REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.43 OF 2012

JOSEPH MUYA NJURU…….. PLAINTIFF/APPLICANT

VERSUS

STEPHEN NJOROGE KUNDA .. 1ST DEFENDANT RESPONDENT

MWANGI KAMAU ……..… 2ND DEFENDANT/ RESPONDENT

LUCY GATHONI WANYEKI….3RD DEFENDANT/ RESPONDENT

NAFTALY NJOGU KINYANJUI …… 4TH DEFENDANT/ RESPONDENT

RULING

By a notice of motion dated **1st March 2012**, the applicants seeks orders that injunction against the defendant/respondents by themselves, their servants and/or agents be restrained from harassing the applicant or his agent, and/or developing, occupying or otherwise interfering with the parcel of land known as **OLJORAI PHASE II** – KAPKURES AREA (ADC) in Naivasha District measuring 70 acres pending hearing and determination of this suit.

Secondly that the respondents be compelled to vacate the suit property and remove any structures thereon, and if they fail to do so, then the applicant be allowed to do so at the Respondent's costs.

Thirdly that his order be enforced by the OCS Nakuru Police Station.

The application is premised on grounds that:

1. The applicant is the legal owner of the suit property.
2. The Respondents have moved onto the undeveloped land and begun cultivating it and erecting illegal structures.
3. The applicant will suffer loss and damage.

In the affidavit sworn by the applicant in support of the application, he deposes that he is the registered owner of the property by virtue of an offer letter from the Ministry of Land dated **16th August 2010** which required him to make payments within a period of one year.

The Respondents moved into the suit property in the year 2000, erected structures and begun cultivating the land – this was on the basis that they owned the land yet they have no proof of ownership. The

applicant's attempt to remove the respondents from the land using the Provincial Administration has not borne any fruit.

The application is opposed, and in the replying affidavit sworn by 1st Respondent on behalf of all the respondents, he states that each one of them was allocated 10 acres of land by ADC in 1992 and they have been in lawful occupation. He has annexed a copy of allotment letter dated **27th April 1992** signed by the then managing director of ADC, Dr. W.K. Kilele. There is also a letter from the Ministry of Lands offering him **Plot No.3039** situated at **Oljorai Phase II Settlement Scheme** measuring 2.00 Hectares upon deposit of a sum of money.

The 1st Respondent deposes that he has been on the property since 1994, farmed and developed the same, and the applicant only moved into the neighbourhood in the year 2000 but on a separate parcel measuring 20 acres.

In 2006 the Settlement Fund Trustee took over the suit property and in 2007/2008, the Respondents and other settlers were displaced following the post-election violence (he has annexed a copy of a card showing that he is a member of the Internally Displaced Persons Association). When he eventually returned to his home following the Government initiated Operation Rudi Nyumbani, he found that his house had been burnt down. He confirmed from the Settlement Officer, the D.O., Chief and Surveyor the boundaries of the plots earlier allocated to him and the other defendants, but when he received a letter it showed that he was now being offered 2 Hectares instead of 10 acres. He raised a complaint and the surveyors informed him that the same land had now been allocated to other people. The Respondents sought help from the Anti-Corruption body but nothing fruitful was realised.

In February 2012 when he hired a tractor to plough the land in preparation for the planting season, he was arrested on grounds that the land belonged to the applicant. The 1st Respondent lives on the land with his wife and 10 children and his only source of income is farming since he is a retired civil servant.

The matter was disposed off by way of written submissions. The applicant's counsel submitted that the prayers sought are merited because there is a danger of the suit property being wasted, damaged or alienated. It is argued that the defendant's conduct amounts to wasting, damaging and alienating the property within the meaning of **Order 40 Rule 1** of the **Civil Procedure Rules**. The structures erected by the Respondents are described as causing substantial damage and the cultivation of the property is said to be destabilising the fragile ecosystem.

The applicants counsel further submits that a prima facie case with probability of success has been made out and that ownership by registration is not necessary at this point. To support this he refers to the case of **Kenya Hotels Ltd. V Kenya Commercial Bank Ltd. & Another**. He urges this court to accept the allotment letter as a sufficient demonstration of his ownership. The respondent's claim of long occupation and possession is challenged on grounds that there is evidence showing that the parcel was originally allocated to members of the Maasai Community by ADC (Agricultural Development Corporation), and communication from the District Officer shows that the Respondents are in illegal occupation.

Counsel urges this court not to allow unscrupulous individuals to lodge non-existent claims harping on the unfortunate events that followed the 2007 elections saying that in 2004 some of the Respondents presented fake documents of ownership and the court should not condone flouting of the law.

It is also argued that the applicant will suffer irreparable damage because of the depletion of or alteration of the eco-diversity caused by the Respondent's activities. It is not clear to me how the applicant's status as a property magnate who has invested heavily in the tourism industry is affected by the activities on the land – I say this because it was already stated that the land is undeveloped and there is no indication that applicant was about to begin some economic activity or development on the said land. Anyway counsel's contention is that damages will not suffice because the Respondents are peasant farmers and squatters who would not even afford damages in the event that the suit succeeds in favour of the plaintiff.

Secondly, that the property had sentimental value for the applicant which cannot be measured in terms of damages.

In response the Respondent's counsel submits that the orders sought are not merited because the Respondents reside on the suit property with their families having been allocated the property by ADC and the Applicant is simply attempting to dispossess them of their property.

Secondly, the orders sought are mandatory in nature and will have the effect of disposing of the matter without weighing the evidence during trial.

Both parties claim ownership, not by virtue of registration, but on the strength of letters of allocation issued to them by the same body i.e. ADC – both signed by the Managing Director of that institution.

So if the applicant is urging the court to deem ownership on the strength of the allotment letter, he is on equal footing with the Respondents. At this point neither of the letters is superior to the other as each is a proper document from the same source. Claims that the document relied on by the Respondents are fraudulent do not have prima facie basis since Exhibit JMN 3 does not have annexed to it letters of allotment in respect of the 21 allotees listed, nor is it clear when the allotments were made. The plaintiff has not established a prima facie case with probability of success in respect of the 1st Respondent which is only in respect of the 1st Respondent. Although in the affidavit SNG1 is said to be a bundle of allotment letters, the only allotment letter I have seen is with regard to the 1st Respondent. With regard to the other Respondents, surely if the applicant has been aware of their presence on the land since year 2000, he cannot suddenly have got a wakeup call 12 years later to seek orders barring their presence in the land

As to whether damages would not be adequate compensation, although the applicant claims this is virgin land, the Respondents say they have farmed the land since the year 1994 and infact photographs annexed shows crops which are not just sprouting, but have almost reached maturity. The applicant has not demonstrated to this court what he intended to use the property for – no plans, no proposals shown to demonstrate his claims about the ecosystem and his drive in the tourist industry. If the Respondents have been on the land and tilled it, then by now the ecosystem is already altered.

Even on a balance of probability surely the scales tilt in favour of the 1st Respondent who is on the land with his family and has food crops on it – and away from the Respondent who (if he is the owner) has left it idle.

The upshot is that the applicant has failed to meet the test set out in **Giella V Cassman Brown** 1973 EA pg 358. However with regard to the 2-4th Respondents, there is nothing to show that they were allocated the parcels, or that they are on the property with the authority of ADC. It would seem they are simply riding on the skirt of the 1st respondent's documents and the fact of continuous possession. I am constrained to consider their interest in the light of the 1st Respondent's deposition that they are indeed on the land with their family, and the effect of the orders sought would end up disposing off the suit without it proceeding to full trial. This would be prejudicial to the interest of all the Respondents and I do not think it prudent to allow the mandatory orders seeking their removal. The upshot is that the application fails and is dismissed with costs to Respondent.

Delivered and dated this 17th day of September, 2012 at Nakuru.

H.A. OMONDI

JUDGE