



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. CIVIL SUIT NO. 346 OF 2002

MUIGAI & OTHERSPLAINTIFFS

V E R S U S

JOHN WAINAINA

JOHN GATHUMU

NZAU MWALIMU NZAU DEFENDANTS

R U L I N G

Before me are two applications. The first application made by Chamber Summons dated 26th February, 2002 seeks orders to restrain the Defendants from committing acts of waste of trespassing on and/or excavating the soil of the parcel of land comprised in title number Nairobi Block 123. It also seeks the order of this court to be served upon officer in charge, Kasarani Police Station as well as Provincial Police Officer, Nairobi to ensure immediate compliance thereof.

The second application by Notice of Motion dated 1st March, 2002 seeks to review, vary and/or set aside the ex-parte order made by this court on 26th February, 2002. In any event, if this court does not grant the plaintiff the interim order as prayed, the Defendants would have obtained their prayers

. Both the applications are supported and opposed by several affidavits filed by both the parties. The plaintiffs have filed three affidavits sworn by one Robert Wamithi Mutahi on 25th February, 2002, 8th March, 2002 and 19th March, 2002. The Defendants have filed two affidavits sworn by John Wainaina the first Defendant on 1st March, 2002 and replying affidavit of Nzau Mwalimu Nzau sworn on 8th March, 2002.

Mr. Ngatia learned counsel for the plaintiffs meticulously put forth their case. It is shown that the plaintiffs are registered as owners by a conveyance dated 8th October, 1977. They have subdivided the suit property and have changed the user thereof from Agricultural to Commercial. However, according to them they cannot undertake any activity due to the acts of waste committed by the three defendants. The acts of waste by way of quarrying the stones, murrum and red soil are demonstrated by production of photographs alleged to have been taken by Robert Wamithi. A valuation report made by Wamae Murithi & Associates is produced which shows 45.5 acres of land are affected and would be lost if those excavation activities are continued. The loss is quantified at Kshs.8.5 million. It is averred that none of the defendants reside in the suit property and that they carry out their illegal activities by allowing their agents to excavate building materials by charging Kshs.20,000/= and cess of Kshs.500/= per each lorry load of building materials so excavated. It is also contended that the third Defendant was charged with offence of trespass on the suit property on the complaint made by the plaintiffs. Robert Wamithi has also averred that the 3rd Defendant was arrested when he pointed him out to the police and when presented before the court. The 3rd Defendant gave his name as Shadrack Nzuki and pleaded guilty of the charge of

trespass and was convicted on his own plea on 18th August, 93. The case was before Makadara Court bearing Criminal No.10630/93. Furthermore, it is demonstrated that the 3rd Defendant had filed a Civil Case bearing H.C.C.S. No.558/1999 against the plaintiffs claiming ownership of the suit property by way of adverse possession. In that case it was contended by him that he lived on the suit premises since 1959 and that he was given the suit property as a gift from an European named Mr. Moore. After hearing the application Hon. Kuloba, J. dismissed his case on 2nd July 2001. The order to that effect is annexed by the plaintiffs.

It is contended by Mr. Ngatia that the same defences have been repeated by the 3rd Defendant in this case and he cannot be allowed to do so as the principle of estoppel applies against him. The only difference is that instead of the year 1959 as alleged in previous matters, he now claims that since 1940 he has been living on the suit property. He has reiterated his claim on the handwritten note by one Mr. Moore. It is appropriate to reproduce the said note which is shown to have been written by one Mr. Moore on 5th June, 1959. That note reads as under:-

I Mr. Moore being the proprietor of Kentile L.R. 57 has this day allowed Mwalimu Nzau all the rights and to claim for the title of this land and all the buildings erected in it.

Signed

Mr Moore.

It was finally submitted that as there are numerous persons who need to be evicted from the suit premises and that they are committing an act of trespass the police should be asked to assist the compliance of the order of this court.

Mr. Mariaria the learned counsel appearing for the defendant valiantly opposed the application. He reiterated the claim of 3rd Defendant as a bequest from Mr. Moore and described the aforesaid note as his will. I may not comment much further to this interesting point raised by him. But I may note without difficulty that the proprietor of the suit property was Kentile Limited as shown in the Deed of conveyance. That note to say the least at this point can neither be accepted as a testamentary document nor as transfer document. It does not lie in the mouth of the 3rd Defendant that the order made by Kuloba, J. does not specify on which ground his originating summons was dismissed. I can simply say that the order is the final expression of the decision of a court. In any event the 3rd Defendant has not responded to the effect that the order was made in default and of course he cannot say that because the order itself states that both the parties were present and heard by the Judge. He cannot further deny that he filed the said suit on the basis of the same two claims which he now brings in as defence to this application. It is also not shown that there is an appeal pending from that order. He went on to further contend that the 3rd Defendant was not the party in the Criminal case as his name is not in the list of the accused persons. However it cannot be ignored that Robert Wamithi has specifically averred that the 3rd Defendant gave that name to the court and he was the 5th accused. No denial of that averment is made by the 3rd Defendant. Once more Mr. Mariaria made very interesting submissions by stating that the principle of estoppel cannot apply to the 3rd Defendant despite the order made against him in the High Court case because he was a plaintiff in that case and in this case he is one of the Defendants! He however fell short of explaining how once a claim is adjudicated against him the same can be used as a defence in a court. Less is said about this contention it is better.

I shall wholly adopt the following passages from the famous case on estoppel from English Jurisdiction, namely *Hoysteed V. Commissioner of Taxation (1926) A. C. U 155* at pages 165 namely:-

“Parties are not permitted to begin fresh litigations because of the new views that may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of legal result either of the construction of documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and that there is abundant authority reiterating that principle.”

“..... it was held that if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title.”

It is also submitted with emphasis that now the damages are already quantified by a valuer in the sum of Kshs.88.5 million, the Defendants could only be asked to repay the same if the court finally finds that they were liable. It is surprising that the Defendants, without showing they are so capable to pay that sum (which is substantial in all respects) have audacity to ask this court to allow them to continue with more damages.

In spite of my insistence to state on which claim or right the Defendants are asking this court to allow them to occupy the premises in the face of the order of Kuloba J. nothing was said except placing the two recurrent grounds which in my view are adjudicated and denied to the Defendants.

Even following Section 7 of the Civil Procedure Act it is made clear that the issue of adverse possession and the claim on so-called Mr. Moore's note were issues in the previous case between the same parties and determined. The Defendants' claim that whatever would be the position they are now on the property and should not be asked to move until the final determination cannot be considered justifiable and proper. It shall tantamount to allow or encourage an illegal claim by the Defendants. The situation or the status quo in this case would be the status quo which would or should be before the illegal stay of the Defendants. I have to right the wrong as Justice of Appeal Mr. Shah said in the case of M/S Gusii Mwalimu Investment co. Ltd & 2 others v/s Mwalimu Hotel Kisii Ltd. C.a. No. 160 of 1995 (Unreported).

The Defendants relied on the judgment of Kwach J. A. in the case of Kamau Mucuha v/s Ripples Ltd C. application No. Nai 186/92 (*Unreported*) and submitted that this court cannot grant the prayer of assistance by the police. The facts of the said case were, in my humble view, very different than those of this case. In present case, as has been amply demonstrated by the plaintiff, there are many persons who enter the suit properties under the protest of the Defendants.

The Defendants have not denied the averments of the plaintiffs that they are their agents and they pay the defendants for quarrying the building materials on the land. The Defendants have failed, even prima facie, to prove their claim over the suit property. The photographs produced show the activities which are carried out by several persons. The plaintiffs have now also proved prima facie (with probability of success that they are trespasses on the suit properties and are undertaking acts of waste on their property. In these circumstances, this court will not be going against any law in allowing the police interventions.

Finally I do note that the effect of the order of injunction prayed for is in mandatory form. But this court is empowered to issue mandatory injunction in appropriate case and specially when there is serious breach and violation of the proprietary rights of litigants. I find this case is one of such cases.

The upshot of all the above is that the application dated 26th February 2002 is granted in terms of prayers (b) and (c) thereof. No order for costs is prayed for and I do not grant any.

Dated and delivered at Nairobi this 11th day of April, 2002.

K. H. RAWAL

J U D G E.