



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 194 of 2004**

**PETER K. YEGO.....1ST PLAINTIFF**

**MUSA BOIT.....2ND PLAINTIFF**

**MICHAEL KIPRUTO T/A AINOPTICH**

**BOREHOLE WATER PROJECT.....3RD PLAINTIFF**

**VERSUS**

**PAULINA NEKESA KODE.....DEFENDANT**

**RULING**

The plaintiffs in this case filed an application under **Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules** seeking an order of injunction to restrain the defendant from sub-dividing, disposing of, transferring, constructing, cultivating or cutting trees on the suit premises known as **Miti Mingi/Mbaruk Block 3/5057** (Barut) pending the hearing and determination of this case. The grounds in support of the application were stated on the face of the application. The application was supported by the annexed affidavit of two of the plaintiffs, namely Musa Boit and Michael Kipruto. Musa Boit swore a further affidavit in support of the application. The defendant Paulina Nakesa Kode swore two affidavits, in reply, opposing the plaintiff's application.

According to the pleadings filed in court, it is the plaintiff's argument that the parcel of land known as **Miti Mingi/Mbaruk Block 3/5057** registered in the name of the defendant is part of the parcel of land where a public borehole, water trap and pipings are situate. The plaintiffs contend that the defendant was registered as the owner of the said parcel of land pursuant to a court order which was subsequently set aside. It is the plaintiff's argument that the subdivision of the bigger portion of land, and the subsequent registration of the defendant as the owner of the said sub-divided portion (suit land) was done during the pendency of an appeal in the Rift Valley Appeals Tribunal. The plaintiffs argued that the suit land had transected the public utility land owned by the plaintiffs. They submitted that they had appealed against the decision of the land disputes tribunal which had awarded the said parcel of land to the defendant. The said appeal was still pending for hearing before the Rift Valley Appeals Tribunal. Pending the hearing and determination of the said appeal, the plaintiffs have sought that the defendant be restrained by means of a temporary injunction from dealing with the said parcel of land. The plaintiffs submitted that if the injunction was not granted, then their appeal before the Provincial Appeals Tribunal would be rendered

nugatory if it were to succeed.

On her part, it is the defendant's case that she is the first registered owner of the suit property known as Miti **Mingi/Mbaruk Block 3/5057**. She was issued with the title of the said parcel of land. She denied the contention of the plaintiffs that the said parcel of land constituted part of the land where the borehole and the water trap for the public use is situated. She conceded that she was registered as the owner of the said parcel of land pursuant to an order of the court. She however submitted that the said court order was valid and had not been set aside. She contended that the plaintiffs had not established what proprietary right they had over the said parcel of land. The defendant challenged the competence of the plaintiffs to file the suit against her. She argued that the plaintiffs were purporting to act on behalf of a group of people, namely the public, without first seeking the leave of the court to file a representative suit or the consent of the Attorney-General to enforce a public nuisance. The defendant submitted that the plaintiffs had made false averments in their affidavits and therefore, as they are seeking an equitable remedy, their application should be disallowed. The defendant contended that she had the constitutional right to own and enjoy proprietary rights over the said parcel of land. She urged the court to dismiss the application.

I have carefully read the pleadings filed by the parties to this application in support of their respective case. I have also considered the submissions made. The issue for determination by this court is whether the plaintiffs have established a case to be granted the order of injunction that they are seeking. At the commencement of the hearing of this application, this court did order the District Surveyor, Nakuru to visit the ground and establish where the borehole, the cattle trap and the power house were situated. In his report dated the 8th of February 2005, the District Surveyor established that the borehole, the cattle trap and the power house were in parcel number **Miti Mingi/Mbaruk Block 3/5056**. He further established that there were water pipings which stretched through parcel number **Miti Mingi/Mbaruk Block 3/5057**. He attached a sketch plan to the said report. What is evident from the said sketch plan is that parcel number **Miti Mingi/Mbaruk Block 3/5057** transects and divides the two portions of land which constitutes parcel number Miti Mingi/Mbaruk Block 3/5057.

According to the plaintiffs they are disputing the defendants ownership of the said parcel of land. Prior to the defendant being registered as the owner of the said parcel of land, a dispute had been referred to the Land Disputes Tribunal for resolution. The Land Disputes Tribunal ruled in favour of the defendant and awarded her the said parcel of land. Upon the said award being made, it appears that the defendant moved with haste and had the said award adopted as the judgment of the court. Meanwhile the plaintiffs, being dissatisfied with the decision of the Land Disputes Tribunal appealed to the Provincial Appeals Tribunal. From the pleadings filed, it is apparent that the said appeal is still pending determination. The defendant, after obtaining the order of the court adopting the award of the Land Disputes Tribunal, had the parcel of land subdivided and the suit land transferred and registered in her name. The plaintiffs discovered what had transpired and duly went before the lower court and had the said order adopting the award of the Land Disputes Tribunal set aside. The plaintiffs then filed this suit to safeguard the status quo on the said parcel of land pending the resolution of the appeal before the Provincial Appeals Tribunal.

Having carefully considered the facts in issue in this case, there is no doubt that the defendant was registered as the owner of the suit property pursuant to an order of the court which was subsequently set aside. It is not disputed that the suit land (**Miti Mingi/Mbaruk Block 3/5057**) was excised from a larger parcel of land known as **Miti Mingi/Mbaruk Block 3/4123**. The defendant cannot therefore shield behind the law by claiming that she was the first registered owner and therefore her title was indefeasible.

I have perused the sketch plan which was attached to the report by the District Surveyor. I have no doubt in my mind that parcel number Miti Mingi/Mbaruk Block 3/5057 was part of a larger parcel of land which encompassed the borehole, the power house and the water trap. This includes the pipings. The plaintiffs have stated that there exists a dispute between them and the defendant. They have appealed to the Provincial Appeals Tribunal. The said appeal is yet to be heard and determined. They are apprehensive that should the defendant not be restrained, she would dispose off the suit land and thus render their appeal nugatory.

I have considered the said argument made. I do find that the plaintiffs have established a prima facie case. The defendant got herself registered as the owner of the suit land using a court order which was subsequently set aside. She cannot seek to benefit from an illegality. Pending the hearing and determination of the suit filed herein, the defendant is restrained by injunction from sub-dividing, disposing off, transferring, constructing, cultivating or cutting trees on the said suit property known as Miti Mingi/Mbaruk Block 3/5057 (Barut). The plaintiffs shall have the costs of the application.

**DATED at NAKURU this 13th day of May 2005.**

**L. KIMARU**

**JUDGE**