



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

ELC CIVIL CASE NO. 89 OF 2013(OS)

JANE SIMITA MUNKA

SIMEL OLE PARTUNKAS

JOHN LOKITILA EREGAE

(Suing on their own behalf and on behalf of OI-Jorai

Community Members)PLAINTIFF/ APPLICANT

VERSUS

SOLAI RUYOBEI FARM LTDDEFENDANT /RESPONDENT

RULING

1. The Applicants filed a Notice of Motion dated **28th September, 2012** seeking the following orders:-

1) spent

2) spent

3) That this honorable court be pleased to grant a temporary injunction against the defendant by itself, its agents, servants, assigns, and or authorized employees restraining them from entering into, selling, offering for sale, excising, subdividing, transferring and or disposing or dealing in any way whatsoever with all that parcel of land known as LR No. 20229/1 (IR 67258) (hereinafter referred to as the suit property) pending the hearing and determination of the suit

6) That costs of this application be provided for.

2. The Application is premised on the grounds set out there in and is supported by the affidavit sworn by **Timeya Ole Ratia** dated **28th September, 2012**. He depones that he is the Vice chairman of Oljorai community and he and the other applicants occupy 3245 hectares of the suit property. They have moved to court because they are apprehensive that the respondent may move to alienate, sell or otherwise deal with the suit property in order to defeat their claim.

3. The application is opposed through a notice of preliminary objection and a replying affidavit. The preliminary objection is filed on the following grounds;

- (1) That the suit application and/or the originating summons is incurably defective as no proper authority sought for the purported members.**
- (2) That the application and/or originating summons is scandalous, frivolous or vexatious.**
- (3) That the suit property is private registered under Registration of Titles Act CAP 281 and the same is not a community land under any existing Law.m**
- (4) That the purported Plaintiffs/Applicants are not registered and/or incorporated group representatives under the Land (Group Representatives) Act CAP 287 Laws of Kenya hence they have no authority to represent any member of a community in a court of Law.**
- (5) That the application is pre-mature, baseless and abuse of court process.**
- (6) That the application is malious and driven by greed as the same is based on forged signatures and/or non existent authority hence the plaintiffs/Applicants are guilty of perjury.**

The replying affidavit was sworn by **Charles Olare Chebet** on **7th November, 2012**. He depones that the respondent is the registered owner of the suit property having purchased the same from Lands Limited on **29th November, 1995** for Kshs.24,000,000 and transfer duly registered on **8th December 1995**. This land was vacant at the time of the sale and the applicants were not in occupation. It was only in 2004 when some strangers invaded the suit property and started residing there; that the applicants have filed numerous suits in relation to this land namely Nakuru **HCCC NO. 22 OF 2004** which suit was dismissed with costs, **HCCC NO. 87 OF 2007** is still pending therefore the applicants' claim should not be entertained because of material nondisclosure.

4. **Matinkoe Ole Koonyo** filed an affidavit in support of the respondent's case where he depones that is the chairman of Ol-jorai settlement scheme and that members of the community were allocated 6000 acres of land by the former President of the Republic of Kenya through the Provincial Administration; that he and one **Peter L.N.Oleosono** identified about 1700 land less people and allocated them land. Each was issued with an allotment letter and they settled on their respective parcels.

5. **David Musuuri Ole Ratia** also in support of the respondent's case depones that he had been allocated land by the Government and was a brother to the 2nd plaintiff who is over 60 years old and illiterate. That his brother was not landless and someone must have purported to sign his signature for purposes of filing this suit.

6. On **13th November, 2013** directions were taken that the application be disposed of by way of written submissions.

The parties filed written submissions reiterating their stated positions but also chose to highlight these submissions.

7. In his submissions, Counsel for the applicant stated that the applicants had lived on the suit land for more than 18 years which had not been challenged by the respondents and deserved preservative orders; That the earlier court cases **Nakuru HCC No. 22 of 2004** and **Nakuru HCC No. 87 of 2007** were not filed by the applicants but may have been filed by a resident without consulting the applicants.

8. On his part counsel for the respondent submitted that the applicants had failed to meet the threshold for granting of an injunction set out in **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**. He submitted

that the applicant had annexed a list of members of **Tasaru Oljorai Company Limited** which members were not the same as the applicant or Oljorai Community members; that no evidence had been adduced as proof of the uninterrupted possession and occupation alleged in the affidavit; that there was material non-disclosure on the part of the applicants about the several cases filed in relation to the suit property namely **Nakuru HCC No. 22 of 2004, Nakuru HCC No. 87 of 2007 and Nakuru HCC No. 209 of 2007**. Some of their members had also sworn affidavits that members of Oljorai community group had been resettled by the Government and that the applicants were imposters.

9. The issue that stands out for determination is whether on the facts and circumstances of this case, the applicant is entitled to the orders of injunction sought at this interlocutory stage.

10. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown & Co. Ltd (supra)**. It lays down the principles for granting an interlocutory injunction relief. The court will consider whether:

1. **The applicant has shown that he has a prima facie case with a probability of success.**
2. **Damages will be an adequate remedy and**
3. **On the balance of convenience, should the court be in doubt it will determine the matter on a balance of convenience.**

11. To show that the applicants have a *prima facie* case with probability of success they have annexed a list of members of Tasaru Oljorai Company Limited but no explanation has been offered on the relationship of these members with Oljorai Community members. They have however not annexed any documents to support their claim of occupation of the suit property by way of photographs and/or letters from the local Administration.

12. On the other hand the respondent has attached a copy of title deed as proof of ownership of the suit property. The respondent has also cast doubt on the claim by the applicants that they are in occupation by attaching two affidavits from members of the applicants, **David Musuuri Ole Ratia** and **Matinkoe ole Koonyo** wherein they depone that they were allocated land elsewhere by the

Government and no person was left out. David Musuuri Ole Ratia also stated that his brother, the 2nd plaintiff was not landless but he was illiterate and someone must have purported to append his signature for purposes of filing the suit.

13. In my view, the issues raised therein would require further interrogation of the parties evidence by way of oral submissions at the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered.

14. At this stage all the applicants are required to demonstrate is not a case which must succeed but one which may succeed. With the facts and evidence placed before me, I am not satisfied that the applicants have established a prima facie case with a probability of success.

15. Will the applicants stand to suffer irreparable damage if the injunction is not granted? The applicants have not placed before me any evidence to show that they are in occupation of the suit property. On the other hand the respondent has title to this land issued way back in 1995. If it is found during trial that the applicants are entitled, the subject matter of the suit being land, the value can be easily assessed in damages and they can be compensated.

16. Having found that the applicants have not satisfied the first two conditions to be granted an injunction, on a balance of convenience, discretion must favour the respondent and I have said why.

17. For the above reasons, I find no merit in the Notice of Motion dated **28th September, 2012** and hereby dismiss it with costs to the respondent.

18. I have taken the liberty to peruse the files related to this matter and noted the following;

(i) In **Nakuru HCC No. 87 of 2007**, the plaintiffs are **Peter Ndungunyu Ole Sono , Musuri ole Ratia** and **Lerionka ole Rotiken** (suing on behalf of Ol- Jorai Community members). The subject matter is **L.R No. 9581** later subdivided into **L.R No. 20229/1 and 20229/2**. **20229/1** is the subject matter in the current suit.

(ii) **Nakuru HCC No. 209 of 2007** was dismissed on **5th May, 2014** for non prosecution. Parties and the subject matter are different from the other suits.

(iii) **Nakuru HCC No. 22 of 2004** appears to have been a replica of **Nakuru HCC No. 87 of 2007**. The first plaintiff was the same and the defendant was similar to the defendant in the current suit and so was the subject matter. This suit was struck out on **14th May, 2005** as it disclosed no reasonable cause of action.

19. To avoid duplicity of suits and abuse of the court process, I order that **Nakuru HCC No. 87 of 2007** and the current suit **ELC 89 of 2013** be consolidated. I do this bearing in mind the overriding objective of the court under Sections **1A, 1B and 3A** of the Civil Procedure Act, 2010 and replicated in Section 3 of the Environment and Land Court Act. see **John Gakure & 148 others Vs. Dawa Pharmaceutical Co. Ltd & 7 others Civil Application No. 299 of 2007**. Where **Waki, JA** expressed himself thus:

“Jurisdiction of the Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court’s view, dealing with a case justly includes *inter alia*, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases”

20. This matter to be mentioned alongside **HCC No 87 of 2007** on **8th July, 2014** to take directions on how the matters will proceed.

Dated, signed and delivered in open Court at Nakuru this 20th day of June 2014.

L N WAITHAKA

JUDGE.

PRESENT

Mr Onyancha for plaintiff

N/A for the Respondent

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE