



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 259 OF 2010 (O.S.)

IN THE MATTER OF LAND PARCELS NO. NYANDARUA/SILIBWET 3945

AND

IN THE MATTER OF LAND PARCEL NO. NYANDARUA/SILIBWET/734 RESPECTIVELY

AND

IN THE MATTER OF ORDER XXXVI OF THE CIVIL PROCEDURE RULES

BETWEEN

BERNARD KAMAU NJUGUNA.....PLAINTIFF

VERSUS

NEHEMIA GITAHI NDIRANGU.....1ST DEFENDANT

REUBEN MICHIRE MUGO.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR,

NYANDARUA.....3RD DEFENDANT

THE DISTRICT SURVEYOR,

NYANDARUA.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Benard Kamau Njuguna filed the originating summons dated 6th October against Nehemia Gitahi Ndirangu, Reuben Michire Mugo, the District Land Registrar Nyandarua, the District Surveyor, Nyandarua and the Hon. The Attorney General, seeking to be declared as the owner of Land Parcel **Nyandarua/Silibwet 3945** and that the 1st Defendant acquired Land **Parcel Nyandarua/Silibwet/734** illegally, while the 2nd Defendant acquired Nyandarua/Silibwet/735 illegally.

Filed simultaneously with the originating summons is the chamber summons of the same date in which the Plaintiff seeks an order of injunction to restrain the 1st and 2nd defendants, their agents or servants from cutting down trees, selling, charging or alienating or disposing of the parcels of land known as **Nyandarua/Silbwet/734** and **735**. The application is supported by grounds found on the face of the

application and affidavits of the plaintiff dated 6th October 2010 and further affidavit dated 18th February 2011. The plaintiff was represented by **Mr. Lompo Advocate**.

The application was opposed and the 1st defendant filed a replying affidavit dated 18th November 2010 while the 2nd defendant filed a replying affidavit dated 18th November 2010. The 1st and 2nd Defendants were represented by Mr. Ocholla. The 3rd defendant, **Charles Onyambu Birundu** also filed a replying affidavit dated 4th February 2011. The 3rd defendant was represented by Mr. Njuguna.

Briefly stated, the Plaintiff claims to be the owner of land parcel Nyandarua/silibwet/3945 which he inherited from his father who had been the registered owner since 1993. This is evidenced by the green cards exhibited as **BKN I and II**. The 1st defendant is registered owner of parcel 734, while the 2nd defendant is registered proprietor of parcel 735 (**BKN III and IV**) and the two plots overlaps with the plaintiff's land 3945. The plaintiff exhibited the confirmed grant of the plaintiff's father's estate. Earlier in 2000, he had been charged jointly with his father for malicious damage to property and forcible detainer as relates to plot 735 but they were acquitted under Section 201 of the Penal Code. (**BKN.1**) as per proceedings exhibited.

Later, the 2nd defendant filed Hcc No. 68 of 2001 against his father but it abated when he died – (**RMM.VII**). On an allegation by the 2nd defendant that the plaintiff was trespassing on his land Plot 375, both of them went to the District Officer's office to try and have the dispute resolved but were referred to the District Land Registrar, Nyandarua and when he produced his title deed, the 3rd defendant, Mr. Birundu took it and locked it up in his desk and has refused to return it to the plaintiff. He denied knowing how the 1st and 2nd defendant acquired their titles but that parcels 734 and 735 are same as 3945 on the ground. He deponed that Plots 734 and 735 emanated from subdivision of **Nyandarua/Silibwet/137** and he was not notified when the subdivision was carried out. He said that the subdivision, resulted in 14 parcels as per mutation dated 18th December 1992 but the green card shows only 7 (seven) parcels resulted (**BKN.VIII (a) and (b)** – mutation and green card).

According to the plaintiff, plots 734 and 735 used to be covered under Plot 136 which belong to the plaintiff's father. It is the plaintiff's contention that the subdivision of plot 137 was illegal, meant to deprive the plaintiff of his entitlement and that the defendants have been cutting trees and burning charcoal as per shown in photographs (**BKNX**) and should be injuncted, otherwise he will suffer irreparably. Mr. Lompo further submitted that after subdivision of plot 137, it had an effect on plot 136 and the map was amended but there is no indication in the map. He also attacked the sale agreements exhibited by both defendants who claimed to have bought their plots 734 and 735 from one Njuguna Chomba, that the sale agreements were not dated and it is only in respect of 2 acres. (**NGN 2**) and (**RMM2**). He also noted the proceedings (**COB2**) and ruling of the Land Registrar are not dated. He urged that the plaintiff has demonstrated that he has a prima facie case with good chances of success.

Mr. Ochola appeared for the 1st and 2nd defendants. To their affidavits, the defendants exhibited their title deeds and they claim to be the bona fide registered owners. The 1st defendant deponed that he purchased the parcel from Samuel Njuguna Chomba in 1992 as evidenced by the sale agreement (**NGN2**). In 1993, during demarcation, a dispute arose between the seller and the owner of Plot 136 – Joseph Njuguna Wagiku, the plaintiff's father and the District surveyor heard the case and filed in favour of the owner of No. 137 and when the owner of parcel 136 did not appeal, they did not appeal the demarcation and he was issued with the title on 17th June 1993. He enjoyed the land till 12th June 2000 when the plaintiff's father blocked his access but it was resolved by the District Officer, Ol'Jorok. He enjoyed the land till October, 2008 when he learnt that the plaintiff had obtained a title and that having failed to appeal against the decision of the District Land Registrar in 1993, the Plaintiff does not have a prima facie case.

The 2nd defendant also claims to have bought the disputed land from **Samuel Njuguna Chomba** in 1988 as part of parcel 137 as evidenced by Agreement of Sale – (**RMM1 and 2**). The land was subdivided in 1989 and before he got a title a dispute arose between the owner of Plot 137 and 136 – the latter belonging to the plaintiff's father. The District Land Registrar visited the land and gave the ruling in

favour of the owner of 137 and after fulfilling all requirements it was registered. He obtained his title in 1994 – **(RMM3)** and **(4)**. In 2000, the plaintiff and his father interfered with his quiet enjoyment and he filed a suit against them for ownership and the defendants’ defence was struck on 1/11/2001 and it was determined in his favour **(RMM5)**. There was no appeal against the ruling. The 2nd defendant deponed that the plaintiff is trying to appeal against the ruling delivered in 1993 which his father failed to appeal. He denied knowing how the respondent obtained the title though he was informed it had been cancelled.

Mr. Njuguna urged the application on behalf of the 3rd defendant. He urged that since the dispute was reported to the Registrar in 1993 and the 3rd defendant made a ruling, the plaintiff never appealed against the said ruling as provided under **Section 150 of the Registered Land Act**. Mr. Njuguna adopted submissions of the 1st and 2nd Defendants.

For the Applicant to be entitled to an order of injunction, he has to demonstrate that;

- (1) he has a prima facie case with probability of success;**
- (2) if an order of injunction is not granted the Plaintiff is likely to suffer irreparable harm/loss;**
- (3) if the court is in doubt, court should decide on a balance of convenience.**

It is common ground that the parcel of land claimed by the Plaintiff Nyandarua/Silibwet/3945 and the parcels claimed by the 1st and 2nd Defendants Plot 734 and 735 overlap on the ground. The green card exhibited by the Plaintiff as **BKN II** shows that the title was issued to the Plaintiff’s father on 26th January, 1993 and the same was transferred to the plaintiff on 28th October 2007 after the land was transmitted to him by Certificate of Confirmation issued on 17th May 2006.

On the other hand, the 1st and 2nd Defendants claim to have bought the land from one Njuguna Chomba after subdivision of Plot Nyandarua/ Silibwet/137. The 1st defendant exhibited a Sale Agreement between them and one Njuguna Chomba. The 2nd Defendant annexed a Sale Agreement written in the Kikuyu language and not translated to English and not therefore of no use to this court.

The applicant pointed out there the manner in which Plot 137 was subdivided is questionable. Whereas, the mutation form **BKN VIII (a)** indicated that the Plot was subdivided into only 8 parcels, the map exhibited by the 3rd defendant as **(COB 3)** shows that about 14 plots resulted from the subdivision. That discrepancy was not addressed by any of the parties. From the map exhibited by the plaintiff – **(BKN IXA)**, both Plot 137 and 136 existed. The Defendants have acknowledged that in their affidavits. It has not been disclosed what happened to the said plot 136 which belonged to the Plaintiff’s father.

The 3rd Defendant admits to having withheld the Plaintiff’s title when he went to report a dispute. The 2nd Defendant exhibited a letter dated 3/4/2009 in which the 3rd Defendant was explaining why he withheld the title. Title 3945 was cancelled after it was endorsed that subdivision of 136 that resulted in 3945 was wrongly drawn. The 3rd Defendant exhibited undated proceedings and decision of the Land Registrar. The Registrar was determining a boundary issue between plots 136 and 137. The question is, how come that the two plots now overlap? The said decision is not dated, so, the question is, when was the Plaintiff aware of it? When was it read and therefore, has the time for appealing by Plaintiff lapsed? These questions can only be resolved at a full hearing. Even the Defendants’ Counsel admitted that there are issues that need verification. From the above reason, I find that the Plaintiff has demonstrated that he has a prima facie case with probability of success.

The Plaintiff has deponed that the Defendants are cutting trees and causing damage to the land and if not stopped, he will suffer substantial loss. He annexed pictures of the felled trees. The dispute here is over land and I do find that the Plaintiff has demonstrated that if an order of injunction is not granted, he will

suffer irreparably. I therefore grant an order of injunction as prayed in the chamber summons pending hearing of the originating summons.

Costs to be in the cause.

DATED and DELIVERED this 27th day of May, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:

Mr. Kamau holding brief Mr. Lompo for Plaintiff

Mr. Njuguna for 3rd to 5th Defendants

Kennedy – Court Clerk