



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 663 OF 2013

ERASTUS NDEGE MACHUKE1ST PLAINTIFF
SIMON KITHU MACHUKE2ND PLAINTIFF
BENSON NTHIGA MACHUKE3RD PLAINTIFF
JOHN MURIUKI MACHUKE4TH PLAINTIFF

VERSUS

JOHN KIURA NGARI1ST DEFENDANT
JOHN NJERU JULIUS2ND DEFENDANT
GISOVI WA MUNYI3RD DEFENDANT
EZEKIAH NYAGA4TH DEFENDANT
DAVID MWANIKI NGUKU5TH DEFENDANT
JACOB NJUE MUTEMBEI6TH DEFENDANT
JAMES NYAGA NGARI7TH DEFENDANT

RULING

By their plaint filed herein on 27th August 2013 and amended on 3rd September, 2014 the plaintiffs/applicants sought the following remedies against the defendants/respondents jointly and severally:-

(a) A declaration that parcels of land numbers MBEERE/KIRIMA/3684, MBEERE/KIRIMA/3683, MBEERE/KIRIMA/3686, MBEERE/KIRIMA/3687, MBEERE/KIRIMA/3697, MBEERE/KIRIMA/3688 and

MBEERE/KIRIMA/3699 are registered in the names of the defendants respectively in trust for the plaintiffs

(b) An order that the trust held by the defendants in respect of respective parcels of land

described in (a) above be determined and the said parcels of land be registered in the names of the plaintiffs

(c) The defendants be permanently restrained from interfering with the plaintiffs' peaceful occupation of the said parcels of land

(d) Costs of the suit

It is the plaintiffs' case that the aforementioned parcels of land (hereinafter the suit properties are subdivisions of the original land MBEERE/KIRIMA/2244 owned by 17 Mbeere Clans including the plaintiffs' Ikambi Clan and that the plaintiffs' grandparents settled on a portion of land that currently constitutes the suit properties in or about 1912 and have occupied and utilized the same to date. However, although it was agreed that the parcel MBEERE/KIRIMA/2244 would be shared among the 17 clans, the plaintiffs' portion was awarded to the Marigu Clan headed by their Chairman the 7th defendant.

On 9th July 2014 the plaintiffs filed a Notice of Motion seeking a temporary injunction restraining the 5th defendant/respondent himself, his servants, agents, workmen or whatsoever from entering upon, constructing, alienating, evicting or in any other way interfering with the plaintiffs' quiet enjoyment of land parcel No. MBEERE/KIRIMA/3697 pending the hearing of this suit. That application is the subject of this ruling.

The application is supported by the affidavit of ERASTUS NDEGE MACHUKE the 1st plaintiff/applicant in which it is deposed, inter alia, that although the parcel of land No. MBEERE/KIRIMA/3697 is registered in the names of the 5th defendant/respondent, it is part of the land that the plaintiffs and their families have been occupying since 1912 yet the 5th defendant/respondent moved into it recently and is putting up a structure on the same.

The application is opposed and in his replying affidavit, the 5th defendant/respondent has deposed, inter alia, that he is the registered proprietor of the land parcel No. MBEERE/KIRIMA/3697 and has annexed a copy of the title. He further denies that the plaintiffs have occupied or utilized the land since 1912 adding that in fact it is he and his family that live on the land and he annexed pictures of the houses they reside in on the land.

Submissions have been filed by both parties which I have considered.

It is clear from the material placed before me that the suit properties listed above are registered in the names of the defendants/respondents herein. The said registration is under the repealed ***Registered Land Act***. A person so registered as owner of land enjoys all that right and privileges that go with such registration subject only to the rights, interests and liabilities mentioned in ***Sections 28 and 30 of the Registered Land Act (now repealed)***. Further, such registration shall not relieve a proprietor from any duty or obligation to which he is subject as a trustee. Registration may also be cancelled if obtained through fraudulent means or by mistake.

The plaintiffs/applicants herein allege that the defendants/respondents are registered as owners of the suit property in trust for them. And specifically in relation to parcel No. MBEERE/KIRIMA/3697 which is the subject of this application, it is the case of the plaintiffs/applicants that the 5th defendant/respondent holds the same in trust for them. Whether or not the 5th defendant/respondent holds the parcel of land No. MBEERE/KIRIMA/3697 in trust for the plaintiffs/applicants is a matter that will be determined at the trial. It is not a matter that can be determined at this stage without hearing the parties. At this stage, the 5th defendant/respondent is the registered proprietor of the said parcel of land and it has not been suggested that he obtained the same through fraudulent means. In considering an application such as this, the Court is guided by the principles laid down in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358*** which are:-

- (a) *The applicant must satisfy the Court that he has a prima facie case with a probability of success*
- (b) *That he would otherwise suffer irreparable loss which is incapable of compensation by damages if the order for injunction is not granted and*
- (c) *If in doubt, the Court will decide the matter on a balance of convenience.*

It must also be remembered that being an equitable remedy, an application such as this will not be granted to a party who has not come to Court with clean hands.

At this stage, the Court is not prepared to find that the plaintiffs/applicants have established a prima facie case with a probability of success as set out in the ***GIELLA*** case (supra). The land in question is registered in the names of the 5th defendant/respondent who is entitled to enjoy the rights and privileges that go with such registration. There is no suggestion that the said registration was obtained through fraudulent means. What is alleged is a trust but as I have stated above, the issue of whether or not the 5th defendant/respondent is a trustee is a matter to be determined during the trial. The plaintiffs/applicants have also deponed through the affidavit of the 1st plaintiff/applicant that they have been occupying, utilizing and developing the property in dispute since 1912. In support of that claim, photographs were annexed to the affidavit of the 1st plaintiff/applicant ERASTUS NGEGE MACHUKE and a glance at the said photographs show what appears to be structures put up recently. Indeed the structures are made of poles with iron sheets and have no walls (annexture ENM 2). Clearly they cannot be evidence to sustain a claim that the plaintiffs/applicants have been utilizing the land since 1912. Whoever put up; those structures must have moved onto the land in dispute very recently.

Clearly, by the evidence now before me, I am not prepared to hold that the plaintiffs/applicants have established a prima facie case with a probability of success. They have therefore failed to surmount the first test in the ***GIELLA*** case (supra). On that basis alone, the application must fail.

Even if the Court were to go further and consider the issue of irreparable loss which is the second test in the ***GIELLA*** case (supra), nowhere in the supporting affidavit of ERASTUS NDEGE MACHUKE has he deponed that the plaintiffs/applicants will suffer such loss. The nearest he has come to that is in paragraph 6 of his supporting affidavit where he mentions that the plaintiffs/applicants will “***suffer great prejudice***”. That is not the same thing as irreparable loss that cannot be measured in damages.

Ultimately therefore, having considered all the matters herein, I find that the plaintiffs/applicants are not deserving of the orders sought in their Notice of Motion dated 9th July, 2014.

The same is accordingly dismissed with costs. As directed on 24th September, 2014, this being a matter for the Environment and Land Court at Embu, it is hereby transferred to that Court for mention on 27th November, 2014 for further orders.

It is so ordered.

B.N. OLAO

JUDGE

14TH NOVEMBER, 2014

14/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Gachoka for Ms Njeru for Plaintiff – present

Mr. Muyodi for 7th Defendant – absent

COURT: Ruling delivered in open Court this 14th day of November, 2014

Mr. Gachoka for Ms Njeru for Plaintiff present

No appearance for Defendant.

B.N. OLAO

JUDGE

14TH NOVEMBER, 2014