



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**E.L.C NO 66 OF 2013**

**JOSEPH LENDUSE ELDAISABA.....<sup>1ST</sup> PLAINTIFF**

**DANIEL LENDUSE ELDAISABA.....<sup>2ND</sup> PLAINTIFF**

**MIKE LENDUSE.....<sup>3RD</sup> PLAINTIFF**

**VERSUS**

**PAUL GUGO LESWAGEY.....<sup>1ST</sup> DEFENDANT**

**COUNTY COUNCIL OF NAKURU.....<sup>2ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs notice of motion dated 7<sup>th</sup> March, 2012 seeks inter alia, a temporary injunction restraining the defendants from interfering and/ or trespassing on the plaintiffs parcels of land, namely, **Nessuit Settlement Scheme/Nku/No 1947, 1948, 1949, 1950, 1969,1970, 1971, 1972, 1973, 1975, 1976, 1977, 1978, 1979, 1990, 1991, 1992, 1993 and 1994** ("the suit properties"). They also seek that eviction orders be issued against the defendants as well as costs of the application.

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of the 1st plaintiff sworn on **7<sup>th</sup> March, 2012**. He depones that the plaintiffs are members of the Ogiek community who together with their extended families, have resided on the suit properties since time immemorial where they have practiced subsistence farming and pastoralism as a way of life. The defendants have now laid claim to the area occupied by the plaintiffs without any right or interest in the suit properties, have erected beacons thereon and destroyed the plaintiffs crops despite the same being communal land to which title deeds have not been issued. He further depones that he and others were charged with the offence of malicious damage to property in 2010 (JLE2) on the instigation of the defendants and that the suit properties are part of the Mau Forest Complex whose dealings were stopped by the court in Nairobi HCCC No 637 of 1997 and Nairobi HCCC No 421 of 2002 (JLE3). He urged the court to grant the orders sought as failure to do so would render them destitute.

3. In opposing the application, the <sup>1st</sup> defendant swore a replying affidavit dated **17<sup>th</sup> May 2012**. He deponed that he is the elected Councilor of Nessuit ward and a member of the Ogiek Community; that the plaintiffs do not own the suit properties as they own and occupy parcels Nos. 630, 631, 632, 633, 638, 639, 640, 641,642,643, and 644 in Nessuit Location as evidenced by a letter from the local chief (PGL1) which parcels are separate from Nessuit trading centre. It is his contention that this is a scheme by the plaintiffs to grab the suit properties (specifically 11-41) and that they were even charged in court for destroying beacons of the aforesaid parcels.

4. He further deponed that the suit properties form part of Nessuit trading centre which were set aside to assist the community access basic necessities, proper housing and also to assist them earn revenue; that the plaintiffs were not among the squatters residing within the trading centre as they held land elsewhere (PGL4) that all the squatters residing at the trading centre had been allocated land and issued with letters of allotment by the 2nd defendant (PGL 5 and PGL6) and the allottees had been paying rates and rent to the Council (PGL7).

5. The 2<sup>nd</sup> defendant equally opposed the application. **Joseph M Malinda** the Clerk, County Council Nakuru, swore a replying affidavit on **12<sup>th</sup> July, 2012** in which he deponed that according to records held by the County Council of Nakuru, the plaintiffs were not the owners of the suit properties and did not reside therein; that the suit properties did not form part of the Mau Forest Complex and neither was it community property; that the planning and development of the Nessuit trading centre (where the suit properties fall) was approved by members of the community and the respective parcels allocated to the persons who had been residing at the shopping centre. Finally he deponed that the list submitted by the plaintiffs of alleged members of the Ogiek community was a forgery signed by relatives of the plaintiffs, manufactured with a view to file suit and mislead the court.

6. On **21<sup>st</sup> May, 2012** all parties agreed that the application be disposed off by way of written submissions. Only the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their written submissions on **29<sup>th</sup> October, 2012** and 15<sup>th</sup> October, 2012 respectively.

7. The 1<sup>st</sup> defendant submitted that the plaintiffs had not established a *prima facie* case with a probability of success or met the other conditions laid out in the case of **Giella v Cassman Brown & Co Ltd. 1973 (EA) 358**. It was his contention that the plaintiffs had not presented any evidence showing that they were the owners of the suit properties and were not in occupation of the same. They had also not demonstrated any irreparable loss that they would suffer and in the unlikely event that they did, damages would be an adequate remedy as held in the case of **J. L. Lavuna And Others V Civil Servants Housing Co. Ltd. & Another (1995] eKLR**. Finally they submitted that the balance of convenience tilted towards the defendants as the plaintiffs had not proved anything other than being members of the Ogiek community.

8. In their submissions, the 2<sup>nd</sup> defendant relied on the **Giella case**, the **East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR** case and the case of **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited [2002] eKLR**. They also relied on **Sections 29 and 33** of the Physical Planning Act which gives local authorities power to approve development plans. They submitted that the suit properties having been designated as a trading centre to serve Nessuit settlement scheme had already undergone the planning, surveying and allocation process in 2009 and had been duly approved by the local community and the Council.

9. As submitted by both counsels, there are well settled principles of law governing the grant of injunctive orders at an interlocutory stage laid out in the case of **Giella vs Cassman Brown & Co. Ltd (supra)** namely that;

- i. The Applicant needs to show that he has a *prima facie* case with probability of success;
- ii. that he stands to suffer irreparable damage that cannot be compensated by an award in damages
- iii. if the court is in doubt, it will determine the application on a balance of convenience.

10. In the instant case, the plaintiffs have submitted that that they are the members of the Ogiek community, whose members live on community land as primarily hunter gatherers without title deeds to the land they occupy. It is their contention that the suit properties form part of the Mau Forest Complex, which is the subject of a necessary conservation drive to preserve the fragile ecosystem as well

as being a veritable political hot potato. The question remains whether the plaintiffs have proven that they are the proprietors of the suit properties despite such obvious challenges as required under **Section 107** of the Evidence Act (Cap 80) laws of Kenya which provides:-

**"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists."**

11. From the affidavit evidence presented by the plaintiffs, I am not satisfied that the plaintiffs have established a prima facie case. They have merely annexed a list of members of the said Ogiek community whose authenticity has been challenged by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. On the other hand, the 1<sup>st</sup> defendant has annexed several documents, including a letter from the area chief (PGL1) which states that the plaintiffs have never owned any of the of the suit properties. He has further annexed letters of allotments issued by the 2<sup>nd</sup> defendant to other individuals (PGL 5 and PG L6) and receipts of rates and rent payments to the Council by the allottees (PGL7).

12. Although the 2<sup>nd</sup> defendant did not attach any supporting documents to their replying affidavit, the facts therein have not been disputed by the plaintiffs.

13. On whether the plaintiffs stand to suffer irreparable loss that cannot be compensated by way of damages, I find that the plaintiffs have not demonstrated such loss.

14. On the third limb of balance of convenience, I find and hold that the balance tilts towards the defendants. The plaintiffs are not in occupation of suit properties. Allotment letters have been annexed by the 1<sup>st</sup> defendant showing that other members of the Ogiek community have been allocated the suit properties and they have taken possession. To grant the orders sought will amount to evicting those allottees who are not parties to this suit and who are in occupation of the suit properties.

15. For the above reasons, the plaintiffs' notice of motion dated 7<sup>th</sup> March, 2012 fails and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**Dated, Signed and delivered in open Court at Nakuru this 10<sup>th</sup> day of December, 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Kurgat for the 1<sup>st</sup> defendant

N I A for the plaintiff

N I A for the 2<sup>nd</sup> defendant

Emmanuel Maelo: Court Assistant

**L N WAITHAKA**

**JUDGE**