



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 62 of 2012

RICHARD WAKWABUBI MAFWABI (*suing as the administrator of the estate of the late Mafwabi Wasilwa Nandabi*).....**PLAINTIFF**

VERSUS

DAVID SIMIYU WANYAMA

BONFACE WACHIYE.....**DEFENDANTS**

R U L I N G

This is a ruling in respect of an application dated 26th April, 2012 brought by Richard Wakwabubi Mafwabi on behalf of the estate of the late Mafwabi Wasilwa Nandabi. The application was brought under the provisions of Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules 2010 and sections 3 and 3A of the Civil Procedure Act. The application which was filed under certificate of urgency on 26/4/2012 was placed before Justice Karanja on 30/4/2012 but because neither the applicant's advocate nor the applicant appeared, the Judge directed that the same be served for interpartes hearing on a date which was to be given at the registry. Later on the same date, a representative of the applicant's advocate took a date at the registry for hearing of the application which was scheduled for 24/7/2012. On the 24/7/2012, the application could not proceed to hearing as the defendants/respondent who had been served with a replying affidavit applied for adjournment to enable them file a further affidavit. The application was then adjourned to 5/12/2012 when the same proceeded.

In the application the applicant had sought for the following prayers:-

- (a) That the application be certified urgent and service be dispensed in the first instance.
- (b) That there be a temporary order of injunction restraining the defendants/respondents, their servants, agents and or anybody purporting to act for them or through them from trespassing upon or committing any acts upon the deceased land parcel No. Saboti/Saboti 2/Muroki/74 and land parcel No. Saboti/Saboti 2/Muroki/76 pending the hearing and determination of the application inter-partes.
- (c) That there be an order of injunction restraining the defendants/respondent their servants, agents and/or anybody purporting to act for them or through them from trespassing upon and/or committing any acts upon the deceased's land parcel No. Saboti/Saboti 2/Muroki/74 and Land parcel No. Saboti/Saboti 2/Muroki/76 pending the hearing and determination of the main suit filed herein.
- (d) That costs of the application be provided for.

As the application was heard interpartes, prayers (a) and (b) have been overtaken by events and what

remains for determination are prayers (c) and (d) of the application. The applicant deponed in the supporting affidavit that he is the administrator of the estate of Mafwabi Wasilwa Nandabi who was the registered owner of parcel Nos. Saboti/Saboti 2/Muroki 74 and 76. he annexed a copy of a confirmed grant in respect of the estate of his late father as well as copies of title deeds for the two parcels of land. He further deponed that on the 16th of April, 2012, the defendants/respondents without any lawful cause in the company of other people entered the said parcels and started fencing off a portion of the said parcels claiming that they wanted to construct buildings for a project. He annexed a copy of a photograph showing a fence. It is on this basis that he prays for an injunction against the defendants/respondents whom he says are not beneficiaries of the estate of his late father and have no authority from him to do anything on the two parcels of land.

In a replying affidavit in opposition to the application sworn by David Simiyu Wanyama on behalf of the other respondent, the respondent avers that he is the chairman of Muroki Coffee Growers Cooperative Society Limited and that as such the applicant has no cause of action against him and the other respondents. He further deponed that Muroki Coffee Growers Co-operative Society Limited are owners of land known as Saboti/Saboti Block 2/Muroki/127 measuring two Decimal Four Nought Nought comprising of a public water resource and which land has been surrendered to the community for reservation of a dam. He annexed a copy of a letter dated 29th November, 2011, surrendering the plot to the community for their welfare.

He also annexed a copy of official search from the lands office which shows that the land is reserved for a dam. Also annexed to the replying affidavit is a map of the area showing that plot No. 127 is in between plot No. 74 and 76 which belong to the applicant's father. There was also annexed a copy of a letter from Lake Victoria North Water Services Board dated 23/5/2012 confirming that the land in question is reserved for a dam and that the process of acquiring title for the same is in progress.

I have carefully gone through the application by the applicant as well as the replying affidavit and further affidavit filed by the applicant. In the further affidavit, the applicant contends that plot no. Saboti/Saboti Block 2/Muroki/127 is part of the parcels of land belonging to the estate of his late father. He further contends that plot No. Saboti/Saboti Block 2/Muroki/127 is being curved off his father's parcels, by the respondents in collusion with unscrupulous lands official. He contends that there already exists a public dam for community use on plot No. Saboti/Saboti Block 2/Muroki/137. At this stage, the only issue for determination is whether the plaintiff/applicant has disclosed a prima facie case to warrant grant of an injunction. It is important to note from both the applicant's pleadings as well as supporting affidavit and further affidavit that he has not described who the respondents are. He does not say whether they own plots adjoining the two plots in issue. Infact it is the first respondent who has deponed in his replying affidavit that he is the chairman of Muroki coffee Growers Cooperative Society Limited who surrendered plot No. Saboti/Saboti Block 2/Muroki/127 for community development. The applicant has not made any effort to demonstrate to what extent the defendants have encroached on his late father's two pieces of land. The respondent have annexed a map of the area which clearly shows that there exists plot No. 127 in between. Plot No. 74 and 76. The applicant has not denied the existence of plot No. 127. he merely stated in submissions through his advocate during the hearing that the map which has been annexed to the replying affidavit has not been certified. It was incumbent upon the applicant to demonstrate that he has a prima facie case against the respondents to warrant the court to issue injunctory orders being sought. I find that the applicant has failed to demonstrate that he has a prima facie case and that he will suffer damage which will not be compensatable. The result hereof is that I find that this is not a proper case where injunction can be granted. The applicant's application is hereby dismissed with costs to the respondents.

It is so ordered.

[Dated, signed and delivered at Kitale on this 30th day of January, 2013.]

E. OBAGA.

JUDGE.

