



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 100 of 2010

PETER CHENGE & 16 OTHERS..... PLAINTIFFS

VERSUS

KAYOS MARKETING & CO-OP. SOCIETYDEFENDANT

RULING

This is a ruling in respect of an application dated **8th November, 2010**. The Applicants seek orders of injunction restraining the Respondents from evicting them from their respective portions of land. The Applicants are members of the first Respondent. They were granted leave to bring the suit herein on behalf of the other members. On or about February, 2010, the 1st Respondent, Kayos Marketing Co-operative Society Limited engaged the services of the second Respondent to carry out survey works on **LR. No. 10123/4** situated at Endebess area of Trans Nzoia County.

The facts emerging from the Affidavits filed show that the 1st Respondent had purchased the land in issue over two decades ago and temporarily settled each of its members pending formal survey. In February, 2010 the second Respondent who had been commissioned to carry out survey work was allowed into the land so that he could survey so that each member could have his or her entitlement.

As the survey works progressed, the Applicants moved to Court on 08/11/2010 seeking an injunction restraining the first Respondents from evicting them from their respective portions of land. The Applicants contend that as a result of the survey, some members have had disproportionate share of rocky land and that some of them are being threatened with relocation from portions they have occupied for over 20 years yet they have done substantial developments on the same. The Applicants contend that they never resolved that survey work be carried out on the land.

The Respondents have opposed the application through Replying Affidavit of Stephen Boiyo Chemogotio, The Chairman of the first Respondent and that of Kepha Motanya Mireri, the second Respondent herein. The Chairman of the first Respondent deponed that the survey which the Applicants are disputing was done in accordance with letter of consent for sub-division issued in respect of LR No. 10123/4. He further deponed that prior to the formal survey being carried out, the members of the Society had been temporarily settled on the land and that everything possible was done to ensure that each member got a proportionate share of both arable and rocky land. The second Respondent also deponed in his Affidavit that he did his best to retain each member within the original boundaries shown when they were being settled and that he did his best to equitably share out the arable and non arable land to each member. He further deponed that it was inevitable that some members had to be slightly moved so as to fit in the sub-division.

I have carefully considered the application by the Applicant as well as the objection to the same by the Respondents. It is clear from the Applicant's Supporting Affidavit that they want an injunction so that the status quo can be maintained i.e. the position obtaining before the survey work started. The

principles which the Court ought to consider when deciding on whether to grant or refuse an injunction were well laid out in the case of Giella Vs Cassman Brown & Co. Ltd 1973 EA 358 as follows:

“Firstly, an Applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. Thirdly when the Court is in doubt, it will decide the application on the balance of convenience”.

The above principles were reiterated in the Court of Appeal of Kenya in the case of Teresa Shitakha – vs – Mary Mwamodo and 4 others (1982-1988) KAR 966.

In the present case, I have no doubt in my mind that the process of survey started after each member had acknowledged his entitlement of the land. Mr. Onyancha for the Respondents referred the Court to document No. 1 on the defendant's list of documents. This is a list containing members of the defendant and their respective entitlement. This is the list which was used to obtain the consent to sub-divide the land. Upon consent to sub-divide being granted, the surveyor moved to the ground and started the sub-division. This was in February, 2010. The survey work proceeded until when it became apparent that some members had to be moved that is when the Applicants moved to Court seeking an injunction. This was 9 months after the surveyor started his work. The question which emerges in the circumstances is whether the Applicants are entitled to an injunction as prayed. As I have stated hereinabove, the Applicants want an injunction which will maintain the status quo i.e one which will ensure that each of them remain in their respective portions as they were before the sub-division. It is clear from the Applicant's Affidavit that the process of survey is in progress. Their only contention is that some Applicants have been given a larger portion of non arable land than others and that some of them are being asked to move. It is common knowledge that in any survey work done on land where people had been settled earlier on, there is bound to be re-adjustments. This re-adjustment cannot amount to eviction as to warrant a Court to issue injunction orders. It is not contested that the first Respondent settled its members on the land temporarily pending formal survey work. The members were settled before survey work was carried out. Now that survey work has been carried out, it is inevitable that some movements of people has to be there. As at the moment the Court cannot decide on whether some members have been given larger portions of non arable land than others. This is a matter for hearing during the main suit. As this is the position of the Court, this matter has to be decided on a balance of convenience.

The question which then arises is as to where does the balance of convenience lie?

In as much as there will be movement of some people from a place they have lived for over a decade this inconvenience cannot outweigh the overall objective of the first Respondent in trying to give each individual his title which will in the long run be more beneficial economically than the temporary inconvenience which in any case has not come as a surprise. I find that the balance of convenience cannot be in favour of grant of injunction sought.

The upshot of this is that the motion herein fails and the same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 21st day of February, 2013.

**E. OBAGA
JUDGE**

In the presence of Mr. Ndarwa for Mr. Wafula for Plaintiff/Applicant and Mr. Onyancha for the Defendant/Respondent. Court Clerk: Joan.

E. OBAGA

JUDGE