

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Suit 174 of 2004

1. SALIM LEMUTA KONYOKIE 1ST PLAINTIFF
2. KANYAMAL SENKELO 2ND PLAINTIFF
- VERSUS-**
1. ERICK KONCHELLA 1ST DEFENDANT
2. KANYAMAL SENKELO 2ND DEFENDANT
3. KUNTAI TUNAI 3RD DEFENDANT

R U L I N G

By a Chamber Summons dated 28th December 2004, Salim Lemuta Konyokie and Kanyamal Senkelo, the applicants herein seek an Order of an interlocutory injunction to restrain Erick Konchellah, Benjamin Ole Tina and Kuntai Tunai, the respondents from interfering with the user or wastage of Land Parcel No. Transmara/Intonia/1, pending the hearing and final determination of this suit. The application is brought under Order XXXIX Rules 1, 2, and 2A of Civil Procedure Rules and Section 3A of Civil Procedure Act, and is supported by some grounds listed on the body of the summons and an affidavit of Salim Lemuta Konyokie, the 1st applicant. Each of the three respondents filed separately a replying affidavit opposing the application.

The first issue that first comes to my attention is the fact that in his replying affidavit, Benjamin Ole Tina Konchellah, the 2nd Respondent who with Erick Konchellah, the 1st Respondent, were sued as the administrators of the estate of the late John Leboi Konchellah, had averred that he is neither an administrator of the said estate nor is he a beneficiary of it. That claim was supported by the 1st Respondent who had annexed to his replying affidavit a copy of a grant of letters of the administration of the said estate. I note that it is true that the 2nd Respondent has never been an administrator of the said estate. The assertion of the 2nd Respondent was not controverted by the applicants. In those circumstances, the applicants do not have a cause of action against the 2nd Respondent and an Order of interlocutory injunction will not therefore issue against him at the instance of the applicants. The applicants have not therefore established that they have a prima facie case against him with a probability of success.

The other issue which I ought to address myself to at this stage is the claim that this suit is a representative action brought by the two applicants on behalf of themselves and sixty others and as the applicants did not comply with the provisions of Order 1 Rules 8 and 12 (2) of the Civil Procedure Rules, the suit and the application brought in are incompetent and null and void. In his affidavit, Salim Lemuta Konyokie, the 1st applicant deponed in paragraph 1 that he had the authority of the 2nd applicant and others. Again in paragraph 3, he stated that over 50 families had been eking out a living from the land and he annexed to the affidavit a list of 60 names. This deponent also claimed in paragraph 4 that Kuntai Tunai made allegations in his presence and of others that he had bought the said land from Rick Konchellah and Benjamin Ole Tina Konchellah and that in paragraph 13 he claimed that the actions of the respondents had inconvenienced the community. It was also denied that the action was brought by the two applicants on their behalf and that of the 60 others named in the annexed list. The first objection under this ground is that the application is incompetent in that no leave of Court in terms of Order 1 rule 8 (1) of Civil Procedure Rules, was sought and obtained before the suit was brought as was held in the case of **Wanjiru -vs- Standard Chartered Bank Ltd and Others [2003] EA 701**. There were also no directions sought and obtained in terms of Order 1 rule 8 (2) of the Civil Procedure Rules before the suit was instituted. As the 60 families on whose behalf the suit and the application were made did not give their consent in writing in terms of Order 1 rule 12 (2) of the Civil Procedure Rules, the application is also rendered incompetent.

There was also another contention that there is no proper suit before this Court under which an application such as the one before me could have been brought. It was contended that this suit was brought by an Originating Summons under Order XXXVI Rule 3D of the Civil Procedure Rules, the main relief being a question whether the applicants had acquired the suit land under Section 38 of the Limitation of Actions Act. However, the actual questions listed for the determination in the said originating summons do not include the issue of whether the applicants had by adverse possession acquired title to the said suit land. While this may be true but the fact that even directions have yet to be given in respect to the Originating Summons and the fact that there is always a possibility of an application for amendment of the Originating Summons being made before the hearing of the suit, this objection is premature in my view and I would reject it.

As regards the reliefs sought by the applicants in this application, I agree with the respondents that a prayer for permanent injunction cannot issue at the interlocutory stage. This may be sought later on during the hearing of the suit itself. The prayer for declaratory Order is also not a relief that may be sought and granted at an interlocutory stage. In any case, such a prayer should only be sought where the suit is brought by a plaintiff and the defendant has been accorded an opportunity of filing defence which led to offering oral evidence by parties at the trial in contrast to affidavit evidence which is relied on in the suits commenced by Originating Summons. In the circumstances, I would hold that a prayer for a declaratory relief is out of place at this stage and with suits commenced by Originating Summons as in this case. However, the application in this case is not yet lost for the reason that there is still prayer 2 which seeks an Order of an interlocutory injunction.

I now turn to examine the main thrust of this application bearing in mind the fact that the applicants seek an Order of interlocutory injunction. It is incumbent upon the applicants to establish that conditions for grant of injunction exist. In his submission, Mr. Sunkuli contended that his clients have lived and occupied the Parcel of Land no. Transmara/Intona/1 for over 40 years and have established homes on it and continue to work and rear their animals on it. He added that the land was registered in the name of John Leboi Konchellah on 9/2/77 but his clients have had exclusive open and uninterrupted adverse occupation of it all along hence, the rights of the owner have been extinguished by operation of Law and his clients have therefore acquired title to it. Mr. Sunkuli added that the Search Certificate and the green card for the title which were signed by one J. K. Ngeno, 078 and issued on 28/12/04 indicated that the suit land was still registered in the name of John Leboi Konchellah. According to Mr. Sunkuli, under Section 37 (1) of the Registered Land Act, until contrary is proved the registered owner of the suit land is the late John Leboi Konchellah and that if the respondents acquired title to the said parcel of land in the year 2003 and that by virtue of Section 30 (g) of the Registered Land Act, their purchase was subject to the overriding interests of the applicants. He relied on the case of **Elizabeth Wanjohi -vs- Official Receiver & others - Civil Appeal no. Nbi 140 of 1998.** He also contended that it was incumbent upon the respondents to make inquiry as to the status of the title of the land and the interests of persons in occupation of it before entering it. According to Mr. Sunkuli any registration of any transaction carried out later on affecting parcels of land acquired by adverse possession must be set aside. It was also Mr. Sunkuli's contention that Section 37 (1) of the Registered Land Act has been contravened by paragraphs 14, 15 and 16 of the replying of Samwel Kuntai in that the signature of J. K. Ngeno, a Land Registrar Transmara District on a search certificate and a green card which were issued on 28/12/2004 has been challenged. He claimed that Section 37 (1) of the said Act provides, that a document purported to be signed by the Land Registrar is presumed to be properly signed but the affidavit of Mohamed Jembe, Land Registrar annexed to the affidavit of 3rd Respondent creates a conflict but once a Land Registrar has issued a document it has to be given effect, as provision of Section 37 (1) of the Registered Land Act is clear. As regards Erick Konchellah, the 1st Respondent, Mr. Sunkuli stated that the man claimed to be an administrator of the estate of the late John Leboi Konchellah but he was not a beneficiary of the estate as confirmed by the list of all the beneficiaries of the estate annexed to his replying affidavit. Mr. Sunkuli also claimed that the said replying affidavit is defective in that it contains a statement of information and belief without disclosing the source. Lastly it was Mr. Sunkuli's contention that damages would not be adequate compensation for his clients who have demonstrated that they have a prima facie case with a probability of success.

It is true that this application which was brought under Order XXXIX rules 1, 2 and 2A of Civil

Procedure Rules, seeks an interlocutory injunction to restrain the Respondents from interfering with user or wastage of land parcel no. TRANSMARA/INTONA/1, but the applicants do not appear to have led any evidence to show that the suit property was likely to be wasted on its user threatened to be changed.

When an interlocutory injunction is sought over a parcel of land it is usually vital that the applicant identifies it precisely. In the present case, the applicants have not made an effort to identify the area over which they seek injunction and in paragraphs 20 and 23 of the replying affidavit of the 3rd respondent stated that he had occupied for a year his parcel no TRANSMARA/INTONA/14, and that the applicants have not occupied any portion of it.

This application seeks to protect the user and prevent the wastage of the parcel of land No. TRANSMARA/INTONA/1 by the injunction pending the hearing of the suit. Both the applicants have stated through an affidavit of Salim Lemuta Konyokie, the 1st applicant that that parcel exists. In support of that contention they put in a search certificate and a green card certified by one J. K. Ngeno, a Land Registrar attached to Transmara District. However, both the 1st and 3rd respondents in their replying affidavits averred that parcel no. TRANSMARA/INTONA/1, was sub-divided in March 2004 and new titles created which thereafter transferred to them. In support of the claim of non-existence of the said parcel, Isaya Mboya Aduda, the District Surveyor Transmara, put in an affidavit in which he enclosed a mutation form which indicated that subdivision was affected. He also annexed a map showing how the subdivision was carried out. One Mohamed Jembe, the Land Registrar of the said District also put in the affidavit disclosing that the information conveyed by documents certified by J. K. Ngeno was not correct. He explained that the said parcel of land was infact subdivided in March 2004 and new titles were created but the old titles were created but the old title was not closed on opening of the new titles. The witness enclosed copies of new titles which were created after the subdivision. Reliance was place on the provision of Section 37(1) of the Registered Land Act to support the contention that the Search Certificate and the green card signed by J. K. Ngeno should be deemed to have been signed by the Land Registrar. While the rule is proper it has become clear that the search certificate that the green card signed by J. K. Ng'eno did not display the correct position of the title as the title of TRANSMARA/INTONA/, had not been closed when new titles were opened. A contrary truth had been proved and the presumption had accordingly been rebutted. I therefore, hold that the land NO. TRANSMARA/INTONA/1, no longer existed consequently an Order of injunction could not issue to preserve land parcel which no longer existed.

Having carefully considered all the issues raised by both counsel, I am satisfied that the applicants have not established that they have a prima facie case with a probability of success. They have also not shown that damages are not adequate compensation for any injury the applicants may suffer. I also note that there was no undertaking made by the applicants as to damages. The application is therefore dismissed with costs.

Dated and delivered this 24th day of January 2006.

B. K. TANUI

JUDGE

In the presence of:- Mr. Minda for Sunkuli for Applicants/Plaintiff

N/A for Respondents/Defendants.

B. K. TANUI

JUDGE

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