



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 150 of 2008

DANIEL M. MBURU.....1ST PLAINTIFF/APPLICANT

SAMUEL NJENGA.....1ST PLAINTIFF/APPLICANT

VERSUS

ELIUD M. KIMANI.....DEFENDANT/RESPONDENT

RULING

By an amended plaint, the applicants, who are suing as the legal representative of the late Joseph Gichamba Thuku (the deceased), the registered proprietor of L.R. No.NAIVASHA/MWICHIRINGIRI BLOCK 1/134 (the suit property) are seeking a declaration that the suit property belongs to the deceased and that L.R.NO.NAIVASHA/MWICHIRINGIRI BLOCK 1/709 be removed from the suit property and be declared illegal. The applicants are also seeking an order of permanent injunction to restrain the respondent from entering, trespassing, cultivating, planting or interfering in any adverse manner with the suit property. In an application brought simultaneously with the original plaint, the applicants are seeking temporary injunction to restrain the respondent as sought in the amended plaint in addition to being stopped from

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constructing any building on the suit land pending the hearing and determination of this suit.

It is the applicants' contention that the suit land is registered in the name of the deceased; that the applicants have lived on the suit property since 1980; that on 16th November, 2005, the respondent, without any colour of right invaded the suit property in the company of a surveyor and commenced the sub-division which resulted in one acre being alienated from the suit property, which was later fenced off; that subsequently the respondent has commenced cultivation of the hived off portion and has been planting trees.

In reply the respondent has deposed that the application is incompetent, vexatious, lacks merit and is an abuse of the process of the court; that he purchased the Block 1/709 from Oscar Ndiba Thande and caused the same to be transferred to him (the respondent); that he is the registered proprietor of Block 1/709; that Block 1/709 is adjacent to the suit land and the dispute being boundary-related cannot be adjudicated by this court.

On 10th May, 2006, the court (Aluoch, J. as she then was) granted the following order
“By consent

- (1)
- (2)
- (3)
- (4)

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(5) **Let there be no construction in any part of the suit premises, awaiting determination of ownership of the suit premises.”**

With that order, I wondered loudly when the matter came up before me on 2nd December, 2009, what was left of the application.

Mrs. Muhuhu for the applicant explained that the matter had been listed by Mr. Kinyanjui, Advocate for the respondent, so that the question of trespass by the respondent on the suit property could be determined. Although that morning (of 2nd December, 2009) Mr. Kinyanjui was said to be on his way to Nakuru Law Courts from Nairobi, he had not arrived at 11.40am when I directed that the matter proceeds in his absence although his client was present and addressed the court. Without Mr. Kinyuajui’s participation, I was still at a loss as to why it was necessary to split the application, the court having made orders that appear to take the matter outside the interlocutory stage, even though clearly there was no *interpartes* hearing of the application.

From the application, it would appear that the applicants’ main concern is the respondent’s activities on the suit property, including the threat by the latter to commence construction on the suit property.

For what it is worth, I will attempt to address the other limbs of the relief sought in the application, namely, an injunction to

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restrain the respondent from entering, trespassing, committing acts of waste, planting or in any adverse manner interfering with the suit property.

For an order of interlocutory injunction to issue, the applicant must demonstrate that he has a *prima facie* case with a probability of success; that the applicant will suffer any injury which an award of damages would not be sufficient to compensate. However, if the court is in doubt, it will decide the matter on a balance of convenience. See Giella V. Cassman Brown & Co. Ltd. (1973) EA 358.

The Applicant’s case is that the suit property existed as one unit comprising 2.731 Hectares. That one acre has been fraudulently curved out of it to create Block 1/709 which is now being claimed by the respondent.

According to a copy of the Green Card exhibited by the applicant, the suit property was initially registered in the name of the Government of Kenya on 18th March, 1991. It was subsequently, on 11th April, 1991 transferred to the deceased and title deed issued. In their supplementary affidavit, the applicants have annexed a copy of a survey plan showing the suit property comprising one long parcel. They have also exhibited a copy of the Green Card in respect of Block 1/709, measuring 0.4047 Ha. That Green Card shows that on

4th December, 1984, Block 1/709 was registered in the name of the Government of Kenya; that on 14th May, 1985 it was transferred to

Rachael Wamaitha Thande and Land Certificate issued to her; that on 25th September, 1997 the land (Block 1/709 was transferred to Oscar Ndiba Thande; that on the same date, the title deed was surrendered.

Yet the respondent contends that he purchased Block 1/709 on 4th February, 2002 from Oscar Ndiba Thande. The history of Block 1/709 from 25th September, 1997, when the title deed was surrendered to the 4th February, 2002, when the respondent purports to have purchased it is not clear. Without that nexus and considering the location of Block No.1/709, *vis a' vis* the suit land, I come to the conclusion at this stage and without making any definite finding that there is a *prima facie* case that Block 1/709 is part of the suit land and its excision from the suit land has not been sufficiently explained.

The balance of convenience also tilts in favour of the applicants who have been in occupation for over thirty (30) years as opposed to the respondent who alleges that he purchased Block 1/709 only in the year 2002 and has not settled there. If the respondent were to proceed with the developments he has proposed on the suit land, the applicants stand to suffer loss as the nature of the land will change and no amount of compensation will restore it.

For these reasons, there will be a temporary injunction in terms

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of prayer (ii) of the chamber summons dated 25th April, 2009. Costs of this application to be in the cause.

Dated, Signed and Delivered at Nakuru this 22nd January, 2010.

W. OUKO
JUDGE