



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA NO. 41 OF 2020

JOSPHAT KALAINÉ M'ABUTU.....1ST APPELLANT/APPLICANT

CHARLES NKUNDURU M'ABUTU.....1ST APPELLANT/APPLICANT

VERSUS

JOSPHAT M'NCHEBERE M'ITHAE.....1ST RESPONDENT

NICHOLAS GITONGA.....2ND RESPONDENT

RULING

1. This ruling relates to two applications dated 22.1.2021 and 7.9.2021 respectively. By a plaint dated 29th September 2018 Joseph Kalaine M'Abutu and Charles Nkunduru M'Abutu herein after appellants sued Josephat M'Ncebere M'Ithae and Nicholas Gitonga herein after sued the respondents claiming the latter had allegedly illegally caused and had been registered as owners of parcel no. Meru North/Athinga/Athanja 8573 and 7717 respectively which they allege to have been hived from parcel no. Meru North/Athinga/Athanja/8043 initially registered in favour of their late father M'Abutu Mirinja at land adjudication stage.

2. The appellant in the lower court claimed that the respondents were using force and violence to deprive them of their land which they had been occupying for long hence prayed for declaratory orders that the sub-division and eventual creation of the aforesaid parcels was unlawful, fraudulent, and illegal and should be cancelled and land reverts back to the 1st appellant. Similarly the appellants prayed for permanent injunction barring and restraining the respondents, their agents and anybody claiming under their names from transferring, entering, evicting or in any way interfering with the use and occupation of parcels no's 8573, 7717 and 8043.

3. The respondents entered appearance, filed a defence and counterclaim dated 3rd October 2018 denying the appellants ever occupied their parcels as alleged or at all and terming them as encroachers or trespassers leading to criminal cases against them which were still pending in Tigania law courts.

4. They counter claimed for a permanent injunction prohibiting the plaintiffs from entering their parcels of land. The appellants filed a reply to defence and defence to the counterclaim dated 16th October 2018 in which they reiterated the contents in the plaint that the creation of parcel no's Meru North/Athinga/Athanja/7717, 8573 from 8043 was fraudulent, illegal and unlawful hence called for court's cancellation and reversal to the 1st appellant name.

5. By a motion dated 24th September 2018 the appellants sought and obtained interim orders of injunction and inhibition against the subject parcels of land triggering the respondents to filing an application dated 25th October 2018 for setting aside or staying those *exparte* orders. Alongside those prayers was also a request for a land registrar and surveyor to visit the suit land and make a report on the party's boundaries and perhaps mark the said boundaries which had allegedly been removed due to change of a river course out of climate change.

6. Both parties filed written submissions to the application dated 6th November 2018 and 19th November 2018 respectively whereof the trial court made a ruling on 13.12.2018 striking out the application dated 24th September 2018, lifted the interim orders and subsequently marked the application dated 24th October 2018 as spent.

7. It appears no appeal was filed against the said ruling by either party. On 23rd October 2019, the appellants filed a notice of motion dated 23rd October 2019 seeking leave to amend the plaint so as to bring on board the real controversy between the parties for determination once and for all. The appellants alleged their title deed had delayed and was only issued to them on 16th July 2019. A copy was attached in the name of 1st appellant for parcel no. Meru North/Athinga/Athanja/8043 for 3.14 Ha.

8. The respondents filed a replying affidavit opposing the motion sworn on 6th November 2019. Before the said application could be heard

the respondent herein filed a preliminary objection dated 18th February 2020 on the following grounds:

- (a) This suit offends mandatory provision of section 16 (2) Government Proceedings Act cap 40 laws of Kenya.*
- (b) The suit offends the mandatory provisions of orders 29 rule 2 of the civil procedure rules 2010.*
- (c) The suit is fatally defective and incurably in law.*

9. Directions were given to have disposal by way of written submissions hence the appellants filed theirs dated 4th March 2020 and the respondents dated 2nd March 2020 leading to a ruling made on 29th July 2020 striking out the suit with costs.

10. It is this ruling which has triggered the current appeal. Meantime and following striking out of the suit the respondent filed a motion dated 6th August 2020 seeking for:

- (i) That the application be certified as urgent and be heard ex parte in the first instance.*
- (ii) That an order of temporary injunction do issue against the plaintiffs/respondents, their agents, servants and/or employees restraining them from entering, trespassing, encroaching, cultivating, utilizing or in any other way interfering and/or dealing with parcels namely North/Athinga/Athanja/8573 and North/Athinga/Athanja/7717 pending the hearing and determination of this application.*
- (iii) That pending the hearing and determination of this application, an order of temporary injunction do issue against the plaintiffs/respondents, their agents, servants and/or employees restraining them from entering, trespassing, encroaching, cultivating, utilizing or in any other way interfering and/or dealing with parcels namely north/Athinga/Athanja/8573 and North/Athinga/Athanja/7717 pending the hearing and determination of the counter claim.*
- (iv) That this honourable court be pleased to grant a prohibitory order over land parcels namely North/Athinga/Athanja/8573 and North /Athinga/Athanja/717 pending the hearing and determination of the counter claim.*
- (v) That this honourable court be pleased to cancel the inhibition orders registered against land parcels namely North/Athinga/Athanja/8573 and North/Athinga/Athanja/7717 in favour of the plaintiffs forthwith.*
- (vi) That the OCS Tigania police station do ensure that the orders herein complied with and peace maintained in the process.*
- (vii) Costs of this application be provided for.*

6. The appellants replied through an affidavit sworn on 14th August 2020. At paragraph 8 (a) it was averred “*the defendants who were never our neighbors came from nowhere and took part of our land. That as the map shows land Reference no. 8573 has double replacement and jumps several other parcels of land and take another small piece of land near our land, a map is attached annexure SKM “3” showing the exact location of the disputed parcels of land and the real controversy in respect to the said motion.*”

7. Again directions were given on 19.8.2020 to have parties’ file submissions and orders for status quo were granted. In compliance the appellants filed their submissions dated 27th August 2020 while the respondents filed theirs dated 25th October 2020. It is not clear if any ruling was ever made on this application.

8. On 7th September 2020, the appellants filed a motion before this court seeking the following orders;

- (a) That this application be certified urgent and be heard on priority basis and ex parte in the 1st instance.*
- (b) That this honorable court be pleased to stay further proceedings in Tigania principal magistrates ELC case no. 183 of 2018 pending the hearing of this application.*
- (c) That this honourable court be pleased to stay further proceedings in Tigania principal magistrates ELC case no. 183 of 2018 pending the hearing and determination of this appeal.*
- (d) That this honourable court be pleased to issue an order of injunction restraining the respondents either by themselves, or either of them, their agents servants from entering, remaining or evicting or interfering with the appellants/applicants use and occupation of L.R No. Meru North/Athinga/Athanja/8043 until this application is heard and determined.*
- (e) That this honourable court be pleased to issue an order of injunction restraining the respondents either by themselves or either of them, their agents servants from entering remaining or evicting or interfering with he appellants./applicants use and occupation of L.R No. Meru North/Athinga/Athanja/8043 until this appeal is heard and determined.*
- (f) Costs of this application be provided for to which a stay of proceedings in the lower court was given by this court and the matter was given an inter partes hearing for 19th November 2020. The respondent has since filed a replying affidavit maintaining the application is resjudicata.*

9. As if this was not enough the respondent moved before this court under certificate of urgency by a motion dated 12th November 2020 seeking for orders:

- (i) That the application be certified as urgent and be heard ex parte in the first instance and service of summons be dispensed with.*
- (ii) That pending the hearing and determination of this application, an order of temporary injunction do issue against the appellants/respondents, their agents servants and/or employees restraining them from entering, trespassing, encroaching, cultivating, utilizing or in any other way interfering and/or dealing with parcels namely North/Athinga/Athanja 8573 and North/Athinga/Athanja/7717 pending the hearing and determination of this application.*
- (iii) That pending the hearing and determination of this application an order of temporary injunction do issue against the appellants/respondents, their agents, servants and/or employees restraining them from entering, trespassing, encroaching, cultivating, utilizing or in any other way interfering and/or dealing with parcels namely North/Athinga/Athanja/8573 and North/Athinga/Athanja/7717 pending the hearing and determination of the application herein.*
- (iv) That this honourable court be pleased to grant a prohibitory order over land parcels namely North/Athinga/Athanja/8573 and North/Athinga/Athanja/7717 pending the hearing and determination of the appeal.*
- (v) That the OCS Tigania Police station do ensure that the orders herein are complied with and peace maintained in the process.*
- (vi) Costs of this application be provided for.*

10. A replying affidavit by the appellants sworn was filed on 10 February 2021 claiming there is no cross-appeal hence the respondents have no locus standi to seek any such orders before this court and that as per registry index map attached, it is the respondents who are on the wrong, for the respective parcels are far away. Once more parties were directed to file submissions.

11. This is the sorry state of this matter where parties are endlessly denying the court delving into the real issue in controversy by making endless applications and counter applications which a court should discourage and aim at reaching substantive justice threshold as expected of it by the Constitution of Kenya 2010 and the laws made there under.

Analysis and findings

12. The court has carefully gone through the record of appeal, the supplementary record of appeal and the entire lower court file. It is apparent parties have filed numerous applications and counter applications some determined and others pending before the lower court.

13. Other than the prayer for stay of proceedings the appellants' application is seeking for restraining orders against parcel no. Meru North/Athinga/Athanja 8043 while the respondents on their part seek restraining orders against the appellants from interfering with parcels no. Meru North Athinga/Athanja/8573 and 7717.

14. Each of the parties' herein are in possession of a title deed which presumably are prima facie under section 26 of the Land Registration Act as proof of ownership hence each has legal ownership rights protectable by law.

15. This court being seized of the main appeal cannot determine the two applications conclusively without pre-empting its views on the merits or demerits of the appeal.

16. The orders which commends themselves are; that pending hearing and determination of the appeal herein:

- (a) The lower court suit be and is hereby stayed.**
- (b) Status quo be and is hereby ordered to be maintained by each party staying at their respective portions of land.**
- (c) The land registrar in company of the land surveyor in charge of the respective area to visit the subject parcels of land ,remark the boundary, ensure compliance with the orders of status quo, prepare and submit a comprehensive report over the status of the three parcels of land before this court within 45 days from the date hereof.**
- (d) Parties to file and serve written submissions on the main appeal restricted to five pages each within 14 days from the date hereof.**
- (e) Service of this order be effected by the appellants.**

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29TH DAY OF SEPTEMBER, 2021 IN PRESENCE OF:

C/A: Kananu

Miss Rimita for the appellants/respondents

Miss Kiuyuki for applicant/respondents

HON. C.K. NZILI

ELC JUDGE