



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CASE NO. E003 OF 2021**

**SIKANY OLE LENGENY & 15 OTHERS.....PLAINTIFFS/APPLICANTS**

**-VERSUS-**

**JOHN RAFFLES NYAUMA.....RESPONDENT/DEFENDANT**

**RULING**

1. Before this court for determination is a Notice of Motion Application dated 1<sup>st</sup> February, 2021 brought pursuant to **Order 40 Rules 1** and **2** and **Order 51** of the **Civil Procedure Rules and sections 1, 1A, 3, 3A** of the **Civil Procedure Act** seeking the following orders: -

**1. Spent.**

**2. Spent.**

**3. That a mandatory injunction restraining the Defendant/Respondent herein by himself, his agent, or servants from interfering, encroaching, wasting alienating, evicting and or trespassing, over all that parcels of land known as Cis-Mara/Nkoben/2376,2377,2378,2379,2380,2381,2382,2383,2384,2385,2386,2387,2388,2389,2390 and 2391 resulting from the subdivision of parcel number Cis-Mara/Nkoben/147 measuring approximately 20.24 Ha pending the determination of this suit.**

**4. Spent.**

**5. Any other order the court may deem fit.**

2. The application is premised on the grounds that the applicants are the registered owners of the suit land herein and have openly, continuously and uninterruptedly occupied the suit land through a claim of adverse possession whereby the Environment and Land Court sitting in Nakuru determined so in the year 2016. That sometime in January, 2021, the respondent encroached on the suit land on allegations that he had bought the suit land from John Sala Koguls vide a sale agreement dated 6<sup>th</sup> May, 2016.

3. The application is supported by the affidavit of the applicant herein sworn on 1<sup>st</sup> February, 2021. The applicant deposed *inter alia* that together with 15 others, they were duly registered as the owners of the suit land known as Cis-Mara/Nkoben/147 and have been in occupation continuously and uninterruptedly for decades. That they filed a suit in the year 2012 at Nakuru Law courts for claim of adverse possession in which judgment was delivered on 10<sup>th</sup> March, 2016 and a decree issued on 16<sup>th</sup> March, 2016.

4. On the 6<sup>th</sup> April, 2016 they filed an application to have the Deputy Registrar of the High Court in Nakuru execute the requisite documents and instruments and ensure that the suit land is transferred to their names and the said order was granted on 10<sup>th</sup> February, 2017. It followed thereafter that the Land Registrar Narok North/South districts vide a gazette notice no. 6945 dated 21<sup>st</sup> July, 2017 invited anyone with an objection to the registration of the applicants as the registered owners to lodge their objection within 30 days. No objection was lodged.

5. The applicant further deposed that on 27<sup>th</sup> August, 2017 he was issued with a Certificate of Title Deed to hold in trust for 15 others for land parcel number Cis-Mara/Nkoben/147 in which it was further subdivided into parcel Cis-Mara/Nkoben/2376-2391.

6. The applicant further deposed that in the month of January, 2021 the respondent encroached on the suit land on allegations that he had bought the suit land from John Sala Koguls through a sale agreement dated 6<sup>th</sup> May, 2016 and that this purported sale agreement was entered at a time when judgment had already been delivered and a decree issued in favour of the applicants. That on 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> January,

2021, the respondent forcefully entered into the suit land and illegally and unlawfully started ploughing on the same. That they reported the matter to the police station and their complaint was registered as OB/16/08/01/2011.

7. The applicant deposed that the acts of interference, nuisance and disturbance by the respondent will cause them irreparable damage with no remedy as to costs. It is their belief that they have good title as they are duly registered owners of the suit land and have a prima facie case with all certainty of success.

8. The respondent herein filed a replying affidavit sworn on 10<sup>th</sup> March, 2021. He deposed that the application is largely misleading and that he has not encroached on the suit land. That it has come to his attention that a judgment and decree was issued in favour of the applicants and that John Sala Koguls has currently moved the court sitting in Nakuru to set aside the said judgment and decree.

9. The respondent further deposed that there is no sense for him to encroach on the suit land knowing very well there was a void contract that was executed on 16<sup>th</sup> May, 2016 and therefore it is clear that such a contract was impossible to perform. As such the applicants are seeking to blackmail this court into making a determination of an alleged contractual breach of the purported sale agreement entered into between him and John Sala Koguls as opposed to a trespass claim as presently filed before this court.

10. In addition, the applicants have not disclosed how they legally accessed the purported sale agreement as it is a private document between parties. Further, the respondent has perused the annexures attached to the application and there is no picture of him directing any ploughing as alleged and hence the pictures are largely scandalous.

11. The respondent further deposed that it has come to his attention that the alleged ploughing that took place on the applicants suit land on 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> January, 2021 was conducted by John Sala Koguls with the full knowledge and supervision of the OCS Olulunga and his officers and as such he sees no reason why he should be dragged into this suit. It is the respondent's averment that the applicants are using him as a scapegoat into their woes with John Sala Koguls and for this reason there is no merit in the current suit as presently filed.

12. The respondent deposed that he has not been summoned by the police nor has he been formally charged in a court of law on allegations of encroachment and the allegations are largely scandalous and misleading. The respondent deposed that he is a medical practitioner and his reputation is at stake and any attempt to tarnish his name is not acceptable and should be frowned upon. He concludes by stating that he is in support of the application and prays that the same be allowed and that the orders issued against him on 3<sup>rd</sup> February, 2021 be discharged and the current suit be dismissed with costs as the applicants are guilty of material non-disclosure as to the exact happenings on the suit land.

13. The respondent also filed grounds of opposition dated 27<sup>th</sup> June, 2021 in opposition of the application on the following grounds: -

**1. That the claim for trespass and other rights as pleaded by the plaintiffs can't be legally sustained as the plaintiffs have lost all the legal rights of ownership as relates to the suit properties following the recent decision by the court in ELC Case No. 207 of 2013 at Nakuru on 15<sup>th</sup> June, 2021 that effectively set aside the ex-parte judgment delivered in favour of the plaintiffs on 10<sup>th</sup> March, 2016.**

**2. That the plaintiffs have lost the necessary locus standi to prosecute this suit and seek any justifiable legal right as pertains to the suit property having lost the right to ownership.**

**3. That the plaintiffs will simply be in court on a fishing expedition if this suit were to proceed since they lack any tangible evidence save for the now obvious shaky hope that they may be successful in the substantive suit being ELC Case No. 207 of 2013 wherein they will be seeking reinstatement of their prescriptive right of adverse possession as relates to the suit land.**

**4. That the legal effect of setting aside a judgment by a court of law is that parties revert to the original position before judgment. As such in the above case it means that the suit land being land parcel no. Cis-Mara/Nkobon/147 and all subdivisions occasioned on it creating the various parcels of land effectively revert to the original owner John Sala Koguls until a contrary decision is made following the hearing and determination of ELC Case No. 207 of 2013 at Nakuru.**

**5. That the current suit as presently instituted by the plaintiffs is speculative and a blatant abuse of the court process and the same ought to be dismissed with costs to the defendant.**

14. The applicants filed written submissions dated 25<sup>th</sup> June, 2021. The applicants submit that the instant application meets the threshold to warrant a grant of injunction as per **Giella versus Cassman Brown (1973)EA 358**. The applicants submit that they are duly registered as the owners of the suit land and they have openly, continuously and uninterruptedly used the suit land for decades which culminated to their successful ownership through adverse possession. The applicants further submit that the principle of indefeasibility of title is well enshrined under **Section 25 (1) of the Land Registration Act of 2012**. This principle is to the effect that once a certificate of title is issued to a person, that person becomes the absolute registered owner of that parcel of land with exclusive indefeasible rights, title and interest vested on him by law and the same cannot be defeated by a party unless there are very clear and cogent grounds as provided by **section 26 (1) of the Land Registration Act**. It is their submission that they have a fundamental right to enjoy the use of the property without any interference unless that interference is one expressly authorised by law.

15. The applicants further submit that if the injunction is not granted they stand a high chance of being denied the chance to peacefully enjoy their property and also stand a chance of losing the said suit land unheard. The applicants rely on the case of **Mohamed Ahmed Dahia & 3 Others versus Abbey Hassan Maalim [2020] eKLR**, **Joseph Siro Mosioma versus Housing Finance Company of Kenya & 3 Others [2008] eKLR** and **Film Rover International Limited and Others versus Common Film Sales Limited [1986] AER 772**. The applicants further submit that on a balance of convenience, the same lies with them because they are the rightful owners and are in occupation of the suit land.

16. The defendant/respondent did not file any submissions.

17. I have analysed the application, the replying affidavit and grounds of opposition together with the written submissions filed and the issue for determination is whether the applicants are entitled to a grant of injunction.

18. The applicants have invoked the provisions of **Order 40 Rules 1 & 2 Civil Procedure Rules** and the inherent powers of this Court under **Sections 1A, 1B, 3 & 3A Civil Procedure Act**. **Order 40 Rules 1 & 2** is a substantive provision of the law where the Court is moved by a litigant for the protection of a right recognized under the law either at an interlocutory stage or permanently. In this case, the applicants are invoking the orders in this application and a permanent injunction in their plaint dated 1<sup>st</sup> February, 2021. The gist of the application as deponed in the supporting affidavit is that the respondent had sometime in the month of January, 2021 started encroaching on the suit land on allegations that he had bought the suit land from John Sala Koguls through a sale agreement dated 6<sup>th</sup> May, 2016 and that that this sale agreement was entered into at a time when judgment had been delivered and a decree extracted in favour of the applicants. The 1<sup>st</sup> applicant further deponed that on the 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> January, 2021 the defendant/respondent forcefully entered the suit land and started ploughing the same. The 1<sup>st</sup> applicant attached a copy of the title, judgment delivered by my brother, Justice Sila Munyao, on 10<sup>th</sup> March, 2016, sale agreement, mutation forms and, entry of OB and pictures of ploughing on the suit land.

19. The respondent on the other hand deponed that of his own knowledge, the ploughing was conducted by John Sala Koguls with full knowledge and supervision of the OCS Olulunga and he sees no reason why he should be dragged into the suit. The respondent is also in support of the application and prayed that the same be allowed. In his grounds of opposition, the Respondent appears to have introduced new information without adducing any evidence thereof and which appears to be contrary to his averments in the replying affidavit.

20. As regards **Order 40 Rules 1 & 2**, the principles for injunction as set out in the case of **Giella Vs Cassman Brown Co. Ltd (1973) E.A. 358** apply. The applicant must establish the following principles: -

**(a) Prima facie case with high chances of success.**

**(b) Establish that he stands to suffer irreparable loss and**

**(c) Where the Court is in doubt, it may decide the case on a balance of convenience.**

21. On the first principle, the applicants have demonstrated ownership of the suit land in which they acquired through adverse possession emanating from the judgment of the court. The respondent has not produced any material to rebut this claim. The suit land was further subdivided and certificate of title deeds issued to the applicants. In my view the applicants have demonstrated a prima facie case with high chances on success.

22. The above being the case, they stand to suffer irreparable harm if the order of injunction is not granted. The balance of convenience, therefore, tilts in favour of the plaintiffs/applicants.

23. Arising from the above, I find that the Notice of Motion application dated 1<sup>st</sup> February, 2021 has merit and the same is allowed as hereunder: -

**3. That a mandatory injunction restraining the Defendant/Respondent herein by himself, his agent, or servants from interfering, encroaching, wasting alienating, evicting and or trespassing, over all that parcels of land known as Cis-Mara/Nkobon/2376,2377,2378,2379,2380,2381,2382,2383,2384,2385,2386,2387,2388,2389,2390 and 2391 resulting from the subdivision of parcel number Cis-Mara/Nkobon/147 measuring approximately 20.24 Ha pending the determination of this suit.**

**5. Costs to the plaintiffs/applicants**

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 16<sup>TH</sup> DAY MARCH, 2022**

**MBOGO C.G**

**JUDGE**

In the presence of: -

CA: Timothy Chuma