



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 220 OF 2010

VIRGINIA NYAKIO CHEGE.....PLAINTIFF
VERSUS
ERERI COMPANY LTD.....DEFENDANT

RULING

This Ruling relates to a Chamber Summons dated 30th August 2010 and filed in court on 1st September 2010 (*the application*) brought under a Certificate of Urgency of even date. The applicant seeks an order of temporary injunction to restrain the Defendant from entering into, harvesting sand and other materials, trespassing, or in any other way from interfering with the plaintiff/applicant's occupation and possession of the parcel of land known as Title Number Longonot Kijabe Block 1/49 pending the hearing and determination of the application and later the suit.

An order of temporary injunction pending the hearing *inter partes* was granted on 5th October and was issued on 12th October 2010. The first leg of the application is therefore spent. This Ruling therefore relates to the second leg of the application that the injunction be extended pending the hearing of the suit.

The principles upon which an interlocutory injunction may be granted were settled in the case of **GIELLA VS. CASSMAN BROWN & CO. LTD [1973] E.A. 358**. These principles are **firstly**, that the applicant must establish a prima facie case with a probability of success, **secondly** that the applicant will suffer irreparable loss and damage which cannot be compensated by way of damages and **thirdly**, if in doubt, the order of injunction may be given on the balance of convenience.

The Applicant's case is basically that she is the registered owner of the land, and the defendant has no right, either by itself or its agents, to enter upon and harvest sand from her land. The Respondent/Defendant's answer is that the Applicant obtained her title fraudulently, and had no colour of right to either the sand or the land upon which the sand is harvested and that her entire suit be dismissed.

I have perused the respective affidavits by the applicant, and the Defendant/Respondent's Replying Affidavit and attachments thereto. There is no dispute that centre of the dispute is the original title registered under the Registration of Titles Act, (*Cap. 28, Laws of Kenya*) and known as L.R. No. 8622 situate west of Kijabe Township in the District of Naivasha, and comprising 8137 acres (*approximately*).

According to the Applicant's Further Affidavit, sworn and filed on 15th November 2010, the original Certificate of Title was surrendered to the Commissioner of Lands on 17th October 1991 in consideration of the proposed sub-division scheme (*plaintiff's/Applicants Exh. VNC(a)*). However by a letter dated 22nd August 1994, a Mr. James Muriuki Muchiri, who purported to be a Secretary of the

Defendant/Respondent told the Registrar that the former directors had no authority to surrender the titles, and the titles were released to him on 25th August 1994.

However in a letter dated 27th October 1994, the firm of Ochieng Oduol & Co. Advocates wrote to the Chief Land Registrar pointing out that the said James Kariuki Muchiri, was an imposter as he was no official or agent of the Defendant/company, and had no authority to request for, and have the titles released to him. Indeed the said James Kariuki Muchiri also known as James Muriuki Muchai admitted in his evidence in Nairobi HCCC No. 3746 of 1988 consolidated with Nairobi HCCC No. 3200 of 1990) that he was neither a director nor any officer of the company of the Defendant Company/Respondent either at the time when he called for the return of the titles, or at the time of hearing the said cases. Although he denied that he had sought to disrupt the running of the company, that is exactly what his unlawful acts caused, and that is one of the principal reasons why Hon. Mbitio J, dismissed those suits brought by the said James Kariuki Muchiri among others, and held that the Defendant Company and its directors had not acted *ultra vires* its or their powers under the law.

Appeals against the decision of Hon. Mr. Justice Mbitio were dismissed in Civil Application No. NAI 7 OF 1998 (*dismissed on 17th February 1998*), and Civil Appeal (*Application*) No. 172 of 2006 was dismissed on 14th February 2002). Those dismissals by the Court of Appeal put paid the shenanigans of the said James Kariuki Muchiri alias James Kariuki Muchai, and his co-plaintiffs, and does not help the plaintiff/Applicant's case in this matter.

Turning to the Defendant/Respondent's case, as set out in the lengthy Replying Affidavit of one Njuguna M. Kungu, the Chairman of the Defendant's Respondent Company's Board of Directors, the company acknowledges that the plaintiff Virginia Nyakio Chege, is the widow of John Chege who is listed as member No. 36 in the copy of the Register of members certified by the Registrar of Companies, and owner of 20 shares.

On the question of whether the sub-division was effected and new titles issued, to the plaintiff/applicant, and contrary to what the Applicant claims in paragraph 7 of her Further Affidavit (that the sub-division of the Longonot farm took place after the surrender of the title for the farm) it is quite clear from the correspondence attached to the Defendant's Replying Affidavit, that no such sub-division took place. Exhibit NK12 (*a letter dated 25th August 1994 under the hand of the Principal Registrar of Titles*) and addressed to the Secretary, Eleri Company Ltd (*the Defendant/Respondent*) says -

"Please note that the surrender of the lead title for LR. No. 8622 was booked for registration on 31st October, 1991 together with a raising order, but the application for registration was rejected and the lead title returned to the Company."

It also means that the Plaintiff's title and that of others issued on or about 23rd November 1991, were issued without the sanction of the Company, and therefore fraudulently.

There is also no response by the Plaintiff/Applicant to the Exhibit NK13(a), (a letter dated 30th December 1991, referred to an earlier letter dated 7th November 1991 advising the Land Registrar Nakuru, to stop "**preparation and issuance of individual title deeds to the members - .. there is a case in Nairobi among members**). In her letter of 16th August 1994, written to the Land Registrar Nakuru - the Chief Land Registrar stated inter alia that no titles should be issued or dealt with, and that the title which was the subject of her a letter to the said Land Registrar on 27th July 1994 **must have been issued in error and should be restricted.**"

The Chief Land Registrar expressed the same sentiments and dismay in her letter dated 24th July 1998 to the Land Registrar Laikipia and Land Registrar Nakuru - that despite advise to the contrary the two Land Registrars had (*for reasons best known to them*) continued to **selectively** issue titles in respect of Nanyuki/Marura/Block 5 - Eleri, and Longonot/Kijabe Block/Eleri when surrenders had never been registered in respect of the Head Titles No. 2755/1, 2781/2, 10712, 2754 and 8622.

As late as 14th May 2009, the Commissioner of Lands sought information from the District Land Registrar, Nakuru "on how parcels were converted to RLA (Cap. 300) from RTA (Cap. 281) without RTA title being surrendered and with court orders registered against it." The Further Affidavit of the Plaintiff/Applicant does not address these concerns of the Commissioner of Lands and the Permanent Secretary Ministry of Lands and Settlement.

All this confirms what the Principal Registrar of Titles stated earlier in his letter that though some of the Titles of the land owned by the Defendant Company were physically surrendered to the Registrar of Titles, the formal surrenders were not registered and could not be registered because of the court orders in Nairobi HCCC No. 3200 of 1990, and even when the court orders were lifted, the surrender was rejected and the Head Titles returned to the Company (*Defendant*). The contention by the Plaintiff/Applicant that she and others were issued with titles pursuant to the surrenders (*of Title L. R. No. 8622*) cannot be correct.

It also confirms that where titles were issued in error, dealings in them was to be restricted until the question of surrender in consideration of the sub-divisions is determined. There is indeed a Restriction entered on 3rd January 1992 against dealing with suit land without the consent of the Land Registrar on account of Nairobi HCCC No. 8746 of 1998. Although that case may have been determined, the fundamental legal question of registration of the surrender of the Head Title, and sub-divisions before it, is yet to be determined. The Plaintiff/Applicant's claim to the suit land is therefore tenuous at best, and cannot therefore support an application for temporary injunction. The land or some of it may be physically occupied by the plaintiff/applicant, but beneficially belongs to the Defendant/Respondent.

For all those reasons I am unable to say that the applicant has made a prima facie case with a probability of success, or that she cannot be compensated in damages in the event of success in her suit. The balance of convenience lies with the Defendant/Respondent company. I therefore dismiss with costs, the Plaintiff/Applicant's chamber summons dated 30th August 2010 and filed on 1st September 2010.

The Defendant/Respondent's counsel asked the court to strike out the plaintiff's suit. I am unable to do so. There was neither a Defence filed nor a cross-application for such prayer. This being a court of record, it can only act on the basis of formal pleadings before it, and not mere oral or written submissions on such an important prayer as an order to strike out pleadings.

Lastly, I note from the report of the Registrar of Companies made to the Defendant/Respondent's Annual General Meeting on 21st April 1998 that there were then only three directors alive out of the original nine. Six had died, and the three surviving then were over 70 years, and therefore beyond the statutory limit of being directors of the company. A new Board of Directors was not elected until 12th March 2010 pursuant to the orders of court in Milimani Commercial Courts, HCCC Misc. Application No. 790 of 2009.

My unsolicited prayer to the Defendant/Respondent's Board is that they move with all speed, revisit the sub-division map (*Plaintiff Exh. VNC (d)*), revisit and ascertain the membership of the company, and once again apply for the surrender of the Head Title to the Longonot Farm (*LR. No. 8622*) and other lands (*not in issue here*), and complete the sub-division and issue of titles to those who are entitled, and I think close or wind up the company. In the absence of such action, we are all bogged down by the same issues clothed in new names.

Save as aforesaid, the plaintiff's application is dismissed with costs as aforesaid.

Dated, signed and delivered at Nakuru this 6th day of May 2011

M. J. ANYARA EMUKULE
JUDGE