REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ENVIRONMENT AND LAND COURT

ELC NO. 20 OF 2012

STEPHEN R.G.G. MUNYI .....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS

KUTUS SECONDARY SCHOOL .....DEFENDANT

RULING

The plaintiff/applicant herein filed this suit against the defendant/respondent on 13th November 2012 seeking the following remedies:-

a. A declaration that he is the registered absolute proprietor of land parcels registration numbers:-
   - KABARE/NYANGATI/2897
   - KABARE/NYANGATI/2895
   - KABARE/NYANGATI/2892
   - KABARE/NYANGATI/2896
   - KABARE/NYANGATI/2902
   - KABARE/NYANGATI/2901
   - KABARE/NYANGATI/2903
   - KABARE/NYANGATI/2898
   - KABARE/NYANGATI/2905
   - KABARE/NYANGATI/2904 and
   - KABARE/NYANGATI/2889

b. A permanent injunction against the defendant/respondent by itself, its agents from trespassing on, fencing around or otherwise adversely interfering with the plaintiff/applicant's quiet possession of the aforementioned parcels of land.
c. Any further or better relief that the court may deem fit and just.
d. Costs of the suit.

Contemporaneously with the filing of the suit, the plaintiff/applicant filed an application seeking an injunction to issue against the defendant/respondent restraining it by itself, its agents and/or servants from trespassing on, fencing around or otherwise adversely interfering with the applicant's quiet possession of the said parcels of land and also a declaration that the plaintiff/applicant is the registered absolute proprietor of the said parcels of land pending the hearing and determination of this suit. It is this application vide a Notice of Motion, which did not indicate the enabling provisions of the law under which it was brought, that is the subject of this ruling.

I must remind the counsels that notwithstanding the liberal provisions of Article 159 of the Constitution, it is a good practice to always cite the legal provisions under which any application is brought.

The application was supported by the affidavits of the plaintiff/applicant herein in which he deponed inter alia, that he is the registered proprietor of all the aforesaid parcels of land and annexed thereto copies of the title deeds of the said parcels adding that when he went to supervise the preparation of the land for planting on 4th October 2012, the Principal of Kutus Secondary School and who is also the Secretary to the defendant/respondent alleged that the land belonged to the school.

The application was opposed and by her replying affidavit dated 5th December 2012, CHRISTINE NGARI who is the Chairperson of the defendant/respondent deponed, inter alia, that the parcels of land referred to above were all sub-divisions of title No. KABARE/NYANGATI/703 which was originally owned by one MBURIA NGARANGARI (deceased) and was transferred to the plaintiff/applicant and one PETER GACHOKI MBURIA by way of transmission on 13th December 1994 and the title deed was issued in their names but was later closed on 3rd April 1996 after the new title deeds for KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889 and which are the dispute properties herein were issued. She further deponed that on or before 1974, the then Kirinyaga County Council acquired land from various individuals by way of exchange and others through compulsory acquisition for purposes of expanding Kutus town and were compensated by land elsewhere and that MBURIA NGARAGARI was one such individual whose parcel No. KABARE/NYANGATI/703 was acquired and he was allocated land in Marurumo being MWEA/MARURUMO/165 and that KABARE/NYANGATI/703 was allocated to the defendant/respondent and that infact the letter allocating KABARE/NYANGATI/703 to the defendant /respondent was signed by the applicant who was then a clerk at the Kirinyaga Council. Copies of the said letters dated 2nd February 1983 together with extracts of the resolution of the Kerugoya/Kutus Urban Council were annexed to the affidavit. That since then, the defendant/respondent has been in occupation of the dispute land.

However, in a supplementary affidavit, the plaintiff/applicant has denied that the late MBURIA NGARAGARI was ever given land at Marurumo in exchange of KABARE/NYANGATI/703 or that the defendant/respondent was allocated that parcel of land.

Submissions have been made by counsels for both sides and I have considered them together with the parties' affidavits and other documents.

This being an application for a temporary injunction, the plaintiff/applicant

must demonstrate that:-

a. ***He has a prima facie case with a probability of success and***
b. ***That he would suffer irreparable injury which is un-compensable in damages and***
c. ***If the court is in doubt, it will decide the case on a balance of convenience*** – ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.***

The dispute property is registered in the names of the plaintiff/applicant and titles issued under the then ***Registered Land Act (chapter 300).*** It is not a first registration as it is a sub-division of the original KABARE/NYANGATI/703 and therefore, under ***Section 143 (1) of the Registered Land Act*** (now repealed), such registration may be impugned on the grounds of fraud or mistake. Therefore, whereas the plaintiff/applicant is arguing that being the registered proprietor of the suit land, his rights are absolute and protected by law, the defendant/respondent's case is that infact the said registration was obtained by fraud and in the statement of defence, the defendant/respondent has pleaded that the plaintiff/applicant caused the suit land to be registered in his names by way of transmission yet the land no longer belonged to the deceased MBURIA NGARANGARI. And in her replying affidavit, CHRISTINE NGARI has deponed that infact the letter from Kirinyaga County Council allocating the

defendant/respondent five (5) additional Acres of land being KABARE/NYANGATI/703 was signed by the plaintiff/applicant himself who was then the clerk to the Council – see annexture CN 4. The letter itself is dated 2nd February 1983 and is addressed to the Headmaster Kutus Secondary School and reads as follows:-

"ADDITION OF LAND TO KUTUS SECONDARY SCHOOL

Enclosed please find the Urban Council resolution which added more land to the school"

It is signed by S.R. MUNYI the clerk to Kerugoya/Kutus Urban Council. In his supplementary affidavit, the plaintiff/applicant's response to this averment is that it is "***hearsay evidence which is not admissible".*** He doe not deny having signed the said letter.

The issues of fraud etc will be fully canvassed during trial because there is a defence and counter-claim in which they are raised. For now, all I can say is that on the material before me, the allegation of fraud is not entirely hollow. And if the letter dated 2nd February 1983 from the Kerugoya/Kutus urban Council allocating land to the defendant/respondent and signed by the plaintiff/applicant was infact in reference to the suit land herein, then the plaintiff/applicant cannot be said to have established a prima facie case with a probability of success to warrant the injunction sought. The plaintiff/applicant cannot approbate and reprobate at the same time. I am not satisfied that the plaintiff/applicant has established a prima facie case as required in the first limb of the principles set out in the ***GIELLA*** case (supra).

As regards the issue of irreparable injury that is un-compensable in damages and which is the second limb set out in the ***GIELLA*** case supra, nowhere in both his supporting and supplementary affidavits has the plaintiff/applicant deponed that he would suffer such injury that damages cannot adequately compensate him. In paragraph six (6) of his supporting affidavit, he has deponed that if the defendant/respondent is allowed to trespass on his land, he will "***suffer great loss, hardship and prejudice***" but it is not suggested that such ***"loss"*** and ***"hardship"*** cannot be compensated in damages if the plaintiff/applicant eventually succeed in his claim. The claim herein is really one of declaration and an order to stop the trespass upon his land. Those are injuries that `can be compensated in damages. The requirement for irreparable injury is a mandatory one for a party to obtain the grant of an injunction under the principles laid down in the ***GIELLA*** case (supra) and the plaintiff/applicant has not satisfied that requirement and on that basis, he does not merit the grant of that remedy.

Finally, if I was in doubt (which I am not) and were to decide this case on the balance of convenience, it is obvious from the evidence before me that the defendant/respondent is currently in occupation of the suit property which it is cultivating no doubt to the benefit of the school. The defendant/respondent being a public institution, I would take judicial notice of the fact that it must be catering for a large student population and therefore, the balance of convenience would favour it, rather than the plaintiff/applicant.

I would therefore dismiss the plaintiff/applicant's Notice of Motion dated 12th November 2012 but with no order as to costs. I would also order that the status quo now obtaining on the suit land should remain and that none of the parties should do any other developments on the same or change it's ownership until this suit is heard and determined. Orders accordingly.

B.N. OLAO

JUDGE

29/4/2013

29/4/2013

Before B.N. OLAO – JUDGE

CC – Muriithi

Ms Kiragu for Plaintiff/Applicant – present

Mr. Wainaina for Defendant/Respondent – absent

COURT: Ruling delivered this 29/4/2013 in open Court.

Ms. Kiragu for plaintiff/applicant present

Mr. Wainaina for defendant/respondent absent

B.N. OLAO

JUDGE

29/4/2013