



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 297 of 1999

GREEN HILL CO. LTD PLAINTIFF

VERSUS

JOEL KITONYI NZIOKI

SAMUEL N NZIOKI DEFENDANTS

RULING

By a Chamber Summons dated 17/2/05 the plaintiff/applicants seeks an order of injunction to issue restraining the defendants by themselves, their agents or servants from entering, demolishing 5th plaintiff's house, grazing, cutting down vegetation or in anyway dealing with plot No. 5 measuring 13 acres within parcel No. 9450/4 Ndithini/Mananja pending hearing and determination of this suit.

The 2nd prayer is that the plaintiff/applicants be granted leave to amend their plaint dated 29/9/99 in terms of the annexed amended plaint and lastly, that costs be provided for. The application is expressed to be brought under Order I Rule 9, 10 (1) (2) 6 A Rule 3, 39 Rule 1, 2, 3, Civil Procedure Rules and Section 3 A Civil Procedure Act. The application is based on grounds found on the face of the application and a supporting affidavit sworn by Wilson Mutungi Ndunda.

The 1st plaintiff Green Hills Farm Co. Ltd is a limited liability company registered on 24/11/99 (WKM). The 2nd, 3rd and 4th applicants are officials of the said company which comprises 16 members who carry out several businesses. Land parcel 9450/4 is held in common in equal shares by the 16 members of Green Hill Farm and the 5th applicant purchased 13 acres of land from that company in 1996, and took possession of it and he has since been in possession. The Respondents who are the sons of one Johnson Nzioki Mutweia occupy plots No. 6, 26 and 27 measuring 141 acres within that property and from about August 1999 the company wanted to get individual title deeds for the members and it is then that Respondents started encroaching on the shares of 2nd to 5th applicants and the applicants instructed their counsel Mr Muli to file this suit. The applicants have noted anomalies in the plaint and wish to amend it. On 11/2/05 the Respondent chased away the applicants' servants and started to destroy the land and its vegetation. The applicant believes that the Respondents will not suffer any prejudice if the plaint is amended and the orders sought are granted.

The Respondents filed a notice of Preliminary Objection to the application which raises five issues to the effect that the application is Res judicata, the application having been heard and ruling delivered on 19/7/00; that the suit is Res judicata in that another suit by same parties was heard and finalized in H.C.C. 313/79. That the plaintiffs lack locus standi in the matter and that the interim order was issued on dishonest misrepresentation of facts.

The parties to this suit have filed one application after the other and this court has had a difficult time trying to ascertain which orders have been granted and which have not. As submitted by Mr Mungatta on 29/9/99, the plaintiffs filed an application seeking orders of injunction under Order 39 and 50 Civil Procedure Rules. The prayers were similar to those sought in the present application. On 18/11/99 interim orders were given in the application dated 29/9/99. On 17/1/01 Justice Mwera in a ruling in another application held that incompetent parties cannot maintain lawful orders and so the injunction plus other orders were vacated. The interim order issued on 18/11/99 was therefore vacated and Mr Mungatta's argument that these orders subsist is not correct. However, what I find still subsisting is the application dated 29/9/99. It was not withdrawn nor were any other orders granted in it.

It was Mr Mungatta's further contention that this suit is Res judicata because H.C.C. 313/79 which was determined by the High Court in Nairobi involved the same parties and same issues. I do not agree. The plaintiff in H.C.C. 313/79 was one Johnson Nzioki Mutweia who is said to be the father of the defendants in this case. The defendants in that case were 14 and included 2nd to 4th plaintiffs. In the earlier case, the plaintiff was seeking a declaration that the defendants hold the suit land 9450/4 in trust for the plaintiff and that the Register was to be rectified to include the plaintiff as a common owner of the suit land with the defendants and mesne profits. The plaintiff, the defendant's father was the successful party in that suit. He is since deceased. In the present case, the plaintiffs seek to have the two defendants who are the sons of the plaintiff in H.C.C. 313/79 to be restrained from interfering with parcels of land set aside for the plaintiffs and especially 5th plaintiff. The 5th plaintiff was not a party in H.C.C. 313/79 and alleges to have bought the land from the 1st plaintiff Green Hill Ltd. The mischief complained of in this suit is that the defendants are trespassing, damaging and wasting plot No. 5 within parcel 9450/4 in which both plaintiffs and defendants have pieces of land. Such act of interference cannot have been committed by their deceased father the party in H.C.C. 313/79. This suit is therefore not similar to H.C.C. 313/79. The subject matter may be similar but the issues and parties are not exactly the same. This suit is therefore not Res judicata.

Mr Mungatta submitted that the 1st plaintiff has no locus standi in the suit because 1st plaintiff was incorporated on 24/11/99 whereas the suit had been filed on 29/9/99. A certificate of incorporation was annexed and confirms that position. As of 29/9/99, when this suit was filed, the 1st plaintiff did not exist as a legal entity capable of suing and being sued and could not have brought this suit. The proposed amendment of the plaint in my view does not change that position. The 1st plaintiff has no locus standi in the matter. I do note that the amendment brings in 2nd – 4th plaintiffs in another capacity other than only being officials of the 1st plaintiff. May be that will save them from being struck off as plaintiffs.

I have found difficulty in considering this application for amendment along with that of injunction. The court is partially at a loss at which plaint to look at when considering prayer for injunction.

In the ruling of 17/1/01 the court suggested to the plaintiffs to bring another suit or amend. They did not do so far the past four years. There is no reason for that delay though I do note that the late M.G. Muli was the counsel for the plaintiffs then. A party can amend their pleadings at any time and save for inclusion of 1st plaintiff as a party, the plaint may be amended with the necessary corrections.

The suit land in dispute is described by the plaintiffs as plot No. 5 measuring about 13 acres within land parcel 9450/4 Ndithini/Mananja. Though the applicants purported to annex a map showing the extent of the piece of land, none was annexed. It seems the said piece of land cannot be ascertained. Section 21 (4) Registered Land Act provides that no court shall entertain any action or their proceedings to a dispute as to the boundaries of registered land unless the boundaries have been determined. There are no titles in respect of the alleged subdivision made to this land. The court has no idea whether the portion of 13 acres is ascertainable or not. Besides, there has been no evidence of ownership of that piece of land by the 5th plaintiff. If an injunction is granted, it may not be possible to enforce it the court not having known the extent by the land in relation to the larger parcel 9450/4 – Ndithini/Mananja. Besides, this case was filed in 1999. Interim orders were granted and were discharged in January 2001. The acts complained by the plaintiffs were allegedly committed from 11/2/05. In my considered view though the

plaintiffs 2 – 4 may have an interest in the suit land, yet it is has not been established that the 5th plaintiff has any interest in part of parcel 9450/4 to warrant the grant of an injunction or that if he has any interest, he cannot be compensated by way of damages and further still the interest has not been proved and ascertained. The court will decline to grant an order on injunction at this stage.

This court had observed that this matter should be set down for hearing on priority basis to avoid the multiplicity of applications being filed and which are causing a lot of confusion in the file. This court advises the parties to do so.

In sum, I grant the prayer for amendment of the plaint but with 1st plaintiff excluded for lack of capacity to bring this suit. Amended plaint be filed within 14 days of today's date.

Applicant to bear costs of the application.

Dated at Machakos this 5th day of May 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE