



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO. 16 OF 2020

MONICA WAMBUI KABOGO.....1ST PLAINTIFF

JOHN THARAO KABOGO.....2ND PLAINTIFF

HEZEKIAH NJAGI KABOGO.....3RD PLAINTIFF

GEORGE NGURE KABOGO

(suing as the joint personal representatives of the Estate of KABOGO THARAU (Deceased))

=VERSUS=

PHILIP ONDIEKI MAYENGA.....1ST DEFENDANT

CONLET BITEKI KIKECHI.....2ND DEFENDANT

EMBAKASI RANCHING CO. LTD.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR NAIROBI.....4TH DEFENDANT

RULING

1. This is the notice of motion dated 27th January 2020 brought under order 40 rule 1 and order 51 of the civil procedure rules and section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law).

2. It seeks orders:-

1. *Spent.*

2. *Spent.*

3. *Spent.*

4. *That this honourable court be pleased to issue temporary orders of injunction restraining the 4th defendant his servants and or agents from registering leases, transferring or in any adverse manner interfering with parcels of land known as LR Nos.105/1272 and 105/1273 Embakasi Ranching Company Limited until the hearing and the final hearing and determination of this suit.*

5. *That this honourable court be pleased to issue temporary orders of injunction restraining the 1st and 2nd and 3rd defendants*

their servants and or agents from entering, transferring or in any adverse manner interfering with parcels of land known as LR No's. 105/1272 and 105/1273 Embakasi Ranching Company Limited until the final hearing and determination of this suit.

6. Costs of this application.

3. The grounds are on the face of the application and are set out on paragraphs (1) to (5).
4. The application is supported by the affidavit sworn by George Ngure Kabogo, one of the administrators of the Estate of the late Kabogo Tharau, the 4th plaintiff/applicant herein, sworn on the 27th January 2020.
5. The application is opposed. There is a replying affidavit sworn by Conlet Biteki Kikechi, the 2nd defendant/respondent herein on the 14th December 2020. She has also filed grounds of opposition dated 14th December 2020. The 3rd defendant/respondent also opposes the application. There is a replying affidavit sworn by Walter Kigera Vice Chairman of the 3rd defendant/respondent, on 27th August 2020. It appears the 1st defendant/respondent did not file any response.
6. On the 30th November 2020, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

The Plaintiffs/Applicants Submissions

7. They are dated 9th September 2020. The deceased Kabogo Tharau became a shareholder of the 3rd defendant on 1st August 1978 vide share certificate No 4606 paid for two shares noE249 and No. E250 which he balloted for on 28th November 1982. The policy of the 3rd defendant/respondent was that every paid up member got a bonus plot for each fully paid up share. The deceased as a result got two bonus plots being Nos E249B and E250B which became Plot Nos 136/14438 and 136/14439.
8. After sub-division the 3rd defendant/respondent showed all the shareholders their respective plots. In early 2018 all supporting allotment documents and receipts were returned to the 3rd defendant/respondent for verification and to facilitate the drawing of lease documents. Online list of genuine owners was prepared and released to the public where it shows clearly that the deceased was the legitimate owner of original plots Nos E249 and E250 which after finalizing survey resulted in LR Nos 105/1272 and 105/1273.
9. The 3rd defendant/respondent called on members to visit their offices to execute the lease documents on 19th November 2019 but upon arrival the plaintiffs found that the lease for LR Nos 105/1272 and 105/1273 were on the names of the 1st and 2nd defendants respectively. The same had been executed.
10. The plaintiffs are joint administrators of the Estate of the late Kabogo. Tharau who became a shareholder of the 3rd defendant in 1st August 1978 vide a share certificate No 4606. The 3rd defendant/respondent in its defence and replying affidavit do not deny that the deceased was a shareholder and allottee of the two plots. The deceased embarked on the long wait for the 3rd defendant to finalise the process of survey which was massive and full of controversy but before the finalization of the process he passed away on 30th January 2014 leading to the ill connived plans of the 3rd defendant to defraud his family.
11. They have put forward the cases of **Fiona J Wangari vs Benson Gachuhi Maina & 4 Others [2020] eKLR; Moses C. Muhia Njoroge & Others vs Jane W Lesaloi & 5 Others [2014] eKLR**. The plaintiffs have demonstrated a genuine and arguable case and which calls for a serious explanation from the defendants. This satisfies this court to issue preservative orders to curtail flagrant abuse of proprietorship rights.
12. The plaintiffs will suffer irreparable injury if these orders are not granted. This court is urged to take judicial notice on conducts and frustrations of reversal of ownership leases on land and the craze on land ownership in Kenya.
13. The deceased was awarded two bonus plots, Nos E249B and E250B which became Plot Nos 136/14438 and 136/14439. It is only later in 1998 that the 3rd defendant purports to alienate the same parcels of land to the 1st and 2nd defendants. The 3rd defendant did not demonstrate how they were able to alienate same land parcel numbers to two different people. The 1st and 2nd defendants did fraudulently acquire the suit properties. They have not demonstrated that they were shareholders or how they became allottees. The balance of convenience tilts in favour of the applicants who have demonstrated legal ownership process which is untainted and unchallenged. They pray that the orders be granted.

The 2nd Defendant's Submissions

14. They are dated 14th December 2020. The prayers sought on the plaintiffs notice of motion are unmerited and the same have been overtaken by events. The orders sought by the plaintiffs are drastic in nature and can only be awarded in the most deserving cases. The plaintiffs have not demonstrated to this court any prima facie case with a probability of success against the 2nd defendant.
15. The 2nd defendant was lawfully, duly registered and issued with a certificate of lease by the 4th defendant which he obtained for value and in good faith in respect of LR NO 105/1273. The certificate of lease is indefeasible and conclusive proof of ownership of the suit property by the 2nd defendant who is currently in actual and rightful occupation of the same.
16. The 2nd defendant cannot be deprived of his duly acquired ownership and possession of the said parcel of land. He had no knowledge of any fraud and was not a party to any fraud having followed due process as was required of him under the law and obtained a valid certificate

of lease to the suit land. He has put forward the cases of **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representativeS of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR; Katende vs Haridar & Company Limited [2003] 2 E.A. 173.**

17. The plaintiffs have failed to substantiate the particulars of fraud. He has put forward the case of **Minnie Waithira Ndindiri vs Francis Ciera Mbugua [2016] eKLR.** He prays that the application be dismissed with costs.

18. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavits in response and the annexures. I have considered the written submissions and the authorities cited. The issues for determination are:-

(i) Whether the plaintiffs/applicants' application meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

19. It is necessary to briefly examined the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358.** In the case of **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal set out what amounts to a prima facie case. I am guided by the above authorities.

20. It is the plaintiff's case that the late Kabogo Tharao paid all the company's dues relating to ownership of the suit properties. He was issued with a provisional letter allocating him two plots E249 and E250 on 28th November 1982. This resulted to LR Nos 105/1272 and 105/1273. He was also allocated two bonus Plots Nos E249B and E250B which became Plot Nos 136/14438 and 136/14439 respectively.

21. The 2nd defendant on his part told the court that he was lawfully and duly registered and issued with a certificate of lease by the 4th defendant for LR No.105/1273 on 27th March 2019. That he obtained the same for value and in good faith from the 3rd defendant/respondent.

22. The 3rd defendant/respondent through an affidavit sworn by Walter Kigera vice Chairperson denies that it allocated the deceased (Kabogo Tharao) any bonus plots. That the deceased was only allocated two plots which were identified to him by a surveyor. In paragraph 8 he states:-

"That the 3rd respondent confirms that indeed the deceased's name was put in the list of for allocation of plot numbers E249 and E250 currently known as LR No. 136/14438 and LR No. 136/14439 but not any other plots".

In paragraph 11 he states:-

"That the land known as LR No 105/1272 and LR No 105/1273 were legally allocated to the 1st and 2nd defendants respectively after having paid the requisite fees".

23. It is clear from the foregoing that the 3rd defendant/respondent, the initial owner of the land confirms the 1st and 2nd defendants to be the legal owners of LR No 105/1272 and LR No 105/1273. It is not in dispute that they (1st and 2nd defendants) have been issued with certificate of leases. The 2nd defendant was issued on 27th March 2019 way before this suit was filed.

24. **Section 26** of the Land Registration Act 2012 provides:-

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

It will be incumbent upon the plaintiffs/applicants to prove at the trial that the certificate of leases issued to the 1st and 2nd defendants were issued fraudulently and or through misrepresentation.

25. At this point I find that the plaintiffs/applicants have failed to establish a prima facie case with probabilities of success at the trial.

26. I have considered the documents relied on by the 2nd defendant/respondent. He appears to have acquired the suit property from the 3rd defendant/respondent lawfully and procedurally. He is the registered lessee on LR No 105/1273.

27. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was) stated that:-**

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

28. I am not satisfied that the plaintiffs/applicants deserve this kind of protection.

29. The plaintiffs/applicants have also failed to demonstrate that they will suffer irreparable loss that cannot be compensated by an award of damages if these orders are not granted. I am guided by the case of **Oloo vs Barclays Bank of Kenya Ltd [2002] KLR 394.**

30. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th day of February 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Muhuhu advocate for the plaintiffs

No appearance for the 1st defendant

Mr. Tito for Mr. B Nzakyo for the 2nd defendant

Mr. Kimetto for Mr. Juma for the 3rd defendant

Phillis – Court Clerk