



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 102 of 2012

DANIEL MAINA KIBAGE.....PLAINTIFF
VERSUS
KENYA FOREST SERVICE.....DEFENDANT

RULING

By the application dated 3/5/2011, the applicant Gabriel Githaiga seeks one prayer, that an order of injunction do issue restraining the defendant by itself, its servants, employees or agents from entering, remaining, visiting or in any way interfering with the applicant's parcel of land known as LR Nyandarua/Muruai 926. The facts as I understand them are as follows:-

Gabriel Githaiga is the registered owner of the suit land measuring about 18.5 Ha as indicated in the Title Deed Nyandarua/Muruai/926 dated 10/11/2009. The said land was allocated to him by the Settlement Fund Trustees (SFT), a charge over the said land was prepared (DMK4). SFT found that the land was bigger than the letter of offer and the applicant was asked to pay more deposit. The applicant repaid the loan and once the payments were completed, there was discharge of charge on 23/9/2009 (DMK7) and the Nyandarua District Land Registrar issued him with a title. The applicant claims to be in possession of the suit land and that it no longer belongs to the defendant.

The applicant's counsel, Mr. Nderitu filed submissions and at the hearing, urged that in 1979, there was an arrangement between the defendant and the Settlement Fund Trustee (SFT) that involved Plot 916 from which Plot 926 was excised. The defendant wanted to declare parcel 96 as a forest area under **Section 4** of the **Forest Act**. An intention to gazette the plot was gazetted under **Section 42** of the **Forest Act**. However, the said gazettment was never done by the Attorney General declaring the area a forest area. Mr. Nderitu urged that since gazettment was never done, the land remained the property of SFT and SFT had the right to transfer, sell or do with it whatever it wanted including selling it as it did to the applicant. He urged that if the defendant wants the land declared as forest land, it must comply with **Part III** of the **Forest Act, 2005**. He urged that the applicant has demonstrated that he has a prima facie case with chances of success and is entitled to a temporary order of injunction. Counsel relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd [2003]1 KLR 125**, which defines what a prima facie case is, **Lucy Njoki Waithanka v Industrial and commercial Development Corporation**, High Court Milimani 321/2001, on what irreparable loss is and **Mbuthia v Jimba Credit Finance Corporation [1988] KLR**, on irreparable loss.

The application was vehemently opposed. The respondent filed a replying affidavit sworn by Peter James Kamwara, the defendant's Head of Survey. The defendant is a State Corporation whose mandate is to manage and conserve forests. He deposed that in 1979, the SFT and the then Ministry of Natural Resources exchanged land. The transaction involved the SFT ceding 199.7 Ha of Leshau Forest and 4,340 Ha of Aberdare Forest to the SFT. In exchange, the SFT ceded parcel Nos Nyandarua/Muruai 96 and Nyandarua Kirima 298 measuring 733.1 and 529.5 Ha respectively to the Forest Department to be converted into Government Forest. The Director of Settlement wrote to the Chief Conservator of Forest

about the transaction on 3/11/1979. Boundaries of the land were surveyed and drawn; the Minister for Environment and Natural Resources caused it to be published in the Gazette Notice 3600 of 20/7/1993, indicating the Government's intention to declare them State forests. Objections were invited within 28 days but none was raised. The Draft Legal Notice was forwarded to the Attorney General for gazette and publication but to date the Attorney General has never gazetted or rescinded the decision. It is the respondent's contention that the land could not therefore have been allocated. According to the respondent, the land was fraudulently allocated to the applicant with the knowledge that the land was not available for public allocation. According to Mr. Okwiri, counsel for the respondent, it is the Attorney General who dragged his feet by not gazetting the forest but that notice still exists and that under **Section 62(1) of the Constitution**, it is still public land. Counsel submitted that the applicant had failed to demonstrate that he has a prima facie case or that he will suffer irreparable loss. He urged that if the applicant is allowed into the land, he will cut trees and destroy the vegetation and in the event he does not succeed in the end, permanent damage would have been done to the land. It was also counsel's contention that the applicant has not come to court with clean hands.

I have considered the rival pleadings, submissions and arguments by both parties. At this stage, all that the court needs to establish without necessarily going into much detail is whether the appellant has a prima facie case with a probability of success or that if the order of injunction is not granted, the applicant will suffer irreparable loss and lastly, if the court is in doubt, it should decide the application on a balance of convenience.

It is common ground that there was an intention to declare Title No. Nyandarua/Muruai 96, from which the suit land was excised, as forest land through the letter of 3/11/1979 and Gazette Notice No. 3600 of 20/7/2003 but the same has never been gazetted by the Attorney General as was intended. The said gazette notice was issued pursuant to **Section 4 of the Forest Act**. The said Section provides as follows:-

“(1) The Minister may, from time to time, by notice in the Gazette-

- a) declare any unalienated government land to be a forest area;**
- b) declare the boundaries of a forest and from time to time after alter those boundaries;**
- c) declare that a forest area shall cease to be a forest area;**

(2) Before a declaration is made under paragraph b) or paragraph c) of subsection (1), twenty-eight days' notice of the intention to make the declaration shall be published by the Minister in the Gazette.”

Given the above scenario, the only question that begs is, since one of the steps that should have been taken towards completion of the gazette i.e. gazette of the declaration, has not been taken by the Attorney General, is the land plot 96 still the property of SFT or did it pass to the Government as a forest. That question can only be answered at the hearing of the main suit. It was the respondent's contention that the land in question is public land and therefore not subject to delimitation to private individuals. **Article 62 of the Constitution** defines what public land is. It states in part:-

“62(1)(g). Government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas.”

As earlier observed the question for final determination is whether without the final gazette of the declaration of the plot as forest, the said land became public land or it remained the land of SFT and therefore SFT could do whatever it wants with it including disposing it by sale as it purported to do.

In the replying affidavit, Peter Kimwara has deposed at Paragraph 5 that in exchange for Nyandarua/Muruai 96 and Nyandarua/Kirima 298, the Forest Department was to cede Leshau Forest and part of Aberdare Forest to the SFT. This was contained in the letter dated 3/11/1979. It is not clear from

the material before the court whether SFT took possession of the two forests that it received in exchange of Muruai and Kirima. Because, if SFT took possession of that land then it means that the SFT recognized the fact that the exchange program of the forests was complete. Since it is not clear from these pleadings whether the exchange was complete, that is also an issue to be determined at the hearing. It is obvious that the applicant bought the land from SFT and was issued with a title on 26/10/99 about 20 years after the gazettement of the disputed area as forest. In his grounds, the applicant indicated that:-

“The defendant/respondent has through its staff, servants, employees, agents and in total disregard of Gabreil Githaiga’s statutorily recognized proprietary rights interfered with his quiet and exclusive possession of the suit land by entering, remaining, using and denying the said Gabriel Githaiga access to his land.”

This statement is contrary to the applicant’s averment at paragraph 10 of his affidavit that he has been in possession of the land till recently when the servants of the respondent started to interfere with the said land. A reading of the above quoted statement in my view, shows that the respondent is in possession of the land and I do agree with the respondent’s contention that if the applicant takes possession, he will cut down trees and it will lead to degradation and that will result in irreparable loss to the respondent which is charged with a statutory duty of conserving the forests for the benefit of the larger public. In the event the court finds in favour of the defendant/respondent then that damage will already having been done to the land but if the land is preserved at this stage then even if the applicant succeeds, he will still benefit from the land.

I do appreciate that the appellant is the registered owner of the land but having pointed out the issues that need determination at the end of this suit, I will find that the material before me, is not sufficient to find that the applicant has demonstrated that he has a prima facie case with a probability of success to be entitled to an interlocutory injunction. I do adopt the decision of Muchelule J, **John Peter Kamau Rubangi v Kenya Forst Service, ELC 141/2010**, where the facts were nearly the same. The court needs to take evidence and examine the relevant documents to establish whether the land is the applicant’s or not.

Besides, the applicant purchased the suit land from the SFT and the costs of the suit land is known and can easily be ascertained for reimbursement but that claim would be from SFT.

As to the balance of convenience, it tilts in favour of the respondent so that since the respondent is in possession, it should continue to occupy it till the matter is heard and determined. The result is that the application is dismissed with costs being in the cause.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

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PRESENT:

N/A for the plaintiff

Ms Ayuma for the defendant/respondent

Kennedy – Court Clerk