



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 155 OF 2018

CHENGO VOI WANJE & 434 OTHERS..... PLAINTIFFS/APPLICANTS

-VERSUS-

DEVELOPMENT BANK OF KENYA LTD.....1ST DEFENDANT/RESPONDENT

GARAM INVESTMENTS AUCTIONEERS2ND DEFENDANT/RESPONDENT

RIVA OILS COMPANY LTD.....3RD DEFENDANT/RESPONDENT

GIRIAMA RANCHING COMPANY LTD.....4TH DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR 5TH DEFENDANT/RESPONDENT

THE CABINET SECRETARY, LAND AND PHYSICAL PLANNING..... 6TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion application dated 2nd August, 2018, Chengo Voi Wanje and 434 Other Plaintiffs pray for orders as follows:

3. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Defendants either by themselves, their servants, agents or any other person acting under their authority from selling the property (known as) LR No. 12785 (CR 19142) (the suit property) either by way of public auction scheduled for 6th August, 2018 or by private treaty and further prevent them from entering or taking possession of, or occupying any part or portion, of the parcel of land or from interfering with the peaceful use and occupation of the suit property by the Plaintiffs.

4. ...

5. That pending hearing and determination of the main suit, this Honourable court be pleased to issue a temporary injunction restraining the 3rd and 4th Defendants/Respondents either by themselves, their servants, agents or any other person acting under their authority from selling, leasing, disposing, licensing or in any way dealing with the parcel of land and from further interfering with the peaceful use and possession of the suit property by the Plaintiffs.

6. ...

7. That pending hearing and determination of the main suit, this Honourable Court be pleased to issue an order directing the 5th and 6th Defendants to supply to the Plaintiffs and to this Honourable Court certified copies of:

(a) Parcel Folders of LR No. 12785 (CR 19142);

(b) Letter of Allotment in favour of the 4th Defendant;

- (c) The application for lease of LR No. 12785 (CR 19142) and all supporting documents;
- (d) A copy of Gazettee or Notice of Sale by Auction of the Lease of LR No. 12785 (CR 19142), if any; and
- (e) All records in their possession relation to the Lease of LR No. 12785 (CR 19142).

8. ...

9. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue an order directing the 1st Defendant to supply the Plaintiffs and to this Honourable Court certified copies of:

- (a) The Loan Agreement giving LR No. 12785 (CR 19142) as security;
- (b) The Charge in relation to LR No. 12785 (CR 19142);
- (c) The Deed of Guarantee by the 4th Defendant;
- (d) The loan statements with respect to the loan secured by LR No. 12784 (CR 19142); and
- (e) Consent to charge and/or further charge.

10. ...

11. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue an order directing the Registrar General of Companies to supply to the Plaintiffs and to this Honourable Court certified copies of:

- (a) CR 12 of the 3rd and 4th Defendants;
- (b) Memorandum and Articles of Association for the 3rd and 4th Defendants;
- (c) Registrar of shareholders of the 4th Defendant;
- (d) Company registration applications for the 4th Defendant;
- (e) Transfer of shares of the 4th Defendant;
- (d) All company records in relation to 4th Defendant.

12. That the costs of this application be provided for.

2. The application which is supported by an affidavit sworn by Johnson Charo, is premised on the grounds that:

- (a) On 23rd July, 2018, the 1st and 2nd Defendants published a notification of sale of the suit property by public auction on 6th August, 2018 over default of a loan facility advanced to the 3rd Defendant and allegedly guaranteed by the 4th Defendant.
- (b) The use of the suit property as a security was done without the knowledge of the Plaintiffs and communities living on or deriving a living from the suit property, and in any case against the express provisions of **Section 39 of the Government Land Act** and **Clause 1 of the Certificate of Lease** which barred the 4th Defendant from using the suit property for any other purpose other than for ranching;
- (c) The granting of the loan and creation of a charge instrument over the property was done fraudulently by officers of the 1st, 3rd and 4th Defendants with a view to dispossess the Plaintiffs of their ancestral land;
- (d) The suit property belongs to the Plaintiffs and their families and was given out as a ranch in 1968 pursuant to a directive from the Government to implement the Lawrence (1966) Mission Report;
- (e) The Government directive on the Report was communicated to the local residents by a very powerful colonial Chief Ezekiel Karisa and other government officials and businessmen namely Menza Shikavi, Bihonda Nodoro and Joseph Biryra and it was to the effect that all locals, including the Plaintiffs herein and their families do forthwith vacate the suit property to pave way for the creation of what later became known as the Giriama Ranch;
- (f) Since the directive came from the government and considering the brutality of the post-independence government, the Plaintiffs and their families obliged and vacated their ancestral land to enable the creation of the Ranch.

(g) Unknown to the Plaintiffs, the individuals who communicated the Government directive and a few other individuals registered a private limited liability company, the 4th Defendant herein, instead of a group ranch as was initially represented to the Plaintiffs.

(h) Following widespread drought between 1991 and 1993, most livestock at the Giriama Ranch died and the Ranch was shut down. The Plaintiffs then slowly repossessed their land.

(i) Ever since repossessing the land, the Plaintiffs have been in open peaceful and continuous occupation of the land without interruption for over three decades and there is currently about 40,000 people on the land; and

(j) If the sale proceeds, over 40,000 people living on the land will be rendered destitute and homeless as they will be forced to vacate the land.

3. Development Bank of Kenya Limited (*the 1st Defendant*) is however opposed to the Plaintiffs' application. In a Replying Affidavit sworn by its Manager in charge of Credit Department Olga Leila Sechero, the 1st Defendant avers that the Plaintiffs have failed to disclose the existence of two other suits being *Mombasa HCCC No. 57 of 2018* and *Nairobi Milimani HCCC No. 304 of 2018* filed on their behalf by the 4th Defendant and seeking substantially similar prayers to invalidate the change and further charge created over the suit property.

4. The 1st Defendant avers that the Mombasa court suspended the auction scheduled for 6th August, 2018 and that the Nairobi Court fixed the matter for the hearing of a stay of proceedings application filed by the 1st Defendant herein. The 1st Defendant thus urges a similar stay of the proceedings herein.

5. The 1st Defendant asserts that having pleaded to be members of the 4th Defendant, the Plaintiffs cannot sustain the present suit in their own separate capacity. The 1st Defendant further avers that it is not true that the Plaintiffs are owners or have any interest in the suit property as the registered owner is the 4th Defendant.

6. The 1st Defendant asserts that the 4th Defendant sought from them a loan of Kshs.60,000,000/- to finance their business and the amount was advanced to them on security of a charge duly registered on the suit property. The 4th and 2nd Defendant subsequently sought a further sum of Kshs.250,000,000/- and were on 26th July, 2007 offered a loan facility of Kshs.190,000,000/-.

7. The 1st Defendant avers that the 3rd Defendant later defaulted on repayment of the loan guaranteed to itself by the 4th Defendant leading to the exercise by the 1st Defendant of its statutory power of sale. The 1st Defendant further avers that the present suit has been brought in collusion with the 4th Defendant as part of the wider and well calculated plan by the 4th Defendant to wear down, bog down, vex and frustrate the 1st Defendant from exercising its statutory power of sale.

8. Giriama Ranching Company Limited (*the 4th Defendant*) is equally opposed to the Plaintiffs' application. In a Replying Affidavit sworn by one of its directors Rajab Menza Shikari, the 4th Defendant denies that the suit premises belong to the Plaintiffs and/or their families. It is the 4th Defendant's case that none of the Plaintiffs is a member or shareholder of the 4th Defendant Company and the claim that the company was formed for and on their behalf does not hold any water.

9. The Chief Land Register, the Cabinet Secretary, Lands and Physical Planning as well as the Honourable the Attorney General sued herein as the 5th, 6th and 7th Respondents are equally opposed to the application. In their joint grounds of opposition dated 3rd October 2018, the 5th, 6th and 7th Respondents oppose the application on the grounds:

1. That whereas the Applicants are seeking several orders against the 5th Respondent, they have not alleged any procedural or substantive irregularity occasioned by the 5th Respondent herein to support the issuance of the same as against him.

2. That the application is premature as the applicants have not exhibited proof of prior request for the documents alluded to in Prayers No. 6 and 7 of the Notice of Motion and refusal by the 5th Respondent to accede to the said request.

3. That no prima facie case is established from the pleadings of this case that would remotely suggest that the 5th Respondent has any likelihood of infringing the Applicant's constitutional right of access to information.

4. That the Applicants have not met the threshold for granting of an injunction and/or the prayers sought against the 5th to 7th Respondents.

5. That from the evidence adduced before this Honourable Court there is no basis for any suspicion or fear that the 5th Respondent will infringe on the Applicant's rights as provided under **Articles 35** of the Constitution.

6. That no allegations of irregularity or illegality has been made or can be construed from the pleadings and evidence adduced against the 5th Respondent.

10. I have carefully perused and considered the Plaintiffs' application and the response thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties. The 3rd Defendant – Riva Oils Company Limited neither entered appearance nor did it respond to the application.

11. By their application herein, the Plaintiffs pray for various injunctive orders to issue restraining the Defendants from disposing off the suit property by way of a public auction which was initially scheduled for 6th August, 2018 or from dealing with the suit property in any other manner. They also seek to be supplied with various documents in respect of the suit property and the loan that led to the advertisement of the said property for sale by public auction on the said date.

12. The principles to be considered for the grant of a temporary injunction were re-stated by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR** as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) Establish his case only at a *prima facie* level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted and

(c) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.”

13. As to what would amount to a *prima facie* case in a matter such as this one, the Court of Appeal had earlier on offered guidance in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, thus:

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. The present proceedings were instituted by the Plaintiffs vide a Plaint dated 2nd August, 2018 filed contemporaneously with this application and seeking for a declaration that the certificate of title held by the 4th Defendant for the suit property is null and void. In the alternative, the Plaintiffs pray for a declaration that they are entitled to the suit property by way of adverse possession and/or that the 4th Defendant holds the said title in their trust.

15. The genesis of the suit was an advertisement placed in the local dailies by the 1st Defendant Bank seeking to sell the suit property by way of public auction on 6th August, 2018. The Plaintiffs contend that they owned the suit property prior to the year 1968 when the same was amalgamated pursuant to a Government directive in order to create a group ranch that is now the Giriama Ranching Company Limited (the 4th Defendant herein).

16. The Plaintiffs aver that they vacated the land when the Group Ranch was formed but following a massive drought in the year 1993, the Ranch ceased operations after most of the livestock kept therein perished. It is the Plaintiffs’ case that they subsequently gradually repossessed the suit property and have since remained in open and continuous possession and occupation thereof as a result of which they have since become entitled thereto under the doctrine of adverse possession.

17. The Plaintiffs application thus in essence seeks to stop the 1st Defendant Bank from exercising its statutory power of sale of the property on account of their adverse possession thereof and or on the basis that the 4th Defendant holds title to the property in trust for themselves. They accuse the 5th, 6th and 7th Defendants herein of colluding with the 4th Defendant to have the 4th Defendant fraudulently registered as the proprietor of the suit property.

18. From the material placed before me, it is evident that the 4th Defendant was incorporated as a limited liability company on 13th August, 1968 and that it was subsequently issued with a Certificate of Title for the suit premises being LR No. 12785 Kilifi on 8th December, 1988. It was also clear that the 4th Defendant as the registered proprietor of the suit property offered the same as collateral to secure a loan facility advanced by the 1st Defendant Bank to Messrs Riva Oils Company Limited (the 3rd Defendant herein). As a result a charge dated 7th March, 2007 and a further charge dated 1st August, 2007 were registered against the suit property.

19. It was the 1st Defendant’s case that the borrower Riva Oils Company Limited which did not enter appearance and /or respond to the claim herein has defaulted on the loans. Upon issuance of the requisite statutory demands and notices the 1st Defendant Bank and the 2nd Defendant Auctioneers proceeded to schedule a public auction to sell the suit property to recover the outstanding loan which according to the 1st Defendant, now stands at a staggering Kshs.285,895,515.40.

20. As it were, in order to succeed in their application for injunction, the Plaintiffs were under a legal duty to establish that they are either the registered owners of the suit property and/or that they have any demonstrable legal interest therein capable of protection by an order of injunction. In that respect, this court takes note that it is the 4th Defendant, a private limited liability company, and not the Plaintiffs, that is registered as the proprietor of the suit land and has been so registered since 1988.

21. Whereas the Plaintiffs allege at paragraphs 3 to 7 of the Supporting Affidavit sworn by Johnson Charo that they owned the suit property prior to the 1968 Government directive that they surrender their portions of the land to enable the formation of a Group Ranch, there was no evidence exhibited to support the alleged ownership of the land then. There was indeed no evidence exhibited in proof of the alleged Government directive and/or that the suit property arises from an amalgamation of smaller portions previously owned by the Plaintiffs.

22. Again, whereas the Plaintiffs contend that they repossessed the suit property in 1993 upon the collapse of the Group Ranch and that they

have built their homes thereon and remained in open continuous possession and occupation thereof, there was nothing placed before me in support of that position.

23. In the absence of such evidence, it follows that the Plaintiffs have failed to establish a prima facie case and the prayers for an interlocutory injunction must fail.

24. In addition to the prayers for injunction, Plaintiffs equally urged the Court to direct the 5th and 6th Defendants to supply them with various documents relating to the registration of the suit property as well as the charge and further charge on the suit property. In this respect, **Article 35(1) of the Constitution** provides that:

“1. Every citizen has the right to access to-

(a) Information held by the state; and

(b) Information held by another person required for the exercise or protection of any right or fundamental freedom.”

25. As it were, the 5th Defendant is the custodian of all records pertaining the land ownership in the Republic of Kenya. Under **Section 7(2) of the Land Registration Act**, it is provided as follows:

“2. The Registrar shall, upon payment of the prescribed fee, make information in the Land Registry accessible to any person.”

26. That being the case, it was clear to me that those records can only be availed to a person who has applied for such records and paid the prescribed fee. In the matter before me, the Plaintiffs have not exhibited anything to demonstrate that they made any such application and that the 5th Defendant refused to accede to the application.

27. A perusal of the list of documents sought reveals that they can easily be obtained by a regular search at either the Land office or the Companies Registry. There was again nothing to show that any efforts were expended by the Plaintiffs to procure the same from those offices.

28. In the premises, I did not find any merit whatsoever in the Plaintiffs’ Notice of Motion dated 2nd August, 2018. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 2ND DAY OF DECEMBER, 2021

In the presence of:

Mr. Kenga for the 4th Defendant

No appearance for Ojiambo for 1st and 2nd Defendants

No appearance for Bwire for the Plaintiffs

No Appearance for the Attorney General

Court assistant - Wario

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J. O. Olola

JUDGE