



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 126 OF 2019

LAWRENCE MAINA MWANGI.....PLAINTIFF

VERSUS

PRAIRIE CO-OPERATIVE SOCIETY LTD..... 1ST DEFENDANT

G.W. WERUGIA T/A

WAHOME WERUGIA LAND SURVEYORS.....2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT

DIRECTOR OF LANDS.....5TH DEFENDANT

DIRECTOR OF SURVEY..... 6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 22nd October 2019, through which the following orders are sought:

(1) [Spent]

(2) [Spent]

(3) *THAT pending the hearing and determination of this suit this honorable court be pleased to issue an order of temporary injunction restraining the defendant/respondents by themselves, their agents, servants and/or anybody claiming under them from surveying, re-surveying, placing beacons, trespassing, selling, transferring, leasing, erecting a fence, demolishing structures and/or in any other way dealing with the suit property Land Reference Number 22910 and/or interfering with the occupation and possession of the suit property.*

(4) *THAT the costs of this application be borne by the Defendants/Respondents.*

2. The application is supported by affidavits sworn by the applicant. He deposed that on 22nd September, 1995 one Philip Kibet Tonui was allotted un-surveyed residential plot No. 14 Lanet-Nakuru and was later issued with a grant IR 74884 for Land Reference No. 22910. That Philip Tonui took immediate possession upon allotment and later sold the parcel jointly to Kimani Hinga Muniu and Hezekiah Kimani Kariuki in 1998 who in turn sold it to the applicant in 2005.

3. He further deposed that he took immediate possession of the land and retained possession until the date of the affidavit. That sometime in July 2019 it came to his attention that Survey Plan FR No. 314/7 comprising of land reference number 22909, 22910, 22674 and 22911 had been cancelled and a new survey plan FR No. 349/74 comprising land reference number 4730/364-372 prepared by the 4th defendant without the knowledge and consent of the owners. He added that he was apprehensive the 1st defendant could be in the process of selling the land including the suit land.

4. The 1st defendant opposed the application through affidavits sworn by its secretary, Hastings F.K. Muhindi. He deposed that plot number 22910 belongs to and forms part of its land parcel number 4730/45 and 4730/42. He added that there is pending ELC No. 127 of 2014 touching on the same property hence this suit is *sub-judice*. The 2nd defendant also filed a replying affidavit whose contents I have noted.

5. In a further affidavit, the applicant confirmed the existence of ELC 127 of 2014 which is partly heard but stated that he is not a party to the said suit.

6. The application was canvassed through written submissions. Only the applicant and the 1st defendant filed submissions. The applicant argued that he has fulfilled the conditions for granting of an injunction and that he is the registered owner of the suit property. He contended that he has demonstrated a *prima facie* case and that the suit property and its status should be preserved pending the hearing and determination of the suit. He added that although the value of the suit property can be ascertained, it would not be right to say that he can be compensated in damages.

7. The 1st defendant submitted that the applicant's case is based on unsupported apprehension. That the applicant is seeking an injunction yet he acknowledges that the 1st defendant was only fencing adjoining parcels and that there is a pending case over the same plot being ELC 127 of 2014 before this court. That the applicant has not shown what damages he will suffer by the 1st defendant fencing adjacent parcels of land which he is not claiming or that he cannot be compensated by way of damages.

8. The 3rd to 7th defendants did not file any documents in response to the application.

9. I have considered the application, the affidavits filed and the submissions. I will deal with the issue of *sub-judice* first since it goes to the jurisdiction of the court.

10. **Section 6** of the **Civil Procedure Act** provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

11. There is no dispute that there exists an earlier suit, Nakuru ELC No. 127 of 2014. Upon perusing the record in the said case, I have noted that the matter is indeed partly heard before me and is scheduled for further hearing of the plaintiff's case on 28th October 2021. The plaintiffs in the case are Philip Kibet Tonui, Kimani Hinga Muniu and Hezekiah Kimani Kariuki, all of whom are mentioned in this case while the sole defendant therein is the same as the 1st defendant herein. The plaintiffs in the case seek inter alia an order that the parcel of land known as LR No. 22910 belongs to them to the exclusion of the defendant. The said property is the suit property in this case where the plaintiff claims its ownership.

12. The record in Nakuru ELC No. 127 of 2014 further reveals that the plaintiff herein filed an application by way of Chamber Summons dated 5th November 2019, seeking joinder and participation in the case as an interested party. The application was allowed on 5th December 2019. Thus, the plaintiff herein is a party in Nakuru ELC No. 127 of 2014. Even if he had not joined the case as an interested party, I would still have found that he is a party to the case by virtue of litigating under the same title as Philip Kibet Tonui, Kimani Hinga Muniu and Hezekiah Kimani since his case is that his title traces its roots to them.

13. In view of the foregoing, I am persuaded that this suit offends **Section 6** of the **Civil Procedure Act** since the question of ownership of LR No. 22910 which is raised herein is also directly and substantially in issue in the previously instituted Nakuru ELC No. 127 of 2014. I cannot therefore entertain this suit or even Notice of Motion dated 22nd October 2019 further.

14. In the result, this suit is stayed pending hearing and determination of Nakuru ELC No. 127 of 2014. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF SEPTEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the plaintiff/applicant

No appearance for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Ms Wanjeri holding brief for Mr Ondieki for the 3rd, 5th to 7th defendants/respondents

No appearance the 4th defendant/respondent

