



Ndirangu & 3 others (Suing as the personal representatives of the estate of Gitahi Wamugunda Kabati - Deceased) v Settlement Fund Trustees & another (Environment & Land Case 445 of 2017) [2022] KEELC 14888 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14888 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 445 OF 2017
YM ANGIMA, J
NOVEMBER 17, 2022
FORMERLY NAKURU ELC 228 OF 2010

BETWEEN

MARY MUTHONI NDIRANGU 1ST PLAINTIFF
JOSEPH GITONGA NDIRANGU 2ND PLAINTIFF
PATRICK WAMUGUNA WACHIURI 3RD PLAINTIFF
IRENE NJERI WACHIURI 4TH PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF GITAHI
WAMUGUNDA KABATI - DECEASED

AND

SETTLEMENT FUND TRUSTEES 1ST DEFENDANT
WILSON GACANJA 2ND DEFENDANT

RULING

A. The Plaintiff's Application

1. By a notice of motion dated January 20, 2022 expressed to be based upon Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* (Cap.21), Order 40 rules 1, 2 & 4 and Order 51 rules 1 & 3 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law, the Plaintiffs sought a temporary injunction restraining the 2nd Defendant from entering or working upon the suit property, destroying or damaging the Plaintiffs' houses and structures thereon or from howsoever interfering with their peaceful occupation and use of the suit property pending the hearing and determination of the suit. The Plaintiffs also sought an order for the OCS Shamata Police Station to ensure compliance with the order once granted. The suit property was described as Nyandarua/Ol Bolosat/300.



2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Plaintiff, Joseph Gitonga Ndirangu on January 20, 2022 together with the exhibits thereto. The Plaintiffs were suing as administrators of the estate of the late Gitahi Wamugunda Gitahi (the deceased) whom they contended was entitled to a portion of 14.88 ha out of the suit property which measures approximately 26.1 ha. The Plaintiffs contended that the deceased was allocated Plot No.457 in Muruai Settlement Scheme in 1983 measuring 14.88 ha but the same was mysteriously moved to Ol Bolosat Scheme and subsumed in Nyandarua/Ol Bolosat/300 and registered in the name of the 2nd Defendant.
3. It was the Plaintiffs' contention that upon being allocated Plot No.457 in 1983 the deceased took possession thereof, settled thereon and worked on it until the time of his demise in 2012 and that his remains were interred there. The Plaintiffs further contended that sometimes in January, 2022 the 2nd Defendant's agents invaded the suit property, destroyed the perimeter fence and started ploughing it with a tractor and digging a pit latrine thereon without the sanction of a court order. It was further contended that the 2nd Defendant's activities were intended to interfere with the Plaintiff's peaceful occupation of the suit property or to evict them without following due process. It was contended that the 2nd Defendant had never been in possession or occupation of the suit property since his registration as proprietor.
4. The Plaintiffs further contended that they and the relatives of the deceased stood to suffer irreparable loss and injury if they are to be evicted from the suit property without due process and during the pendency of the suit. They consequently prayed for a temporary injunction in terms set out in their application pending the hearing and determination of the suit.

B. The 2nd Defendant's Response

5. The 2nd Defendant filed a replying affidavit sworn on May 13, 2022 in opposition to the application. He stated that he was allocated parcel 300 in Ol Bolosat Settlement Scheme measuring 26.1 ha in 1993 and that upon fulfilment of all the requisite conditions he was issued with a title deed in 2009. He contended that he was the first registered proprietor of the suit property hence he had acquired an indefeasible title thereto.
6. It was the 2nd Defendant's contention that there was no evidence on record to demonstrate that Plot No.457 Muruai Scheme was the same as parcel 300 in Ol Bolosat Scheme. It was contended that the two parcels fell within two different schemes and that the Plaintiffs had no legitimate claim against parcel 300. It was further contended that the Plaintiffs had not satisfied the conditions for the grant of a temporary injunction hence the court was urged to dismiss the application with costs.

C. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on July 1, 2022 whereas the 2nd Defendant's submissions were filed on July 26, 2022. The 1st Defendant did not file any response or submissions in the matter.

D. The Issues for Determination

8. The court has considered the Plaintiffs' application dated January 20, 2022, the 2nd Defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion



that the main issue for determination is whether or not the Plaintiffs have made out a case for the grant of a temporary injunction.

E. Analysis and Determination

9. The principles for the grant of a temporary injunction were summarized in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Mrao Limited v First American Bank & Another* [2003] KLR 125. The first is that the applicant must demonstrate a *prima facie* case with a probability of success at the trial. The second is that an injunction will not normally be issued unless the applicant might suffer irreparable injury which cannot be compensated by an award of damages. Third, if the court is in doubt on the 2nd principle it shall determine the application on a balance of convenience.
10. The court has considered the affidavits and documents on record on the first principle. The court has warned itself that at this interlocutory stage it is not required to make definitive findings on the issues for determination in the main suit. The court only requires to be satisfied on a *prima facie* basis that the Plaintiffs have a good case with reasonable prospects of success without delving into the evidence in great detail. The court is satisfied on the basis of the material on record that the deceased was allocated what was previously known as Plot No.457 in Muruai Scheme and that he took possession and put up some structures thereon. There is photographic evidence of some of the developments he undertook on the disputed property.
11. There is a dispute as to whether or not Plot No. 457 Muruai Scheme and Parcel 300 Ol Bolosat do overlap. The Plaintiffs' contention was that Plot 457 Muruai was irregularly transferred and made part of Ol Bolosat Scheme and allocated to the 2nd Defendant who was then a senior officer at the Ministry of Lands. The 2nd Defendant denied any connection between the two plots. The court is of the opinion that this issue can only be resolved by the trial court. It is, however, evident that the 2nd Defendant's activities whether on Plot 457 or Parcel 300 began only as recently as January 2022. There is no evidence that the 2nd Defendant had taken possession and utilized any portion of the disputed land prior to January, 2022. The court is thus of the opinion that the Plaintiffs have made out a *prima facie* case within the meaning of the first principle for the grant of an interim injunction.
12. The court has considered the 2nd principle against the material on record. The court has noted that although the Plaintiffs contended that they stood to suffer irreparable loss and injury unless the interim injunction was granted they did not explain the nature and extent of the irreparable injury they stood to suffer and why damages may not adequately compensate them in the event they were successful at the trial. The court is, however, alive to the fact that they and some of the deceased's relatives are still in occupation and are undertaking some economic activities on the disputed land. The court is thus in doubt as to whether the Plaintiffs stand to suffer irreparable injury or damage in the absence of an injunction.
13. The court shall now consider the 3rd principle on balance of convenience given that it has some doubt on the 2nd principle. It is necessary to consider which side shall suffer greater hardship by either denying or granting the interim injunction. The material on record indicates that the Plaintiffs and the deceased's relatives have been in occupation of the disputed land. They appear to have some structures and to be undertaking some economic activities thereon. On the other hand, the 2nd Defendant only attempted to take possession or to utilize the suit land in January 2022 or thereabouts. The court is of the opinion that the Plaintiffs shall suffer greater hardship by denying them the injunction than the 2nd Defendant shall suffer by granting it. Accordingly, the balance of convenience lies in favour of the Plaintiffs.



F. Conclusion and Disposal Order

14. The upshot of the foregoing is that the court is satisfied that the Plaintiffs have made out a case for the grant of the orders sought. Accordingly, the notice of motion dated January 20, 2022 is hereby allowed in the following terms:
- a. A temporary injunction be and is hereby granted restraining the 2nd Defendant by himself, his agents or servants or anybody else claiming through him from entering or working upon the suit land, destroying or damaging the Plaintiffs' houses and structures, or from howsoever interfering with the Plaintiffs' occupation and use of the suit property, that is, Nyandarua/Ol Bolosat/300 pending the hearing and determination of the suit.
 - b. The OCS Shamata Police Station shall ensure compliance with the order of injunction.
 - c. The suit shall be mentioned on February 8, 2023 for pre-trial directions.
 - d. Costs of the application shall be in the cause.

RULING DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF NOVEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Kinyua Njogu for the Plaintiffs

N/A for the 1st Defendant

Mr. Waudu for the 2nd Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

