IN THE HIGH COURT OF KENYA

AT NAKUR

CIVIL CASE NO. 165 OF 2001

KARINO OLE NAKURO ……1st PLAINTIFF

KISEN OLE MALOI…….……...…2ND PLAINTIFF

SENTERU NASARON……..…….…….…..3RD PLAINTIFF

VERSUS

JOHN LEDIDI……...……1ST DEFENDANT

PATRICK KARANJA MWAHUKI……...2ND DEFENDANT

SAPUNYU OLE NKURUNA…….…….……...….3RD DEFENDANT

RULING

The decision of this court (Rimita, J) in Nakuru HCCC No.89 of 1996 made on 12th May, 2000 was unsuccessfully challenged in the Court of Appeal with the result that the decree was confirmed. In the decree, it was declared that some seventeen (17) defendants in that suit had acquired title to 2,581 acres of LR No.NAROK MAIELA ESTATE NO.2662 and 1,626 acres of LR NO.NAROK./MAILA ESTATE 1380 by adverse possession. The court also issued a permanent injunction to restrain the plaintiff in that suit, Ngati Farmers Co-operative Society Limited (the society) from evicting the defendants from the two mentioned parcels of land and finally, the court ordered the plaintiff to transfer to the defendants the above mentioned portions of land. Two of the applicants in the present motion were defendants in Nakuru HCCC No.89 of 1996. They have brought this action against one of the defendants in Nakuru HCCC No.89 of 1999 (John Ledidi) and two others, Patrick Karanja Mwahuki and Sapunyu Ole Nkuruna seeking in the plaint that the three be restrained:

"(a)……..from entering, surveying, subdividing, alienating, allocating, disposing off, selling or in any other manner dealing with or interfering with the plaintiff's quiet occupation and enjoyment of their portions of land they are occupying in the suit premises……

b) An order to issue to the Government Surveyor requiring him to enter upon, survey and identify the potions of the suit land belonging to the plaintiffs and thereafter to allocate the same to the lawful beneficiaries of the court order issued in Nakuru HCCC No.89 of 1996"

The instant motion only seeks an injunction pending the hearing and determination of the main suit. It is the applicants' contention that since the decision of the Court of Appeal confirming this court's judgment was rendered on 23rd July, 2009, the society has failed to engage the applicants in order to comply with

the decree by identifying the parcels in question, surveying, sub-dividing and transferring the resultant parcels to the applicants; that this exercise has not been undertaken due to insecurity on the ground; that the decree was in favour of about 3000 persons who reside on the suit property.

The applicants aver further that the respondents herein have conspired with others and are in the process of allocating the suit property to third parties to the exclusion of the applicants, who they are planning to evict and relocate from the suit property together with over 3000 population living on the suit property; that the 1st respondent, John Ledidi is a person of immense influence being a councillor has issued threats of eviction. That as a matter of fact on one occasion in September, 2010 an attempt to evict the applicants and others aborted in a bloody incident with the death of one private surveyor who had been hired by the 1st respondent and confederates; that the population on the suit property has been stopped from tilling or tending to their farms.

In response, the respondents have filed replying affidavit and a notice of preliminary objection, the combine effect of which may be summarized as follows:

i) that the suit is both premature and incompetent;

ii) that the suit is *res judicata*, Nakuru HCCC No.89 of 1996;

iii) that the exercise being undertaken on the suit property is in furtherance of the court order in Nakuru HCCC No.89 of 1996 and is aimed at curving out the 4207 acres from the two parcels in terms of the order of the High court;

iv) that the 2nd respondent Patrick Karanja Mwahuki as the Chairman of the Society is non-suited;

v) that the 1st applicant has done everything to frustrate the smooth transfer of the suit property;

vi) that the Society has also been in the process of surveying and sub-dividing its land and distributing it to its members which exercise will be hampered if an injunction were to issue.

I have duly considered these arguments as well as authorities cited by counsel for both sides. Being an application for a temporary injunction, the usual strictures enunciated in the celebrated case of **Geilla** V. **Cassman Brown** & Co. Ltd. (1973) EA 358 must be satisfied for the relief of injunction to be granted. In considering whether the applicant has demonstrated *prima facie* case with a probability of success, it is now established that at this stage, it is not the role of the court to make definite findings of law or fact. The court is only to ascertain whether there is an apparent violation of the applicant's right which will require it to call upon the other party to rebut the alleged violation. See **Mrao Limited** V. **First American Bank of Kenya Limited** (2003) KLR 125.

At the trial, the applicants will be required to prove that:

i) they, together with over 3000 people, are the beneficiaries of the orders issued in Nakuru HCCC No.89 of 1996 and confirmed by the Court of Appeal in Civil Appeal No.64 of 2004;

ii) the respondents are engaged in the survey, sub-division and allocation of the two parcels of land the subject of Nakuru HCCC No.89 of 1996;

iii) the respondents are in the process of dispossessing the applicants and disposing of the suit properties to third parties.

The plaint in Nakuru HCCC No.89 of 1996 is clear that it was founded on breach of an agreement between the Society and some seventeen (17) individuals regarding grazing rights and the use of dipping facilities on the suit property.

In the defence and counter-claim, again there is no doubt that the affected parties were the same seventeen (17) individuals, whose claim against the Society was that they were entitled to the suit property measuring in total 4,207 acres by adverse possession. Both the High Court and the Court of Appeal found in their favour.

Although I was not able to peruse HCCC No.89 of 1996 and apart from the plaint the parties did not annex the judgment in HCCC No.89 of 1996, in its judgment, the Court of Appeal observed that the appellants were unable to settle its members upon purchase of the land in 1964 due to:

"…….the presence on the suit land of the 17 respondents and 3000 other people commonly referred to as Maasai."

The court observed also that from the evidence on record, the Maasai had built on the suit property five primary schools and a secondary school. Later in that judgment, the Court found that:

'Above all, the suit property is not less than 16000 acres and there are over 3,600 settlers in occupation."

It is clear from the counter-claim that the suit was not a representative suit. But from the two passages I have reproduced above, the Court of Appeal appreciated that there were more than just the 17 respondents on the suit property. The present suit has been brought by only two (2) persons who were among the 17, namely the 1st and the 2nd applicants herein. The affidavit in support of that application is sworn by the 1st applicant with the authority of the other two applicants, which authority relates to the verifying affidavit to the main suit. It is not disclosed whether or not the other 15 defendants in HCCC No.89 of 1996 are aggrieved by the activities allegedly being perpetrated by the respondents. It is not clear who the 3rd applicant is in relation to Nakuru HCCC No.89 of 1996. I reiterate that the 1st respondent in this application was among the 17 defendants in Nakuru HCCC No.89 of 1996.

In other words, there is no *prima facie* case that the applicants represent the interest of the 17 defendants or even the 3,000 settlers. There is no *prima facie* case that the activities complained of have affected the applicants individually as the land in question is vast and portions occupied by the settlers have not been determined.

Regarding issue (ii) – whether the respondents are engaged in the survey, sub-division and allocation of the suit property. The decree did not specify how the two parcels of land were dealt with after their transfer to the defendants in Nakuru HCCC No.89/1996. The respondents have however, explained that indeed there has been survey on the parcel in question for the purpose of identifying the parcel constituting 4207 acres to be excised from the larger 16,000 acres as ordered in Nakuru HCCC No.89 of 1996, and also for the sub-division of the other remaining portions to be distributed to society's members. The above explanation, in my view, is plausible as it is only after the 4207 acres are isolated from the rest of the society's parcel that the society can comply with the decree by transferring the portion to the defendants in HCCC No.89 of 1996.

The applicants have prayed in the instant motion that the respondents be restrained from, among other things, entering or sub-dividing the two parcels of land. Such a relief cannot be granted in view of the above explanation.

Regarding the final matter, namely that the respondents are in the process of dispossessing the applicants and evicting them from the suit property and to dispose of the property to third parties, the applicants have averred that the respondents have been collecting money from strangers and third parties who are not beneficiaries of the decree in question with the intention of allocating them land within the suit property. It is further deposed that the 1st respondent has held several meetings at which he has announced his plans to relocate and evict the applicants. Apart from these general assertions, there is no evidence in support thereof. There are no details or particulars of the strangers or third parties or how much is being collected.

The 1st respondent has denied that there are threats to relocate or evict. He has explained that there are only plans to vet, through a committee, those who are on the land to ensure that only genuine beneficiaries are considered in the sub-division. The applicants have not shown any *prima facie* evidence that the property is in the process of sub-division in order to allocate the resultant parcels to people other than those envisaged in the decree. After all it has been stated that the settlers are represented in the exercise by a surveyor. It has been submitted for the respondents that this suit is *res judicata* HCCC No.89 of 1996. This suit is based on distinct facts from HCCC No.89 of 1996 even though both seek the same relief.

In the result, I find that the applicants have not demonstrated a *prima facie* case with a probability of success at the trial. The exercise of survey is in compliance with the decree hence the balance of convenience it to let the survey to excise 4,207 acres from the main suit property proceed. It is only after that, that the beneficiaries of the decree and all other interested parties can agree on the mode of distribution. I may only mention that it is important that the parties and interested parties co-operate and work together to avoid further delay in the determination of this matter.

The application fails and is dismissed with costs. The interim orders are vacated.

Dated, Signed and Delivered at Nakuru this 5th day of March, 2012.

W. OUKO
JUDGE