



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 102 OF 2017

WILLIAM KYENGO SILA.....PLAINTIFF/APPLICANT

-VERSUS-

MAURICE MWANZA KAKUL.....1ST DEFENDANT/RESPONDENT

JOSEPH MUTUA.....2ND DEFENDANT/RESPONDENT

PETER MAILU MUNYAO.....3RD DEFENDANT/RESPONDENT

PATRICK KIMUYU MUNYAO.....4TH DEFENDANT/RESPONDENT

FRANCIS MUSYOKA MWOLOLO.....5TH DEFENDANT/RESPONDENT

PIUS MUTETI MUSYIMI.....6TH DEFENDANT/RESPONDENT

PAUL MATHUMBI.....7TH DEFENDANT/RESPONDENT

BENEDICT KING'OO MUSEMBI.....8TH DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's Notice of Motion Application expressed to be brought under Order 40 Rules 1(a) & (b) and 2 (2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act for Orders: -

i. That pending hearing and determination of the suit herein, an order of injunction do issue against the Defendants restraining them, their agents, servants and contractors and each and every one of them from entering Land Parcel Nos. 609, 752, 748, 749, 746, 751, 753, 754, 755, 608 and 750 – Kisekini Adjudication Section and cultivating, ploughing, cutting/harvesting trees, demolishing houses thereon, constructing structures thereon or in any other way interfering with the said parcels of land or the Plaintiff's peaceful occupation and use thereof.

ii. That the costs of this application be paid by the Defendant/Respondents.

2. The application is dated 3rd April 2019 and was filed in court on 25th April 2019. It is predicated on the grounds on its face and is supported by the supporting and further affidavits of William Kyaengo Sila, the Plaintiff/Applicant herein, sworn at Machakos on 3rd April, 2019 and 29th January 2020 respectively.

3. The Defendants/Respondents have opposed the application vide the replying affidavit of Benedict King'oo Musembi, the 8th Defendant/Respondent, sworn at Machakos on 23rd July, 2019 with the authority of the other Defendants/Respondents and filed in court on 1st August, 2019.

4. The application was canvassed by way of written submissions.

5. The Plaintiff/Applicant has deposed in paragraphs 2, 3, 4, 5, 6 and 7 of his supporting affidavit that the disputed land is the Plaintiff/Applicant's ancestral land, having been unlawfully sub-divided by the Defendants and/or their agents during land adjudication in

Kisekini area and recorded/registered in the Defendants' names, that the unlawful and sub-division and recording/registration of the Plaintiff's said ancestral land was done even after the court (vide Kilungu DMCCC No. L 26 of 1977) had awarded the said land to the Plaintiff and/or the Plaintiff's family on or about 5th April, 1981 and the court also fixed boundaries of the land, that the Plaintiff/Applicant and his family have occupied and developed the suit properties since the date of the said court order, and even long before, the Plaintiff and his family have permanent buildings/homes and cultivated shambas with both subsistence crops and mature exotic trees thereon, that the Defendants are, and have been threatening to demolish the Plaintiff's houses and to harvest his mature exotic trees on the suit parcels of land, and have severally attempted to trespass onto his cultivated shambas and that the Plaintiff stands to suffer irreparably unless orders sought herein granted.

6. On the other hand, the 8th Defendant/Respondent has deposed in paragraphs 4, 5, 6, 7, 8, 9 10, 11, 12, 13, 14 and 15 of his affidavit that Land parcels subject to the application have already been issued with title deeds as follows: -

- i. Makueni/Kisekini/746 – Joseph Mutua Mutunga
- ii. Makueni/Kisekini/748 – Gakui Muchimi
- iii. Makueni/Kisekini/749 – Gakui Muchimi
- iv. Makueni/Kisekini/750 – Pius Muteti Musyimi
- v. Makueni/Kisekini/751 – Patrick Kimuyu Munyao
- vi. Makueni/Kisekini/752 – Peter Mailu Munyao
- vii. Makueni/Kisekini/755 – Benedict King'oo Musembi
- viii. Makueni/Kisekini/608 - Benedict King'oo Musembi.

That as for plot numbers 753 and 754, 8th Defendant was unable to get the title deeds because they are in the names of Mwololo Musyimi and Maundu Musyimi who are already deceased, that Gakui Muchimi who is known as Gabriel Kakui Musyimi died on 26th February, 2010 before this case was filed, that Paul Mathumbu Munyao died on 7th July, 2019 and letters of administration are yet to be taken out for his estate, that the title deeds for the suit properties were processed after the process of adjudication had been undertaken with the Land Adjudication Officer's decision of 6th July, 2016 being the last decision, that after the decision by the Land Adjudication Officer, the Plaintiff/Applicant never appealed to the Minister within the 60 days granted, that the Plaintiff/Applicant is not in occupation of any suit property but it is the Defendants who are occupying and have been in possession of the suit properties, that the Plaintiff/Applicant is settled at a place called Nthunguni, which is about 7 kilometers away from the suit properties, and has never been in possession or use of any of the properties, that the Plaintiff's application is based on falsehoods as he is not settled in any of the suit properties, that the application is brought in bad faith and malice since the Plaintiff was aware even at the time he filed the suit the Defendants were the ones in possession, that the application by the Plaintiff is an attempt to evict the Defendants from properties registered in their names or names of their parents before the case is fully heard and that he is advised by his advocates on record, which advice he verily believes to be true, that the Plaintiff has not satisfied the conditions for being granted an injunction.

7. In his further affidavit, the Plaintiff/Applicant has deposed in paragraphs 2, 3, and 4 that having read and understood the Replying Affidavit of Benedict King'oo Musembi sworn on 23rd July, 2019 and filed herein on 1st August, 2019, he has noted that the Defendants have taken out title deeds on the suit parcels of land during the pendency of the suit herein, that in view of the foregoing, the Plaintiff needs to amend his Notice of Motion dated 3rd April, 2019 and to further amend the plaint herein before either the main suit or his said Notice of Motion can be heard; all in the interest of justice and that the Plaintiff verily believes that the Defendant's act of taking out title deeds on the suit properties during the pendency of the suit herein was meant to defeat the cause of justice and that justice must, however, prevail.

8. It is common ground that in order for the court to grant the order of injunction, the Plaintiff/Applicant must satisfy the principles set out in the case of **Giella -Vs- Cassman Brown & Co. Ltd [1973] EA 358**.

9. In their submissions, the counsel for the Plaintiff/Applicant have contended that it has not been denied that the larger parcel of land (then undemarcated/unsurveyed), which was the subject matter in Kilungu District Magistrates Court in case No. L 26 of 1997 is the same one in the suit herein. The counsel went on to submit that the Defendants/Respondents have not shown or demonstrated that they are either in occupation of the suit properties or that they will suffer any form of prejudice if the orders sought are granted.

10. It was also the counsel's submissions that the Plaintiff/Applicant has a *prima facie* case with probability of success. That being in occupation of the suit properties, the Plaintiff/Applicant stands to suffer irreparably and that the balance of convenience tilts in his favour.

11. On the other hand, the submissions by the counsel for the Defendants/Respondents in respect of the first principle/condition were that even though the Plaintiff/Applicant alleges that the suit property is ancestral land which was allocated to his family by court vide Kilungu DMCC No. L 26 of 1977 on 5th April, 1981, he neither attached the judgement and the decree ensuring therefrom to his supporting affidavit nor did he identify who the parties were to the proceedings.

12. The counsel for the Defendants/Respondents went on to submit that the Respondents have shown that the suit property was issued to them after the objection that was before the Land Adjudication Officer was dismissed. The counsel pointed out that despite the Plaintiff/Applicant being granted 60 days to appeal to the Minister, he never did so and, therefore, the Defendants/Respondents were issued

with title deeds. The counsel added that the Plaintiff/Applicant has not denied the fact that the Defendants/Respondents have settled on the land.

13. It was further submitted that the Land Adjudication Act, Cap 284 of the Laws of Kenya provides for the procedure of ascertaining ownership to land before titling. That under Section 29 of the Act, any person aggrieved by the decision of the Land Adjudication Officer may appeal to the Minister within 60 days and the decision of the Minister is final. That the Plaintiff/Applicant having failed to exercise his right within 60 days provided under the law, the decision made by the Land Adjudication Officer is final and binds upon the Plaintiff/Applicant.

14. The Defendants/Respondents further submitted that the Plaintiff/Applicant should not attempt to use this court as an Appellant option. In support of his submissions, the counsel relied on the case of **Dume Deri Mumbo & 19 Others (Suing on their own behalf and on behalf of Wandarari Clan) –Vs- Cabinet Secretary of Lands, Housing and Urban Development & 6 Others [2016] eKLR** where Angote J while dismissing an application for injunction held;

“...the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings.”

15. The counsel further cited the case of **Benjamin Mwanzia Wambua (Suing as legal representative of the estate of Mukui Wambua Maingi -Vs- Stephen Kimeu Kimanga in Makueni ELCC No. 84 of 2017**. The counsel submitted that the position in the two authorities applies to the decision by the Land Adjudication Officer under Section 26 if it is not appealed against within 60 days.

16. The counsel further submitted that it is the Defendants/Respondents who are holding the title deeds to the suit properties after the process of adjudication was done. The counsel pointed out that the Defendants/Respondents are also the ones in occupation and granting the orders of injunction as prayed will amount to evicting them and technically granting the Plaintiff/Applicant final orders.

17. On the issue of irreparable harm, the counsel submitted that the Defendants/Respondents have established their homes in the parcels of land and have been using the same while the Plaintiff/Applicant is settled in another parcel of land, 7 kilometers away thus it is the former and not the latter who will suffer irreparable harm (Emphasis are mine).

18. As for the third principle, the Defendants'/Respondents' counsel submitted that it is only applicable when the court is in doubt as to whether the Plaintiff/Applicant has satisfied the first two (2) principles. The counsel added that in any case, the Defendants/Respondents being the ones holding the title documents, in occupation and possession, the balance of convenience still tilts in their favour.

19. The counsel concluded by urging the court to dismiss the Plaintiff's/Applicant's application with costs to the Defendants/Respondents.

20. Having read the application, the replying affidavit and the submissions filed by the counsel on record for the parties, my finding is as hereunder;

21. Firstly, I do agree with the counsel for the Defendants/Respondents that the Plaintiff/Applicant has failed to show that he has a *prima facie* case with probability of success for the reason that he has not contravened the Defendants/Respondents deposition that they were issued with title document in respect of their respective suit properties after the Plaintiff/Applicant failed to appeal to the Minister within 60 days as is required under Section 29 of the Land Adjudication Act upon his objection being dismissed by the Land Adjudication Officer.

22. In addition to the above, it is clear from the affidavit evidence that the Defendants/Respondents are the ones in occupation of the suit properties and as was correctly submitted by their counsel, to grant the order of injunction will amount to evicting them and technically granting the Plaintiff/Applicant the final orders.

23. It is also not lost on me that even though the Plaintiff/Applicant has alleged that the suit properties are ancestral and were allocated to his family by Kilungu District Magistrate Court vide case number L26 of 1977, as was correctly submitted by the Defendant's/Respondent's counsel he did not attach the said judgment and the ensuing decree therefrom in his supporting and further affidavits. The Plaintiff/Applicant has not identified the parties to the aforementioned proceedings.

24. As for the principle of irreparable harm, I am in agreement with the counsel for the Defendants/Respondents that the Plaintiff/Applicant who is not in occupation of the suit properties will not suffer any irreparable harm if the orders sought are not granted.

25. As for the third principle, I wish to point out that this court is not in doubt as to where the balance of convenience lies as the same lies in favour of the Defendants/Respondents who are in occupation of their respective suit properties.

26. The upshot of the foregoing is that the Plaintiff/Applicant has failed to prove by his supporting and further affidavits that the suit properties are in danger of being wasted or alienated by the Defendants/Respondents in order for the prayers sought by him to be granted.

27. Suffice it to say, the application lacks merit and same is dismissed with costs to the Defendants/Respondents.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 11TH DAY OF MAY, 2021

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi