



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 18 of 2006

JOSEPH KIBUNGEI KUNGUN

(Suing on his own behalf and on behalf of the Estate of the Late Kugun Kibarno);.....PLAINTIFF

VERSUS

GILBERT KIPKOECH SUM

KIMAIYO ARAP

KEINO:.....DEFENDANTS

RULING

The Plaintiffs filed an application dated 15th February, 2006 under the provisions of inter alia, , Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules seeking alia the following orders. _-

“ (a).....

(b) This Honourable court be pleased to restrain the Defendants by themselves, their agents and/or servants by way of interlocutory injunction from interfering, altering, moving or in any other way intermeddling or disturbing the temporary scheme of occupation in respect of the suit land.

(c)

(d) IN THE ALTERNATIVE this Honourable court be pleased to determine the status quo in relation to the occupation of L.R. No. 8313 by the family of the late Kibarno Kugun and/or the estate of the late Kibarai Kugun.

(e) Upon establishment of the said status quo this Honourable court be pleased to order maintenance of the same pending the hearing and determination of the main suit.

(f)”

At the hearing of the said application, the 1st Defendant’s counsel Mr. Gicheru raised a preliminary objection and asked the court to strike out the application in limine. He submitted that the application for injunction is in respect of property known as L.R. No. 8313 which is registered under the provisions of the Registration of Titles Act, chapter 281. He said that the land in question is registered in the name of various parties and who hold titles. He added that under section 22 (4) (b) of the Act, the holder of the title document was the absolute proprietor. The other title holders have not been named as parties in the

suit. That the suit deals with the entire suit property and not portions thereof and as a result it would be a breach of principles of Natural Justice of the application is heard without the hearing or joinder if the said parties who have an interest.

In reply, Mr. Cheruiyot, counsel for the plaintiff, said that the Defendants were in charge of the farm and are the ones who perpetrated the alleged fraud against the plaintiff. It was submitted that orders sought were against the Defendants and the plaintiff had no claim against the other parties. That in the event the court found that the other parties were necessary Defendants then the court had the jurisdiction to enjoin them.

Counsel for the plaintiff continued to submit that to strike out the application or suit would be draconian. He also referred to the alternative prayer for the maintenance of the status quo.

I have considered the Preliminary objection and the rival submissions. It is clear from the plaint that the suit property is L.R. No. 8313 situated at Lolkinyei Kosigat Location Moiben Division of the Uasin Gishu District measuring 894 acres of land or thereabouts. The judgment and prayers sought in the plaint are in respect of the said property. The prayers are inter alia as follows:-

(i) A declaration that:-

(a) The registration of the late KUGUN A. BARNO , the Defendants and Seven others as tenants in common in equal shares is null and void. (emphasis mine)

(b) The purported sub-division of the suit land on paper on the basis of shares and the subsequent issuance of titles is null and void.

(ii) An order that:-

(a) The register be rectified to show that the late KUGUN .A. BARNO, the Defendants and the said seven others were simply tenants in common and that they be registered as such.

(b) The purported sub-division of the suit land on paper on the basis of shares and the subsequent issuance of titles is nullified on and the respective registers be cancelled accordingly.

(c) The suit land be distributed to the registered owners and/or their estates according to the individual contribution and taking into account the need for necessary public utilities.

(iii) An order for permanent injunction as per paragraph 18.”

I am of the view that the plaintiff in this suit intends to obtain final orders against not only the Defendants but also seven other persons who are not named in the plaint. The plaintiff concedes that the land was sub-divided and titles issued. Rectification of the register will certainly affect the said seven others and their rights and interest. There is no dispute that the plaintiffs, Defendants and the seven others hold titles to various sub-divisions of the original land.

If one relates the substantive prayers to the application for injunction then any existing “**scheme of occupation**” or “**status quo**” is likely to be affected by any orders given by this court. The alleged scheme of occupation and status quo could be controversial and/or disputed. The seven others are part of the situation on the ground whichever it might be. They have not been named as parties and there are no claims or allegations against them. The suit affects the entire property known as **L.R. No. 8313**. So far the parties to the suit or the other seven are said to be registered as tenants in common in equal shares.

The Plaintiff wants to change this situation and the same will certainly have implications on the unnamed persons. It is my view that any grant of any of the order in the application would amount to a gross and blatant violation of the cardinal principles of natural justice. This is aggravated by the fact that the undisclosed seven others have not been named in the suit.

This court cannot cure the situation by enjoining the seven others as suggested by the plaintiff. Firstly, the seven others have not been disclosed, neither can the court create any claims against them when the plaintiff has not. In any case, this is not the hearing of the main suit or trial. It is an interim application.

As a result of the foregoing, this court cannot in Law or fact grant the orders sought in the application as long as the so-called seven others persons are not parties in this suit. The preliminary objection must succeed as there is no useful purpose for the hearing of the application. It follows that it must be struck out in Limine which I hereby do with costs to the Defendants.

The consequence of this is that the interim orders granted on 16th February, 2006 and extended from time to time are hereby discharged.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY, 2006.

M.K. IBRAHIM

JUDGE.

Coram

Ibrahim 'J'

C/C - Chelang'a

Mr. Terer for the plaintiff

Mr. Gicheru for the 1st Defendant

No Appearance for the 2nd Defendant.

Ruling read in their presence.

M.K.IBRAHIM

JUDGE