



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 340 of 2008

PETER MBUGUA NJOROGE (*suing as administrator and legal rep.*
of the estate of GEOFFREY NJOROGE MUTHEE (Deceased))..... **PLAINTIFF**

VERSUS

CYRUS WAWERU KAGUNYI **DEFENDANT**

RULING

The applicant in the Chamber Summons dated 11th November, 2008 seeks an interlocutory injunction against the defendant/respondent, restraining him, whether by himself, his servants, agents, workmen assigns or children from entering, occupying, disposing of, dealing in or otherwise or howsoever interfering with the plaintiff/applicants' peacefully and quiet occupation, enjoyment, use and possession of land parcel No. **NAKURU MUNICIPALITY BLOCK 29/618 RHODA**, until the hearing and determination of the suit herein.

A perpetual injunction in the above terms is sought in the suit herein which also seeks a declaratory judgment to the effect that the title deed held by the defendant/respondent over the suit land, on the strength of which the respondent threatens to evict the applicant and the beneficiaries of the estate he administers was obtained fraudulently and that the suit land forms part of the estate of the late Geoffrey Njoroge Muthee, administered by the applicant.

The application is premised on the grounds that:

- 1. The parcel of land belongs to the estate of Geoffrey Njoroge Muthee and comprises his estate.**
- 2. The plaintiff and the Children of the Intestate have been in occupation of the parcel of land since 1980's.**
- 3. The deceased had developed the land.**
- 4. The Respondent acquired title to the land illegally and fraudulently while the plaintiff and his siblings were in occupation of the same.**
- 5. The Respondent had started making attempts to illegally remove the Applicant and his siblings from the suit land.**

6. The applicant, the beneficiaries of the deceased, as well as his estate will suffer irreparable damage should the applicant be removed from the suit land.

7. The applicant has a prima facie case against the Respondent with a probability of success.

Filed in support of the application is the applicants' affidavit of 29 paragraphs sworn on 11th November, 2008. In it he depones that he is the son of the late Geoffrey Njoroge Muthee (*the Intestate*) and that he and other children of the Intestate have lived on the suit land ever since the Intestate bought the same from one James Kanegeni. To support the assertion that the suit land belonged to the deceased, Geoffrey Njoroge Muthee, the applicant has annexed to his affidavit a copy of an agreement of sale between the Intestate and the said James Kanegeni dated 5th June, 1978. The same however refers to a Plot No. 529 Ronda Farm. The applicant depones further that the issue of the ownership of the suit land has been litigated previously before other forums but that no final order has been made as to whether the respondent can validly evict the applicants by means of force like he has attempted to do. The applicant depones also that despite a warning issued to the respondent to desist from interfering with the applicants occupation and enjoyment of the suit land he "*violently visited the suit parcel ... in the company of goons and other violent people ... and attempted to remove*" the applicant and is co-occupants from the parcel of land. In the process the respondent and his companions removed all the doors to the dwelling house thereon. They threatened to return to complete their mission. Photographs of the dwelling house(s) erected and the doors have also been annexed as exhibits.

Opposing the application the respondent filed a replying affidavit sworn by himself on 20th November, 2008 to which he has annexed a copy of a Title Deed dated 29th November, 2004 and a copy of a Green Card depicting him as the registered owner of the suit land. He claims to have bought the same from the first registered owner, one Benjamin Chepkwony Rono, the absolute owner of the parcel since 29th March, 2000.

The respondent disputes that the Sale Agreement relied or relates to the suit parcel owing to the fact that it refers to a sale of plot No. 529 Ronda and not the disputed parcel which is plot No. 618. He states also that even if it refers to the said plot the transfer in favour of the intestate is not proved in the absence of consent of the Kalenjin Enterprises Ltd, shown in clause 2 thereof to have been a prerequisite to the sale. The respondent depones further that the eviction carried out on 10th November, 2008 was done pursuant to an order of the court issued on 29th October, 2008 in CMCC.NO. 927 of 2008 and that the present application is, by virtue of the eviction overtaken by events.

In a further affidavit filed by the applicant herein (*in answer to the respondents' replying affidavit*) the applicant clarified that the parcel of land herein was originally referred to as Plot No. 529 and initially belonged to one Christina Yator, a shareholder of Kalenjin Enterprises Ltd who later sold it to James Kanegeni, who in turn sold it to the Intestate. He annexed a letter dated 19th September, 2001 from Rift Valley Enterprises, (*formerly Kalenjin Enterprises Ltd*) which stipulates that the Benjamin Rono, who sold the subject parcel to the Respondent had acquired a title thereto through fraud. He also annexed a photocopy extract of the transfer from James Kanegeni to the Intestate, dated 5th June, 1978. The applicant denies the alleged eviction of 10th November, 2008, reiterating that only doors to the dwelling house were removed.

On behalf of the applicants, learned counsel, Mr. Mr. Karanja submitted on the above adding only that when the purported first registered owner purportedly obtained title to the suit land the Intestate had been in occupation since 1978. Counsel submitted therefore that since the Respondent had notice of the Intestates' right of occupation his title is subject to an overriding interest under **Section 30** of the **Registered Land Act**. Mr. Karanja submitted further that the alleged eviction order is null and void having been made against a non-existent person, pursuant to a falsely filed affidavit of service against a person who was already deceased. Counsel submitted, therefore, that a prima facie case had been established, irreparable loss demonstrated and that even if there was doubt on the first two conditions for granting an injunction then the balance of convenience still favoured the applicant.

Mr. Ngure, learned counsel for the Respondent submitted that no prima facie case had been established, particularly since the initial ownership of the suit land to Benjamin Chepkwony, is based on a first registration and that the eviction sought to be restrained is “*fait accompli*.”

The applicant’s possession of the suit land is not disputed. Clearly, his eviction there from is quite questionable, given that the order, by virtue of which, it is purported to have been effected was issued without those affected by it being served with a hearing notice. I accept counsel for the applicants’ submission that the affidavit alleging service upon Geoffrey Njoroge was false since the said person is deceased and could not have accepted any service of summons to enter appearance, the plaint, certificate of urgency and the Chamber Summons relating to CMCC.NO. 929 of 2008.

The respondent has not challenged the contentions in the further affidavit which demonstrates that the title held by the alleged first registered owner is tainted with fraud. That, in law, is a valid ground to impeach the same with the result that the title held by the respondent would have no root or foundation. The applicants’ locus and capacity to bring this action and to apply for the orders herein is not challenged. He has a duty as administrator ad litem to seek the orders sought herein in order to preserve the estate and to safeguard the interests of the beneficiaries thereto.

Considering all the facts, I am persuaded that a prima facie case has been established to warrant the granting of the orders sought. Irreparable loss would visit the applicant in the event that the attempts by the respondent to interfere with the applicants’ possession of the suit land is not restrained pending the hearing of the suit. I accept Mr. Karanja’s submission that in the event that the suit fails, an order for the payment of mesne profits would adequately compensate the respondent.

In the premises I find that, there is merit in the applicants’ Chamber Summons herein and do hereby allow the same in terms of prayer 3 thereof. Costs shall be in the cause.

Dated, signed and delivered at Nakuru this 23rd day of July 2009

M.G. MUGO

JUDGE