



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE NO. 48 OF 2019

MUDE HUSEIN MOHAMED.....1ST PLAINTIFF
 RODGERS SAMANYA.....2ND PLAINTIFF
 HASSAN ABDULAHI ALI.....3RD PLAINTIFF
 JAMES NJENGA NYAGA.....4TH PLAINTIFF
 ABDULRAHMAN WAMALA.....5TH PLAINTIFF
 THE PUBLICAN (AFRICA) LTD.....6TH PLAINTIFF

VERSUS

MASINDE MULIRO UNIVERSITY
 OF SCIENCE AND TECHNOLOGY.....1ST DEFENDANT
 TURKAN UNIVERSITY COLLEGE
 (Being sued as a Constituent
 College of the 1st Defendant).....2ND DEFENDANT
 THE COUNTY GOVERNMENT
 OF TURKANA.....3RD DEFENDANT
 THE COMMISSIONER OF LAND.....4TH DEFENDANT
 THE COUNTY SURVEYOR
 TURKANA COUNTY.....5TH DEFENDANT
 THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

AND

MOUNT KENYA UNIVERSITY.....INTERESTED PARTY

RULING

1. This is a ruling on two consolidated applications one dated 25/6/2019 and the other dated 1/8/2019.
2. The application dated 25/6/2019 has been brought by the plaintiffs who seek the following orders:-

(1) ...spent

(2) ...spent

(3) ...spent

(4) That upon hearing and determination of this application this court be and hereby pleased to issue a temporary injunction against the 1st and 2nd defendants/respondents, their officials, servants or agents from evicting the plaintiffs/applicants, building, developing, selling, transferring, leasing, charging, encroaching or interfering in any way with the plaintiffs/applicants quite possession on a portion of land parcel No. LR. 14691/425 Kanamkemer, Lodwar-Turkana County AND OR all that stretch of land measuring One Hundred (100) Metres or thereabout adjacent to the fence in the forecourt of the 2nd defendant/respondent touching Lodwar - Kitale highway.

(5) ...spent

(6) That the OCS, Lodwar Police Station be directed to ensure supervision and enforcement of the orders of this court.

(7) That costs of this application be borne by the 1st and 2nd defendants/respondents.

3. The application is brought under **Order 40 Rule 1(a) and (b), Order 50 Rule (1) of the Civil Procedure Rules 2010**,

4. The application is supported by the affidavit of the 1st plaintiff sworn on **25/6/2019**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

5. On **10/9/2019** the 1st and 2nd plaintiffs filed a further affidavit dated **2/9/2019**.

6. In brief the grounds upon which the application dated **25/6/2019** is premised are as follows: that the 1st and 2nd defendants issued a **30** day notice to vacate dated **31/5/2019** to the plaintiffs and other unnamed persons who have been in occupation of the suit land for a long period; that the suit land was allocated to the plaintiffs by the 3rd defendant's predecessor; that the plaintiffs are the bona fide and beneficial owners of the suit land by virtue of that allocation; that the 1st and 2nd defendants' claim over the land is invalid for the reason that at the time the defendants purported to purchase the suit land from the interested party the plaintiffs had already been allocated and were in occupation; that the plaintiffs are still in occupation to date; that the site plan used in the development of the Mt. Kenya University did not include the suit land as the suit land had been surrendered by the interested party who had been compensated by the Municipality Council of Lodwar for the loss thereof; that the taking of the suit land by the 1st and 2nd defendants would doubly and unfairly benefit the defendants and unless the orders sought are granted the plaintiffs stand to suffer irreparable loss and damage as they may be evicted by the respondents.

7. The supporting affidavit of the plaintiffs dated **25/6/2019** states that the plots **Nos. 790, 829, 920, 931, 932, 976 (a) and 888** were allocated to them by the Municipal Council of Lodwar upon their request on various dates for the purpose of building private hostels for the students of Mt. Kenya University and the plaintiffs took possession thereof on different occasions. They assert that they are the lawful beneficiaries of the said parcels. They attach to their affidavit the notice to vacate, copies of letters of allotment and sale agreements relating to the land, minutes from the defunct Municipal Council of Lodwar and what they call a letter from the Council to the interested party directing that the land be demarcated. I have examined what is alleged to be a copy of that letter which is marked as **Exhibit MHM10B** and found it to be virtually illegible just as are other documents that the plaintiffs purport to rely on which are contained in the affidavit bundle. In the further affidavit dated **3/9/2019**, the plaintiffs present an argument that the land allocated to the interested party was **100 acres** yet it transferred **104.009 acres** to the 1st defendant and no justification has been provided for the inclusion of the extra **4 acres**. They aver that some of the plaintiffs purchased their plots from previous allottees and reiterate that the equivalent of the aggregated size of the plaintiffs' portions of land was compensated for by allocation to the interested party of some land behind the campus, and that the 1st defendant's land is already fenced and is distinct from the plaintiffs' land. They denied having encroached on the 1st defendant's land and emphasized that the County Surveyor of the 3rd defendant has admitted their claim vide the replying affidavit and their defence filed in the matter. They also argued that the interested party has impliedly admitted their claim.

8. In response to application dated **25/6/2019**, **Prof. Thomas Ekamais Akuja**, the Principal of the 2nd defendant herein filed a replying affidavit dated **30/7/2019** and a further affidavit dated **14/9/2019**. His response as contained in those affidavits is that the interested party who was the leasehold owner of title No. **LR 14691/425 Kanamkemer** in Turkana County sold all the land comprised in that title as well as the developments thereon to the 1st defendant; that the agreed purchase price was paid and the land which measured **42.02 Hectares** was transferred to the 1st defendant; that according to the certificate of title which he exhibits in his affidavit the said land as demarcated extends to and abuts the Kitale - Lodwar highway and the plaintiffs have no title to the portions of land that they purport to hold, hence the notice to vacate complained of; that the plaintiffs have not been in occupation of but have attempted to encroach on the land without any colour of right and they have not demonstrated any documentary proof of ownership of the suit land; that the 1st and 2nd defendants have never surrendered any part of the land to the plaintiffs and have not been compensated by any authority; that the demarcation of the suit land measuring **42.02 hectares** was shown to the 1st and 2nd defendants by the interested party before the sale and no note of any claim by the plaintiffs was evident on the certificate of title and that the plaintiffs have not proved they have a prima face case.

9. The 3rd and 5th defendants filed a replying affidavit sworn by **Henry Ekai Nalipan**, Deputy Director of Survey in the County Government of Turkana the 3rd defendant on **30/7/2019**. In that affidavit the deponent states that according to the land register in possession of the 3rd defendant plot **Nos. 790,829,920,931,932,976(a) and 888** were allocated to the plaintiffs by the Municipal County of Lodwar; that the said plots were initially part of and were hived off the land parcel owned by the interested party and formed a stretch of land located on the front

part of the interested party's original parcel of land and they abutted the Lodwar - Kitale highway; that the interested party was compensated by way of allocation of a parcel of land at the rear side of the original parcel and consequently relinquished its interests on the plots allocated to the plaintiffs. In brief the 3rd and 5th defendants support the plaintiffs' claim.

10. The application dated **1/8/2019** and filed in court on **28/8/2019**, has been brought by the Interested Party who seeks the following orders:-

(1) That this application be heard in priority to the plaintiffs/applicants' application dated 25/6/2019.

(2) That the Interested Party's name be struck out as party in these proceedings.

(3) That the cost of this application be borne by the plaintiffs

11. The application is brought under **Order 10 Rule 10 (2) of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act.**

12. The application is supported by the affidavit of **Anthony Mwangi Ndung'u** the Director of Institutional Planning and Administration of the Interested Party herein sworn on **1/8/2019**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

13. The grounds upon which the application is made are that the interested party has been improperly joined as a party in these proceedings; that as correctly noted by the plaintiff, the interested party sold all that parcel of land known as **LR No. 14691/425** (the suit property) to the 1st defendant and therefore has no interest in the same; that the interested party has no interest in the **100 metre** stretch of land in front of the suit property having surrendered the same to the Municipal Council of Lodwar; that no orders have been sought against the interested party in this matter, neither will any decision or orders issued herein affect it in any way and that the issues in controversy between the main parties herein can be resolved without the participation of the interested party.

14. The 1st and 2nd defendants filed submissions on the application dated **10/10/2019** on **11/10/2019**. The plaintiffs' submissions on applications dated **1/8/2019** were filed on **16/10/2019**. The issues that arise from those applications are as follows:

(a) Whether a temporary injunction should issue against the 1st and 2nd defendants restraining them from evicting the plaintiffs or interfering in any way with the plaintiffs' quiet possession of the portion of land they occupy.

(b) Whether the interested party's name should be struck out from these proceedings.

(c) What orders should issue?

(a) Whether a temporary injunction should issue against the 1st and 2nd defendants restraining them from evicting the plaintiffs or interfering in any way with the plaintiffs' quiet possession of the portion of land they occupy.

15. It is not disputed that the 1st defendant has title to a parcel of land known as **LR 14691/465** Kanamkemer Lodwar in Turkana County which it purchased from the interested party. The issue in dispute is whether the plaintiffs are in occupation of a portion of that land and if so whether an injunction should issue restraining the 1st and 2nd defendants from evicting them therefrom pending the hearing and determination of this suit.

16. The plaintiffs' claim is strongly supported by the 3rd defendant who asserts that the portion the plaintiffs' claim was hived off by Municipal Council of Lodwar from the interested party's land before the interested party's land was transferred to the 1st defendant. The 1st defendant disputes this and laughs of the allegation, simply responding that the land could not have been excised and allocated to the plaintiffs for the purpose of building private students hostels if the institution was not already in place! Copies of a certificate of title in respect of **LR 14691/425** measuring **42.02** hectares and a lease which are in the name of the interested party issued on **15/8/2016** are exhibited. Also exhibited is a transfer to the 1st defendant of that title, dated **9/2/2017**.

17. Most of plots allotment letters and other documents exhibited by the plaintiffs are faint and almost totally illegible. However it would appear from the contents of the affidavits that they were issued on various dates beginning from the year **1992**. Some of the annexures appear to be copies of agreements for purchase of land. However what is clear is that the plaintiffs, unlike the 1st defendant do not possess titles to the plots they hold. They also claim that the land was hived off from **LR 14691/425**.

18. The 3rd defendant's Deputy Director of Survey appears to confirm that the parcels held by the plaintiffs were part of the **LR 14691/425**. In addition the affidavit of one Antony Mwangi Ndungu Director of Institutional Planning and Administration of the interested party in support of the application dated **1/8/2019** states that the **100 metre** stretch of land that is in dispute between the 1st defendant and the plaintiffs was not part of the property sold and transferred to the 1st defendant. At **paragraph 8** of that affidavit he states that the "*title documents transferred to the 1st defendant speak for themselves*".

19. The above statement prompt this court to examine the only documents exhibited as evidence of the transfer which are attached to **Thomas Ekamais Ekuja's** affidavit sworn on **30/7/2019**.

20. The certificate of title provides for **42.02 Hectares**: So does the lease. The transfer of title dated **9/2/2017** speaks of transfer of **42.02**

Hectares as delineated on land survey plan **No. 405918**. No qualification is to be found in that transfer to the effect that the **100 metre** stretch in dispute is excluded.

21. The affidavit of **Antony Mwangi Ndungu** exhibits no documents in support of the allegation that the transfer excluded the disputed portion. This casts considerable doubt on the propriety of the plaintiffs' reliance on that admission. The plaintiffs allude to minutes of the defunct Municipal Council of Lodwar **Exhibit 10 (A)**, a site plan exhibited as **Exhibit 11** which I have stated herein before is almost illegible and does not provide this court with any help in this matter.

22. However I have examined the affidavit of **Henry Ekai Nalipan** sworn on **26/7/2019** which attaches what he refers to as the site plan and which is clearer in contrast with plaintiffs' copy. That document has nothing on its face to suggest that the disputed land is not part of **LR 14691/425**.

23. I have considered the submissions of the parties in this matter in support of the application. In this court's view and having regard to all the material on record the plaintiffs have fallen short of establishing a *prima facie* case against the 1st defendant as required by the conditions in **Giella -vs- Cassman Brown 1973 EA 358**.

24. As to whether the plaintiffs may suffer loss that may be not compensated for or by way of damages I note there is no evidence of developments by the plaintiffs of the dispute portion such loss is therefore not proved.

25. In the final analysis this court finds that the main conditions for the grant of an order of injunction in favour of the plaintiffs have not been established.

26. The case of **Giella -vs- Cassman Brown 1973 EA 358** provides a third option that is the consideration of balance of convenience. On this point however, I am not persuaded that the applicants deserve the injunctive orders sought on the basis of the balance of convenience for the reason that they have not demonstrated to the court in clear terms the damage they would suffer if the orders were not issued.

(b) Whether the Interested Party's name should be struck out from these proceedings

27. **Order 1 Rule 9** provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties; the court is mandated to deal with the matter in controversy in so far as regards the rights and interests of the parties actually before it.

28. The interested party sold the suit land to the 1st defendant. It was enjoined to these proceedings by the plaintiffs from the inception of the suit and the plaintiffs are naturally opposed to the striking out of the interested party's name from this suit as are the 1st and 2nd defendants.

29. On the part of the 1st and 2nd defendants their response to the interested party's plea to be struck out is that the interested party is in a position to tell this court whether any portion was surrendered to the plaintiffs.

30. Clearly the plaintiffs were of the opinion that the interested party had a role to play in the proceedings. However the main ground that sways this court into retaining the interested party in these proceedings is the averment by the deponent of the 1st and 2nd defendant's replying affidavit sworn on the **14th September 2019** that:

"...in order to resolve the issues in dispute before this honourable court, the interested party is a necessary party and would have in any event have been enjoined in this suit by the first and second defendants."

31. It is not that averment alone that persuades the court to retain the interested party in these proceedings. It is obvious that the interested party is cited as the seller of the suit land in **paragraph 5** of the 1st and 2nd defendants' defence dated **19/8/2019** filed on **22/8/2019**. There is a further statement in **paragraph 19** of the same defence to the effect that the said defendants purchased the entire parcel of land known as **LR No 14691/425 Kanamkemer** from the interested party and not just part of it. The interested party filed its application seeking to be struck out after the defendant's defence was filed. I have perused the record and I have not seen any defence filed on behalf of the interested party, to which the 1st and 2nd defendants could be said to have acquiesced by failing to respond thereto in order to warrant the striking out of the interested party.

32. In this court's view therefore, the retention of the necessary party would in the circumstances adumbrated hereinabove obviate the need for any of the other parties to make an application downstream that the interested party be re-enjoined in the suit. In any event if no wrongdoing is established against the interested party the usual panacea would be costs. The interested party's application dated **1/8/2019** therefore has no merits.

(c) What orders should issue?

33. In the final analysis I dismiss the two applications dated **25th June 2019** and **1st August 2019**.

34. Costs will be paid by the applicants to the plaintiffs in respect of the application dated **1st August 2019**.

35. Costs shall be paid by the applicants to the 1st and 2nd defendants in respect of both applications.

It is so ordered.

Dated, signed and delivered at Kitale on this 13th day of February, 2020.

MWANGI NJOROGI

JUDGE

13/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Mbaabu for the 1st and 2nd respondent

N/A for the other parties.

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

13/2/2020