



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 37 of 2007

PETER MWINZI MUINDI AND 12 OTHERS

.....APPLICANT

AND

KENYUCO HOUSING CO. SOCIETY LTD. AND ANOTHER RESPONDENT

RULING

I have before me an application dated 17th January, 2007 provided under Section 3 (a) of Civil Procedure Act and Order XXXIX Rules 1, 2 and 3 of Civil Procedure Rules, I replaced the words 'Rules' to the words 'code' in the application by taking Judicial Notice of the name of the legislation.

It seeks temporary injunctions inter alia against the 1st Defendant, the previous owner of the property originally registered as L.R. No.Kajiado/Kaputoi North/3034 and against the 2nd Defendant the District Land Registrar, Kajiado.

The injunctions sought are specified in prayer numbers (b) and (c) and I reproduce the same:

(b) THAT the first defendant whether by itself or servants and agents be restrained by an order of temporary injunction from surveying, demarcating or in any way trespassing on and interfering with the original beacons, boundaries and access roads on and concerning ALL THOSE parcels of land known as Land Reference Numbers: Kajiado/Kaputiei/3797, 3798, 3802, 3803, 3795, 3796, 3800, 3801, 3807, 3808, 3812, 3813, 3887, 3888, 3865, 3870, 3735,3739,3815, 3866 and 3832 until the final determination of the suit.

(c) THAT the second Defendant be restrained by an order of temporary injunction from registering any mutations, survey plans, transfer or any other transactions involving extinguished title Land Reference No. Kajiado/Kaputiei – North/3034 in so far the such mutations, survey plans, transfers or transactions affect the boundaries, access roads and the Plaintiffs' interests in ALL THOSE parcels of land known as Land Reference Numbers Kajiado/Kapusiei/3797, 3798, 3802, 3803, 3795, 3796, 3800, 3801, 3807, 3808, 3812, 3813, 3887, 3888, 3865, 3870, 3735, 3815, 3866 and 3832 until the final determination of the suit.

I do note that the orders refer to specific parcels of land mentioned in the said prayers and not all the parcels carved out from the original plot bearing L.R. No.Kajiado/Kaputiei North/3034.

The plaintiffs aver that they all are the registered owners of the parcels of land in question and they have

annexed their respective titles specified in further affidavit of the 1st Plaintiff filed on 7th February, 2007.

Thus there cannot be a dispute that they are the proprietors of parcels of land registered in their respective land. The fact of their ownership is not denied.

The title deeds were issued between 1997 and 31st May, 2005.

It is also contended by the plaintiffs' counsel that the original Title 3034 was closed on sub-divisions and new numbers were given from 3577 to 3894. It is shown in the property section of card for parcel No.3034 and the date of entry of the said new sub-divisions was 21st July, 1997. Thus as per the plaintiffs, the title of the 1st Defendant was extinguished as at that date.

But on 16th May, 2006, the 1st Defendant applied for resurvey and rectification consent whereof was granted and new additional parcels were created bearing Nos. 23401 to 23473. Thus additional 72 parcels were created.

It is averred by the plaintiffs that during all the process of application, consent of resurvey and rectification and consequent process of resurvey rectification, mutation or creation of new plots, they were not given any notice and were not given any opportunity to be heard.

According to the re-survey and creation of additional plots the size of the plaintiffs' plots shall be reduced by 0.03 of a hectare and that according to them, is illegal and the Defendants have to be restrained from interfering with their properties.

The first Defendant opposed the application and supported its case by averments made in the replying affidavit of its chairman Wyclife W. Fwambah on 8th February, 2007 and further affidavit sworn on 28th February, 2007.

As per the averments made, by the 1st Defendant the resolution to resurvey and rectify the plots was approved unanimously at the Annual General Meeting of the members held on 13th May, 2005. Thereafter the application was made to the Land Control Board to resurvey and redivide the original plot and consent to do so was granted on 2nd September, 2005 and on 8th February, 2006 respectively.

The reason for such application was that some members fraudulently allocated to themselves the bigger plots. The resurveying was completed by September, 2006. Thereafter the mutation forms and plans were registered (see Annexure WWF 5).

It is also contended that to give each member the required sized plots the first Defendant need 60 hectares and it only has 40.47 hectares.

I also do note from Ann. WWF 7 that five new title deeds annexed by the 1st Defendant are registered in the name of one person namely Leonard Mutua Mutero. No explanation for giving five titles to the same person is given, when the error to be rectified was as per the Defendant that the over subscription or larger portion of land taken by some members. The court copy of the replying affidavit did not include the list of members but as per the list annexed by the Plaintiffs the members are 377 and the original sub-divisions were also 377. I also note that the minutes of AGM (Ann.WWF.1) mentioned about two plots at Kitengela and Embakasi Plots. It does not mention the reason for resurvey in respect of those two plots. I am also not told that these two plots include the plot in question. There is also no record of the members present at the meeting.

With these facts, it is contended by the 1st Defendant that the exercise having been completed in September 2006, nothing is remained to be given injunctions against.

The 2nd Defendant's case is a bit different than that of the 1st Defendant. The learned state counsel Mr.

Makongo agreed with the Plaintiff that as a result of the resurvey, the land was split into more parcels and thus new titles were issued in addition to the earlier ones. This contention which is supported by the document produced by the plaintiff, goes contrary to the case of the 1st Defendant.

There is no denial by the 1st Defendant to the averments that the Plaintiffs were not invited in the Annual General meetings and most of the Plaintiffs are not members of the 1st Defendant. There is no response to the contention of the Plaintiffs that the 1st Defendant had no right over the plot once the title was closed after the first survey.

Thus prima facie, it is clear that the proprietary rights of the Plaintiffs have been curtailed without their knowledge and/or consent.

Section 19(1) and (2) of the Registered Land Act Cap 300 (hereinafter referred to as '*the Act*') gives the registrar power to correct the line or position of any boundary shown on the registry map, with the agreement of every person shown by the register to be effected by the correction and further if boundary is altered the parcel number shall be cancelled and the parcel shall be given a new number. None of those provisions is shown to have been adhered to. The Plaintiffs are still holding the title deed and as per Section 27 of the Act the registration of the plot shall vest in the person the absolute ownership of that land.

Section 28 of the Act further stipulates that rights of the proprietor, whether acquired on first registration or whether acquired subsequently, shall not be liable to be defeated except as provided in this Act.

With these facts, the Plaintiffs definitely have shown that they have prima facie case with reasonable prospect of success, and thus they are entitled to prayer No. (b) of the application. I do grant the said prayer.

The learned counsel for the 2nd Defendant raised a legal issue that as the 2nd Defendant is a Government servant and the acts complained were carried out as such government servant, no injunction can lie as per the provisions of Section 16 of the Government proceedings Act (cap.40). He relied on an unreported case of **Nemu Investment Ltd. Vs. Jacob Matipei. H.C.C.S. Milimani No.1275 of 1999.**

Section 16(1) (i) stipulates inter alia that the court shall not grant an injunction against the Government in any proceedings against the government but may in lieu thereof make an order declaratory of the rights of the parties.

But sub section (2) of Section 16 stipulates and I quote:

“16(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government”.

Section 162 of the Act stipulates that the Act binds the Government subject to Section 161 of the Act which shows rights, interests, power and privileges conferred on the government by any other written law.

The question before me is whether granting prayer (c) shall in effect give any relief against the government as envisaged in Section 16(2) of the Government proceedings Act. I do not think so and in any event, I have power to give declaratory relief against the government in any event. The substantial issues are between the Plaintiffs and the 1st Defendant. No substantive relief is sought against the government.

In the premises, I do find that the Plaintiffs have prima facie case showing proprietary rights and the parcels mentioned in prayer no (c) and order that the status quo shall be maintained in respect of those

properties, pending hearing and determination of the suit.

The costs of this application be in the cause.

K.H. RAWAL

JUDGE

3.5.07