defendant interfered with land parcels **No. Ndeiya/Ndeiya /721 and Ndeiya/Ndeiya /615.** The Land parcel no. 615 is the subject matter of this case. However, the 1st Defendant alleged that this land **parcel No. Ndeiya/Ndeiya 615** belonged to their late father **Joshua Mbira Githathu.** That the said **Joshua Mbira Githathu** had not registered the land into his name. When he passed on, the land was sub-divided into eight parcels of land as per annexures GMM3. The 1st Respondent stated that land parcel No 615 does not exist now.

From annexure GMM1 the land parcel No. 615 was initially registered in the names of Kiambu County Council and later to the name of George Munyua Mbira. Later on 26/7/2002, the title was closed on subdivision and new titles were issued. From 1st Respondent annexure GMM4, land parcel No. 721 exists in the name County Council of Kiambu. This is the parcel of land that the applicants allege was subdivided by the 1st Defendant into eight plots.

However, from the green card, what was sub-divided was land **Parcel No. 615** and not **721.** There was also evidence that a competent Court of Law sitting in **Limuru law Courts** had found in favour of 1st Defendants and ordered some of the plaintiffs to vacate the 1st Defendants land. The Plaintiffs did not appeal against that decision. They however decided to file this suit in the year 2011.

From the annexures attached to the Replying Affidavit by the 1st Defendant, land parcel No **Ndeiya/Ndeiya 615** ceased to exist in the year 2002 when it was sub-divided to produce eight new parcels of land. It would therefore be futile to issue an injunctive order against non-existent parcel of land. An injunction cannot issue to restrain an event that has already take place. (See ***Esso Kenya Ltd Vs Mark Makwata Okiya, Civil Appeal No. 69 of 1991.***)

I find that the plaintiffs/ applicants have failed to establish a prima-facie case with probability of success.

On the second issue of irreparable loss, the plaintiffs did allege that they occupy the parcel of land **Ndeiya/Ndeiya/721.** The 1st Respondent parcel of land was formerly land parcel No. **Ndeiya/Ndeiya /615.** Those are two separate parcels of land and there is no evidence that the Plaintiffs will suffer irreparable loss or injury of which monetary compensation is inadequate.

On a balance of probabilities, the Court has noted that the Plaintiffs have alleged that they have lived on this parcel of land for more than 60 years. However, there is no evidence to show that they lived on the 1st

Defendants land parcel **No. Ndeiya/Ndeiya/615**.It was their allegation that they lived on land parcel No. **Ndeiya/Ndeiya/721**. The balance of probabilities shifts in favour of the 1st Defendant herein.

Having now considered the Notice of Motion dated 20th August, 2013 and the annexures therein and the written submissions, the court finds that the applicants herein have failed to establish the criteria for grant of injunctive orders. The issues raised herein by the plaintiffs can be resolved and ventilated after calling evidence in a full trial. Therefore, the court declines to allow the Plaintiffs application dated 20/8/2013. The same is consequently dismissed with costs to the 1st Defendant/Respondent.

It is so ordered.

Dated, Signed and delivered this **28th** day of **February 2014**

L..N GACHERU

JUDGE

In the Presence of:-

Mr Kariuki holding brief for Mr Matwere for the Plaintiff

None attendance for Defendant though notified.

Muna: Court Clerk

L.N. GACHERU

JUDGE