



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CAUSE NO. 270 OF 2017**

**FORMERLY NAKURU ELC CAUSE NO. 62 OF 2012**

**TITAME OLE SANKEI.....PLAINTIFF**

**-VERSUS-**

**JOHNSON KIPTUMAI CHERUIYOT.....DEFENDANT**

***RULING ON AN APPLICATION DATED 24<sup>TH</sup> APRIL, 2018***

***AND 30<sup>TH</sup> OCTOBER, 2018.***

**RULING**

The Defendant/Applicant herein has filed two identical applications dated 24<sup>th</sup> April, 2018 and 30<sup>th</sup> October, 2018 both of which were brought under section 3A and under order 40 rule 1,2,3 and 9 of the Civil Procedure Rules respectively.

On the First Application dated 24<sup>th</sup> April, 2018 the applicant sought for a restraining order against the Defendant pending the hearing and determination of the Plaintiff/Respondent Application and in the 2<sup>nd</sup> Application dated 30<sup>th</sup> October, 2018 he sought for temporary order of injunction restraining the Plaintiff/Respondent or their agents and employees, felling of indigenous trees, sub-dividing, selling and/or evicting the applicants from the suit land and further that pending the hearing and determination of the suit herein a permanent order of injunction do issue to restrain the plaintiff/respondent by themselves or any other person acting on their behalf from sub-dividing, putting up structures, planting exotic trees, evicting or interfering with plot No. CIS MARA/OLOLOLUNGA/197 now 17052 and 17060.

Both Applications were based on the grounds that the Applicant is the sole owner of Parcel No. CIS MARA/OLOLOLUNGA/360 and the respondents are out to sub-divide, encroach, sell parts of the land to third parties and that the Plaintiff/Respondent has infringed on the Applicant's right over the suit land.

Since both the Applications are made by the same Applicants herein and are against the same Respondents, and orders sought are the same and they relate to the same subject land. I do exercise my discretion and consolidate both Applications and make one decision since they are being necessitated because the applicant before the ruling in the first application could be made, filed the latter application and it is as a result of this and to save on judicial time that I will determine the two applications together.

In his Affidavit in support of both applications both the applicants allege that the respondent has given a power of Attorney to his sons who have commenced to sub-divide the suit land and selling them to third parties and that the purchasers of the land are now demolishing houses on the suit land and because of the above the applicant prays that the Respondent be restrained by the court pending the hearing and determination of the suit herein.

The Respondent had opposed both Applications by way of a replying affidavit which was filed in court on 5/10/18 and grounds of opposition that were filed in court on 12<sup>th</sup> October, 2018.

The Respondent in his replying affidavit avers that the pleadings in the notice of motion dated 24<sup>th</sup> April, 2018 comprises of unsigned pleadings that offends the provisions of order 2 Rule 16 of the Civil Procedure Act and hence defective and fundamentally flawed and the order sought are unintelligible and hence the court can grant orders that can't be understood.

The Respondent further averred that the Applicant is in abuse of the court process and has continued to file several applications without waiting for the court's ruling on either of the Applications and has confused the court and the parties.

The Applicant contends that the instant application is premature as it seeks orders against the 2<sup>nd</sup> and 3<sup>rd</sup> proposed defendants even before the court makes a determination of the same and hence the application will condemn the 2<sup>nd</sup> and 3<sup>rd</sup> proposed defendants unheard.

The Respondents avers that the property known as CIS MARA/OLOLOLUNGA/197 does not exist anymore and hence the court cannot issue orders that will be incapable of enforcement and the orders if granted will be in vain.

On the application dated 30<sup>th</sup> October, 2018 in which the Respondent had filed grounds of opposition, he contends that the Application is an abuse of the court process and the same is sub judice as it seeks the same prayers, grounds and parties as the Application dated 24<sup>th</sup> October, 2018 and the Applicant has filed one Application after another without waiting for the court to render its determination and has thus become vexious, frustrating and abuse of the court process.

The respondent further states that both applications cannot meet the threshold for grant of orders of injunction and more particularly an order of a permanent injunction cannot be granted at the interlocutory stage and furthermore both applications are based on falsehoods and unsubstantiated claims.

I have considered the applications before me and the grounds of opposition and the replying affidavit in opposition to the application.

First and foremost, I must point out that though the applicant is unrepresented litigant and has filed a history of applications in this matter, a fact that I must say is in exercise of his fundamental right to access the court however, the applicant even after being prompted severally by the court he continued in his mission and even not caring about the fact that there are others whose determination was still pending and as rightly pointed out confusing the court and the respondent in equal measure.

In the instant application it is evident that the orders the applicant is seeking are to restrain the respondent from selling, cultivating and dealing with land parcel No. CIS MARA/OLOLOLUNGA/17052-17060 which was formally land parcel No. CIS MARA/OLOLOLUNGA.197. The Respondent in his grounds of opposition has stated that land parcel NO. CIS MARA/OLOLOLUNGA/197 does not exist and hence the orders sought cant be granted. However, I disagree with the above position as the applicant states that the suit land was formally part of land parcel No. CIS MARA/OLOLOLUNGA/197.

On the pleadings, the respondent states that they offend the provisions of order 1 Rule 16 of the Civil Procedure Rules and that being unsigned thus untenable and the respondent in his submissions has relied on the case of **HCC NO. 1994 OF 2000 1 REGINA KAVENYA MUTUKU & 3 OTHERS -VERSUS- UNITED INSURANCE COMPANY LTD NAIROBI** where the learned Justice Ringera held:-

**“an unsigned pleading has no validity in law as it is the signature the appropriate person on the pleadings which authenticate the same and unsigned document is not a pleading”.**

I have looked at the record and I do find that both the applications that are filed in court are all signed and authenticated it is the court record that is final as a true record of all the pleadings and proceedings in any matter if the respondent had a copy that was unsigned then he ought to have checked the court record and hence I find that the applications are properly signed and filed in court.

On the grant of the interlocutory orders at this stage of the proceedings I find that the respondents position is correct in law.

On the issue of whether the application is sub judice and premature as relates to the joinder of proposed interested party, as stated by the respondent I have not found any order sought by the applicant against the proposed interested party as the orders sought are explicit as against the respondent herein.

From the above position what remains is whether the applicants have established the grounds of orders of injunctions. It is incumbent upon the applicant to establish the conditions that exist for the grant of injunction namely that the applicant has established a prima facie case with a probability of success and that damages may not be adequate compensation and the balance of convenience tilts in his favour.

Having carefully considered the application and all the issues that were raised I find that the applicant has shown proof that the respondent has granted his children power of attorney to deal with land and having annexed copies of sale agreement and photographs, search certificates in respect of the suit the applicant's apprehensive is real and well founded and it is my finding that he has established a prima facie case with a probability of success. On whether damage will be adequate compensation I have not seen any undertaking by the respondent to satisfy any judgement that may arise and in the circumstances, I find damages may not be adequate and hence the balance of convenience rests in his favour.

From the above therefore I will allow both applications in the following terms:-

1. An order of injunction do issue restraining the respondent by himself, agents, employees or any person acting on his behalf from selling, sub-dividing, putting up structures, felling trees and any manner interfering with land PARCEL NO. CIS MARA/OLOLOLUNGA/17052-17060 pending the hearing and determination of the suit herein.

I will grant the costs of the application to the applicants.

Orders accordingly.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 5<sup>th</sup> day of July, 2019**

**Mohammed Noor Kullow**

**Judge**

**5/7/19**

In the presence of:-

Mr Kilele for Kiplangat for the plaintiff

N/A for the defendant

CA:Chuma

**Mohammed Noor Kullow**

**Judge**

**5/7/19**