



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC NO. 18 OF 2020

CHRISTINA SOTE KIPTUI and MARGARET JEMUTAI CHEPTO

(Suing as the Administrators of the estate of the late

GEORGE KIPTUI CHESANG).....1ST PLAINTIFF

ISAAC KIPCHUMBA ROTICH LELKUTWO.....2ND PLAINTIFF

VERSUS

MUSA CHERUTICH SIRMA.....1ST DEFENDANT

KIPLAGAT NAMUNI.....2ND DEFENDANT

NAKURU GRAINS MILLS LIMITED.....3RD DEFENDANT

RULING

1. This ruling is in respect of four applications and a preliminary objection: Notices of Motion dated 4th March 2020, 9th March 2020 and 11th March 2020, all filed by the plaintiffs as well as Notice of Motion dated 18th March 2020 and Notice of Preliminary Objection dated 18th March 2020, both filed by the 1st defendant.

2. Notice of Motion dated 4th March 2020 seeks the following orders:

a) *[Spent]*

b) *THAT this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, their agents, servants, employees, tenants or otherwise howsoever from entering, trespassing, occupying, charging, carrying on any further development, interfering with the plaintiffs' quiet and peaceful occupation or dealing in any way with all or any portion of those parcels of land known as L.R. No 22650 and L.R. 22651 in any manner whatsoever prejudicial to the interests of the plaintiffs pending the hearing and determination of this application.*

c) *THAT this Honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, their agents, servants, employees, tenants or otherwise howsoever from entering, trespassing, occupying, charging, carrying on any further development, interfering with the plaintiffs' quiet and peaceful occupation or dealing in any way with all or any portion of those parcels of land known as L.R. No 22650 and L.R. 22651 in any manner whatsoever prejudicial to the interests of the plaintiffs pending the hearing and determination of this suit.*

d) *THAT the Officer Commanding Station (OCS) Kaptembwo Police Station do supervise the peaceful execution and compliance of this order.*

e) *THAT the costs of the application be provided for.*

3. Hardly a week later, the plaintiffs dashed back to court with Notice of Motion dated 9th March 2020 in which they seek the following orders:

1. *[Spent]*

2. [Spent]

3. THAT this Honourable court be pleased to order that Nakuru CMC ELC case number 48 of 2020 NAKURU GRAIN MILLERS VERSUS ISAAC LELKUTWO be transferred to this honourable court and to be consolidated with NAKURU ELC NO. 18 OF 2020 for hearing and determination.

4. THAT the costs of the application be provided for.

4. When Notice of Motion dated 4th March 2020 initially came up *ex parte* under certificate of urgency on 4th March 2020, I granted prayer (b) thereof and scheduled a date for inter parte hearing. The plaintiffs contend that those orders were disobeyed. In that regard, they filed Notice of Motion dated 11th March 2020 seeking the following orders:

1. [Spent]

2. THAT MUSA CHERUTICH SIRMA, KIPLAGAT NAMUNI and MOSES ARASA, VAYONDA JEPUCHUMBA SIRMA and TITO KIPRONO DAVID KOROS be committed to civil jail for a term of six months for deliberately disobeying the orders of this court issued on 4th March 2020.

3. THAT this honourable court be please to order that the defendants be denied audience until they purge the disobedience of the court order by restoring the status quo obtaining when the orders were issued and served.

4. THAT this honourable Court be pleased to issue such other or further punitive orders in respect of the said disobedience as may be necessary for the ends of justice to be met.

5. THAT the costs of the application be provided for.

5. Aggrieved by the orders of 4th March 2020, the 1st defendant filed Notice of Motion dated 18th March 2020 in which he seeks the following orders:

1. [Spent]

2. THAT this honourable court be pleased to set aside and or vary the orders of status and the consequential orders thereto, issued on 5th March, 2020 by his Lordship Hon. Justice D. O. Ohungo, in the Notice of Motion application dated 4th March, 2020 instigated by the plaintiffs/respondents.

3. [Spent]

4. THAT this honourable court be pleased to issue permanent orders of injunction restraining the plaintiffs/respondents by themselves, their agents, servants, employees, tenants or otherwise howsoever from entering, trespassing, occupying, charging, carrying on any further development, interfering with the defendants quiet and peaceful occupation or dealing in any way with all or any portion of those parcels of land known as LR. NO. 226650 and LR NO. 226651 in any manner whatsoever prejudicial to the interests of the defendants/applicants upon the hearing and determination of this suit.

5. THAT the costs of this application be provided for.

6. The 1st defendant also filed Notice of Preliminary objection dated 18th March 2020 through which he seeks striking out of the application and the entire suit on the following grounds:

1. The plaintiff/applicants application and suit, offends mandatory provisions of The Oaths and Secrets Act (sic), CAP 15 Laws of Kenya.

2. That there is no plaintiff before court.

3. No summons to enter appearance issued in the suit herein.

4. In the alternative and without prejudice to the foregoing the plaintiff never served summons to enter appearance upon the defendants/respondents.

5. The plaintiffs application and suit are fundamentally flawed and incompetent (sic) for want of locus standi.

6. Jurisdiction is contested.

7. Notices of Motion dated 4th March 2020, 9th March 2020 and 11th March 2020 are supported by affidavits sworn by Isaac Kipchumba Rotich Lelkutwo, the 2nd plaintiff. He deposed that the 1st plaintiffs are the administrators of the estate of Kiptui George Chesang (deceased). That on 4th March 1996, the deceased was offered a grant of Uns. Residential Plot No. 11 – Nakuru Municipality measuring approximately 0.2 hectares now known as L.R. No. 22651 which offer the deceased accepted on 16th April 1996 by paying a sum of KShs 55,055. That the

deceased immediately took possession of the said property, fenced it and planted trees on it. That sometime during early 1996, the deceased purchased the parcel of land known as unsurveyed residential plot number 10 – Nakuru Municipality measuring approximately 0.2 hectares now known as L.R. No. 22650 from Joe B. Chepkok, an allottee of the said plot, and took immediate possession after paying the consideration.

8. Mr Lelkutwo further deposed that sometime in 1999, he took possession of the parcels of land known as L.R. No. 22650 and 22651 with the permission of the deceased and ultimately purchased the parcels from the deceased on 8th September 2010 and continued carrying out farming on them. That he has been in uninterrupted occupation of the parcels since 1996. He further deposed that the 1st and 2nd defendants were fraudulently issued with certificates of title in respect of the suit properties on 10th November 2017 and that the 2nd defendant transferred L.R. No. 22651 to the 3rd defendant on 25th January 2018. That on 1st March 2020, the defendants sent over 50 armed youth who destroyed the fence and structures on the suit properties, deposited construction material and started digging trenches with a view to erecting a perimeter wall around the suit properties and two other plots being L.R. No. 22652 and 22653.

9. He further deposed that he learnt that on the same day of 4th March 2020 on which the plaintiffs herein obtained an injunction against the defendants, the 2nd defendant herein, in his capacity as a director of the 3rd defendant herein, instituted Nakuru CMC ELC Case Number 48 of 2020 against him and obtained an injunction against him.

10. With regard to Notice of Motion dated 11th March 2020, Mr Lelkutwo deposed that the orders made by this court on 4th March 2020 were served on 5th March 2020 upon Mr Arasa Kinara who was the defendants' foreman and on 6th March 2020 upon Mr Kemboi S.L. advocate after the said advocate informed Mr Konosi advocate on 6th March 2020 that he had instructions to receive the order and pleadings herein on behalf of the 2nd and 3rd defendants. That despite being served, the defendants continued with construction of a perimeter wall day and night and that as of 11th March 2020, the defendants had put a gate on the suit properties in total disregard of this court's order.

11. The 3rd defendant responded to Notice of Motion dated 11th March 2020 through a replying affidavit sworn by Tito Kiprono David, its director. He deposed that neither he, his fellow director nor the 3rd defendant were served with the order of 4th March 2020 and only came to know about the matter on 11th March 2020 through one Mr Raymond Kiplagat who knows the 3rd defendant and who was in court on that day for other matters. He added that Mr Kemboi has never acted for the 3rd defendant in this matter and did not inform him or his colleagues about this matter. He added that the perimeter wall along L.R. No. 22650 and 22651 was completed by 11th March 2020 and that as at that date they were embarking on two adjacent plots known as L.R. No. 22652 and 22653. He also stated that he is not aware of any foreman by the name of Moses Arasa and that their contractor did not inform him of any court order. The 1st and 2nd defendants similarly filed replying affidavits in which they denied that they were served with the order. They equally denied that Mr Kemboi had any instructions to receive the order on their behalf.

12. The 3rd defendant also responded to the applications dated 4th March 2020 and 9th March 2020 through yet another replying affidavit sworn by Tito Kiprono David. He deposed that the 3rd defendant is the legal owner of the parcels of land known as L.R. No. 22650 and 22651 and that it has been in possession without interruption since 2017. He added that when the 3rd defendant erected a fence around the plots, the applicants raised a complaint and threatened to cause violence as a result of which the 3rd defendant secured a court order in Nakuru CMC ELC Case Number 48 of 2020 since each of the parcels had a value of KShs 6 million which is within the pecuniary jurisdiction of the subordinate court. He annexed a valuation report and stated that the application seeking transfer of Nakuru CMC ELC Case Number 48 of 2020 to this court is not justified.

13. On his part, the 2nd defendant filed a replying affidavit in which he deposed that he sold L.R. No. 22651 to the 3rd defendant on 25th January 2018 and that prior to that date, he had been in uninterrupted occupation of it from 13th March 1996. He denied that he was served with the order of 4th March 2020 or that Mr Kemboi had any instructions to receive the order on his behalf.

14. The applications and the preliminary objection were canvassed together through written submissions. I have considered the preliminary objection, the applications, the affidavits and the submissions. I will deal with the preliminary objection first.

15. For a preliminary objection to be valid, it must raise a pure point of law. The objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, Law JA stated as follows:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

16. Applying the above principles to the objection herein, it immediately becomes clear that grounds 3 and 4 of the objection cannot succeed since they raise matters of fact whose verification will require evidence. I dismiss the said grounds.

17. Ground 1 of the objection is that *the suit "offends mandatory provisions of The Oaths and Secrets Act (sic), CAP 15 Laws of Kenya"*. The 1st defendant reiterated as much in his submissions and further argued that the plaintiffs have not demonstrated capacity to bring this suit. To begin with, there is no such statute as Oaths and Secrets Act within the Laws of Kenya. Perhaps the 1st defendant meant the **Oaths and Statutory Declarations Act**. Even so, no particular provision of the said statute is cited as being infringed by the suit. For those reasons, I dismiss ground 1 of the objection.

18. Under grounds 2 and 5 of the objection, the 1st defendant contends that the 2nd plaintiff has not demonstrated any authority to represent the 1st plaintiffs and that he could not have validly acquired the suit properties from the deceased. A perusal of the plaint herein shows that it was accompanied by a verifying affidavit to which is annexed an authority signed by Christina Sote Kiptui and Margaret Jemutai Chepto who are stated to be suing as the 1st plaintiff and as the administrators of the estate of the late George Kiptui Chesang (deceased). Among the documents listed by the plaintiffs in their list of documents is letters of administration, in respect of the deceased's estate, issued to Christina Sote Kiptui and Margaret Jemutai Chepto on 20th September 2016. I find no merit in grounds 2 and 5 of the objection.

19. Finally, under ground 6, it is argued that this court has no jurisdiction since the value of the suit properties is KShs 12 million which falls within the pecuniary jurisdiction of the subordinate court. This ground is hinged on an issue of fact that needs verification by evidence: the value of the properties. It must fail on that score. Further, the valuation that is relied on to advance the ground has been introduced by the defendants. That violates the requirement that an objection can only be raised and argued on the basis of the facts laid before the court by the party against whom the objection is raised.

20. All in all, Notice of Preliminary objection dated 18th March 2020 is without merit.

21. I now turn to Notice of Motion dated 11th March 2020 which seeks orders that Musa Cherutich Sirma, Kiplagat Namuni and Moses Arasa, Vayonda Jepuchumba Sirma and Tito Kiprono David Koros be committed to civil jail for a term of six months for deliberately disobeying the orders of this court issued on 4th March 2020.

22. Allegations of contempt of court are serious matters since the rule of law is at stake in such situations in addition to the liberty and property of the alleged contemnor being at risk. Consequently, the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See **Mutitika vs. Baharini Farm Limited [1985] KLR 229.**

23. To sustain an application for contempt, the applicant must demonstrate wilful disobedience and the order said to be disobeyed must be clear enough as to leave no doubt as to what is to be done or refrained from. See **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR.** I am not satisfied that any wilful disobedience has been demonstrated in this case. The order is said to have been served personally on Moses Arasa who the plaintiffs have identified as the defendants' foreman. The defendants have denied knowledge of such a person. Further, the order was not personally served on the defendants. Although the plaintiffs insist that Mr Kemboi, advocate, received service of the order and the pleadings herein on behalf of the defendants, Mr Kemboi is not on record in this matter and his actions cannot bind any party in the matter. For all those reasons, Notice of Motion dated 11th March 2020 fails since it does not meet the higher standard of proof required in contempt proceedings.

24. Through Notice of Motion dated 4th March 2020, the plaintiff seek an interlocutory injunction against the defendants. They must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358.** They must establish a *prima facie* case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR.**

25. From the material placed by the parties before the court, there is no dispute that the 3rd defendant is the registered proprietor of the suit properties. The 2nd plaintiff claims the suit properties on allegations that he purchased them from persons who had been allotted by the government. He has exhibited copies of allotment letters and documents supporting his claims of purchase. Whereas the rights of the 3rd defendant as a registered proprietor are secured by law, I am alive to the fact that the plaintiffs are seeking cancellation of the defendants' title. In the circumstances, it is important that the suit properties be preserved to await determination of the dispute at the hearing of the suit. This is in line with **paragraph 32 of Gazette Notice No. 5178 titled "Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts"** which encourages preservation of the suit property. It provides:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

26. So as to preserve the suit property while taking into account the overriding interest of justice herein, I will also grant an order of inhibition. That resolves Notice of Motion dated 4th March 2020.

27. Since this ruling has finally determined Notice of Motion dated 4th March 2020, prayer 2 of Notice of Motion dated 18th March 2020 stands spent. Further, a reading of prayer 4 of the application shows that the 1st defendant thereby seeks a permanent injunction "*upon the hearing and determination of this suit*". As drawn, the permanent injunction is not sought as an interlocutory relief and cannot therefore issue at this stage. If still interested in pursuing such a relief, the 1st defendant may wish to amend its defence to introduce a counterclaim to that effect. All in all, Notice of Motion dated 18th March 2020 is without merit and is dismissed.

28. Regarding Notice of Motion dated 9th March 2020, there is no dispute that Nakuru CMC ELC Case Number 48 of 2020 exists. A perusal of the plaint therein shows that parties to the suit are the 2nd plaintiff herein and the 3rd defendant herein. The reliefs sought in the suit are a declaration that the parcels of land known as L.R. No. 22650 and 22651 belong to the 3rd defendant herein and a permanent injunction restraining the 2nd plaintiff herein from dealing with the said properties. In this suit, the plaintiffs seek among other orders, cancellation of the defendants' titles to L.R. No. 22650 and 22651. In those circumstances, common questions of law and fact will arise in both matters and the interest of justice dictate that they be determined at once by the same court. The plea that Nakuru CMC ELC Case Number 48 of 2020 be

transferred to this court and to be consolidated with this suit for hearing and determination is merited.

29. In the result, I make the following orders:

- a) **Notice of Preliminary objection dated 18th March 2020 is dismissed.**
- b) **Notice of Motion dated 11th March 2020 is dismissed.**
- c) **Notice of Motion dated 18th March 2020 is dismissed.**
- d) **Nakuru CMC ELC Case Number 48 of 2020 Nakuru Grain Millers vs Isaac Lelkutwo is hereby withdrawn from the subordinate court, transferred to this court and consolidated with this suit for hearing and determination.**
- e) **This suit (ELC No. 18 of 2020) shall be the lead file.**
- f) **Status quo existing on the parcels of land known as L.R. No. 22650 and 22651 as at the date of delivery of this ruling is maintained pending hearing and determination of the consolidated suits.**
- g) **An order of inhibition be registered against the parcels of land known as L.R. No. 22650 and 22651 pending hearing and determination of the consolidated suits.**
- h) **Costs of the Notice of Preliminary Objection and the applications shall be in the cause.**

Dated, signed and delivered at Nakuru this 18th day of January 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Konosi for the plaintiffs

Mr Opar holding brief for Mr Biko for the 1st defendant

Mr Opar and Ms Kathurima for the 2nd and 3rd defendants

Court Assistants: B. Jelimo & J. Lotkomoi