



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

E.L.C NO. 269 OF 2012

GEOFREY KIMARU KORIR.....1ST PLAINTIFF
GEORGE WENDOT.....2ND PLAINTIFF
DANIEL KANDAGOR BOWEN.....3RD PLAINTIFF
PHILIP KIPTARUS KANGOR.....4TH PLAINTIFF
GABRIEL KANGOR.....5TH PLAINTIFF
JANE CHIRCHIR.....6TH PLAINTIFF
CHEPKEITANY TIWINA.....7TH PLAINTIFF
JULIUS CHEPKETANY CHEBOR.....8TH PLAINTIFF
EMMANUEL SANG.....9TH PLAINTIFF
KIPSEREM JACKSON CHEBURET.....10TH PLAINTIFF
JULIUS C CHEMJOR.....11TH PLAINTIFF
JOSEPH KIBOR CHEMJOR.....12TH PLAINTIFF

VERSUS

WILLIAM NGETE WANYAMA.....1ST DEFENDANT
FRANCIS FUMBE.....2ND DEFENDANT
THOMAS NABETET.....3RD DEFENDANT
JOHN EKELONYO.....4TH DEFENDANT
MR . MULI.....5TH DEFENDANT

RULING

1. The Notice of Motion dated **12th March, 2012** has been brought under **Order 40 Rule 1, 2 ,Order 51 Rule 1** of the Civil Procedure Rules and **Section 3 A** of the Civil Procedure Act. The Applicants are seeking, *inter alia*, the following orders;

i. **That pending the hearing and determination of this suit this honourable court be pleased to issue an injunction restraining the defendants/respondents their agents, servant and or any person acting under them from interfering with land parcels Nakuru/Ngongongeri/1817,1819,1820,1821,1822,1823,1824,1825,1826,1828,1829 & 1831 (here after referred to as the suit properties) in any manner whatsoever.**

(ii) **That costs of this application be borne by the defendants.**

2. The application is supported by the affidavit of **Joseph Kibor Chemjor**, and is based on the grounds stated on the face thereof.

3. He depones that in 2005, the 12 applicants herein together with three other individuals jointly purchased parcel **No.Nakuru/Ngongongeri/ 1676** from **Sammy K. Mwaita** measuring 23.5 Hectares. They subdivided the said parcel among themselves and obtained title deeds. Despite being registered as the lawful owners, the defendants without any legal claim are now in the process of clearing and burning the said parcels ready for planting which is an infringement of the plaintiffs proprietary rights.

4. The application is opposed. **Francis Fumbe** the 2nd respondent herein, filed a replying affidavit on 2nd April, 2012. He deposes that the respondents and several other persons have been in occupation of the suit properties for a period of over 20 years as squatters but denied that any of the respondents were cultivating therein. This was initially forest land which the former President Daniel ArapMoi upon the respondents request, directed the then Commissioner of Lands Sammy Mwaita, to put the respondents in lawful possession of the land they were occupying. Sammy Mwaita did not heed the former president's directive but instead allocated himself and John LokorioNakuru/Ngongongeri/1, the subject of a related suit in, **Nakuru High Court Civil Case No. 19 of 2006** pending before the court of appeal. Mr Mwaita later excised Nakuru/Ngongongeri/ 1676 which he sold to the plaintiffs herein.

5. When the application came up for hearing on 22nd January, 2014 Mr Kabita holding brief for Mr Akango applied that the application to be disposed of by way of written submissions. His application was denied and directed that the application proceeds at 12.45P.M by way of oral submissions. Only **Mr. Murimi** , learned counsel for the plaintiff was present during the hearing.

6. **Mr. Murimi** enunciated the averments contained in the supporting affidavit of the applicants. In addition he exhibited photographs showing land that had been freshly cultivated by the respondents. He further submitted that Nakuru High Court Civil Case No. 19 of 2006 addressed issues relating to Nakuru/Ngongongeri/1 which land was different from the current suit parcels as established by the Nakuru District Land surveyor.

7. He drew the attention of the court to a report by the Nakuru District Land surveyor dated 26th March, 2013 who had visited the suit parcels to mark and demarcate the boundaries between parcel No. Nakuru/Ngongongeri/ 1 and Nakuru/Ngongongeri/ 1817-1831 as ordered by the court on 26th March, 2012. In his report he stated that the two parcels were different.

8. He relied on the case of **Kenya Commercial Finance v Afraha Education Society CA 142 of1999**which I have read and considered.

9. Before considering the prayer for injunction, it is important to first consider whether this suit and application are *res sub judice* Nakuru High Court Civil Case No. 19 of 2006 pending before the court of appeal. This contention if proved will render it unnecessary at this juncture, to proceed with the suit or application.it behooves this court to consider it first.

See Channan Agricultural Contractors V. mumias Agricultural Transport limited Civil Appeal No. 81 of 1991 where the court of Appeal held:-

“Section 6 of the Civil procedure Act does not empower a judge to strike out but only allows for stay”

10. The respondents contention that the issues raised in the current suit and application are similar to those in Nakuru High Court Civil Case No. 19 of 2006 is vehemently opposed by the applicants who argue that the issues raised in Nakuru High Court Civil Case No. 19 of 2006 and the parties thereto are different from those in the instant suit and application. The applicants therefore maintain that the suit herein is not *res sub judice* Nakuru High Court Civil Case No. 19 of 2006.

11. **Section 6 of the Civil procedure Act**, under which the above contention is premised provides:-

“No court shall proceed with the trial or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.”

12. From the foregoing provisions of the law the suit herein can only be *res subjudice* if: -

- i. the matter in issue is also directly and substantially in issue in Nakuru High Court Civil Case No. 19 of 2006; or
- ii. if the parties in the other suit (Nakuru High Court Civil Case No. 19 of 2006) are the same as the parties in the current suit or are the same parties under whom the parties in the current suit may then claim.

13. I have taken the liberty to ascertain the issue(s) in Nakuru High Court Civil Case No. 19 of 2006 and the issue(s) in the current suit and also the parties in both suits.

14. Whereas the issue in the instant suit relates to the respondents rights over Land parcels the issue in Nakuru High Court Civil Case No. 19 of 2006 relates to the rights of John Lokorio over Nakuru/Ngongonger/1. The issues in that suit differ from the issues under consideration in the current suit. I also note that the parties in the said suit are not similar to the parties in this suit. For these reasons, I find and hold that the suit herein is not *res sub judice* Nakuru High Court Civil Case No. 19 of 2006.

15. Going back to the prayer sought for injunction in the current application, the principles of granting orders of injunction are well settled. Therefore, I wish to refer and rely on the celebrated case of **Giella vs Cassman Brown (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 on doubt, it will decide an application on the balance of convenience.”

16. Have the applicants made out a *prima facie* case with a probability of success? In **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125a** *prima facie* case was described as:

“... 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 properly 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.”

17. In the present case, I have considered the facts deponed in the affidavit, the evidence annexed thereto and the authority relied on. It emerges from the material before the court that the plaintiffs have a genuine and arguable case. The applicants' case is that being the registered owners of the suit properties, their interest in the suit property is indefeasible. Their aforementioned contention is based on **Sections 27 and 28** of the Registered Land Act, Chapter 300 laws of Kenya (repealed) replicated in **Sections 24 and 25** of the Registration of Lands Act 2012.

Sections 24 and 25 of the Registration of Lands provide:-

24 (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b).....

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

The courts are required under section 26 to take certificates of titles as prima facie evidence.

26.. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

18. On the other hand, the Respondents' claim is based on the verbal directive by the former head of state President Moi to the Commissioner of Lands to allocate the respondents' land. They allege that instead of following instructions, the Commissioner allocated himself the land meant for them and thereafter sold the same to the applicants. The burden is on the respondents to prove that the suit parcels were indeed allocated to them by the former head of state. This was Government land and the defendants have exhibited no evidence that the procedure for acquiring Government land as provided for under Part IV of the Government's Land Act was complied with.

19. This suit relates to land parcel No. Nakuru/Ngongongeri/ 1676 which was subdivided into plots Nos. Nakuru/Ngongongeri/1817-1831. The defendants have not demonstrated how land parcel No. Nakuru/Ngongongeri/1676 was excised from land parcel No. Nakuru/Ngongongeri/1 and subsequently subdivided into Nakuru/Ngongongeri/1817-1831. The copies of titles annexed by the applicants are for Parcels No. Nakuru/Ngongongeri/1817, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1828, 1829 & 1831. The land which the respondents allege to be in occupation is Nakuru /Ngongongeri/1. This is evident from paragraph 3 of the 2nd respondent replying affidavit where he depones;

“That my co-defendants, myself and several other persons numbering over 100 have been residing on and using NAKURU /NGONGORERI/1 for a period of over 20 years as squatters”

20. I am unable to find anything that entitles the defendants to this land. They have also being unable to demonstrate that their claim constitutes overriding interests within the meaning and intendment of section 30 of the Registered Land Act Cap 300. Not even section 30(g) can come to the aid of the defendants.

21. The report by the District land surveyor Nakuru dated 26th March confirming that he had established the boundaries between Nakuru/Ngongongeri/1 and Nakuru/Ngongongeri/ 1817 to 1831 states that the parcels are different and this has not been disputed by either party.

22. Having found that the applicants have a prima facie case I do not find the need to consider the second and third principles for granting an injunction.

23. For the above reasons I find that the application for injunction is merited and grant prayer 3 in the Notice of Motion dated 12th March,2012 with costs.

Dated and Signed at Nakuru this 16thday of May 2014.

L N WAITHAKA

JUDGE

PRESENT

M Akango for the Defendants

N/A for the plaintiff

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE