



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 100 OF 2018 (O.S)

MUYUMBA WATITA

ENOS BARAZA

JAMES TARA & 49 OTHERSPLAINTIFFS

VERSUS

JOANNES SATIA (Administrator of the Estate of RICHARD

SATIA (DECEASED).....1ST DEFENDANT

BEATRICE INJETE FRANCIS (Administrator of the Estate of

NYONGESA AWELEKHE (DECEASED).....2ND DEFENDANT

NELSON WANYONYI (Administrator of the Estate of JULIUS

MABUSI (DECEASED).....3RD DEFENDANT

JOAB NYONGESA (Administrator of the Estate of NYONGESA

CHAIRO (DECEASED).....4TH DEFENDANT

LONAH NAKHUMICHA KITUI (Administrator of the Estate of

JACKTON SIBOKI (DECEASED).....5TH DEFENDANT

RULING

1. The application dated **12/11/2018** and filed in court on **14/11/2018** has been brought by the plaintiffs who seek the following orders:-

1. ...spent

2. ...spent

3. That there be temporary orders of injunction restraining the defendants/respondents by themselves, their servants and or agents from trespassing, entering, ploughing, damaging, wasting, alienating, evicting or transferring or in any other way interfering with the plaintiff's use, possession and ownership of all that parcel known as LR No. 5335/24 situated at Endebess Area measuring 40 acres pending the hearing of and determination of the main suit herein.

4. That costs of this application be provided for.

2. The application is brought under **Order 40 Rule 1, 2 and 3 and Order 51 of the Civil Procedure Rules.**

3. The application is supported by the affidavit of one **Emmanuel S. Chonge** the 5th applicant, sworn on **12/11/2018**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The grounds upon which the application is made are that the plaintiffs have peacefully and continuously occupied the said parcel of land for over **40** years; that the 1st defendant has threatened to evict the plaintiffs; that the plaintiffs purchased the said land from **Richard Satia & Partners** in **1973**, and claims the same by virtue of purchase and/or adverse possession; that the balance of convenience favours the plaintiffs and if the orders prayed for are not granted the plaintiffs stands to suffer great loss and damage from any interference.

5. In response to application dated **12/11/2018** the 1st defendant filed replying affidavit dated **29/7/2019**. On **30/7/2019** one **Emmanuel Sichangi Chonge**, the 5th plaintiff filed an affidavit in reply to the replying affidavit of the 1st respondent.

6. The plaintiffs filed their submissions on **14/8/2019**. The defendants filed their submissions on **20/8/2019**. I have considered the application, the response and the submissions.

7. The issues that arise for determination are as follows:

a. Whether an order of temporary injunction should issue restraining the defendants/respondents from interfering with the plaintiffs' use, possession and ownership of the suit land;

b. What orders should issue?

a. Whether an injunction should issue restraining the defendants/respondents from interfering with the plaintiffs' use, possession and ownership of the suit land;

8. While in process of writing this ruling in this matter, it came to the attention of this court that what appears to be an eviction of the applicants from the suit land had occurred on **11/9/2019**, which event led to the filing of the application dated **20/9/2019** for orders of committal for contempt against the 1st respondent and a show cause order against the OCPD Endebess Police Station. In that application it is averred that the 1st defendant "*invaded the suit land destroyed the homesteads of the plaintiffs and rendered them homeless.*" Photographs of the destruction wrought in that eviction exercise were attached to the supporting affidavit of the applicants in that application.

9. In a ruling delivered on **13/11/2019** in respect of that application this court considered the replying affidavit of the 1st respondent dated **26/9/2019** and filed in opposition to the contempt application. That affidavit brought to the attention of this court the existence of other litigation regarding the suit land filed in other courts, to wit, **Nakuru HCCC No. 141 of 1991, Nakuru HCCC No. 164 of 1993 and Eldoret ELC No. 42 of 2015**. In the replying affidavit the 1st respondent in the application stated that the eviction orders implemented on **11/9/2019** arose in those cases, and were obtained not by him but by other persons. This court dismissed the application.

10. In the circumstances outlined hereinabove this court is not convinced that the instant application meets the threshold required for an order of injunction to issue.

11. An injunctive order is essentially a restraining order aimed at preventing the happening of a certain event. If that event has already occurred then an order of injunction cannot issue.

12. In the case of **Kalya Soi Farmers Cooperative Society v Paul Kirui & another [2013] eKLR**, the court observed as follows:

"An injunction is an equitable remedy to which the principles of equity apply. The Court of Appeal at Nairobi in Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No.20 of 1994 (12/94 UR) addressed itself to the issue of grant of an injunction where the action sought to be restrained has already taken place and the application of the equitable principle that equity does not act in vain as follows-

"An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

13. The plaintiffs themselves have admitted that they were evicted from the suit land as earlier outlined hereinabove. For the reason that the eviction mentioned hereinabove is said to have taken place on **11/9/2019**, the averment in the application that they are in possession of the suit land can no longer be verified on the basis of the instant application that was filed much earlier on **14/11/2018** and supported by two affidavits of **Emmanuel S. Chonge** sworn on **12/11/2018** and **29/7/2019**.

14. The applicants herein alleged that the eviction was effected by the 1st respondent in conjunction with members of police service. I have no doubt that the applicants gave this court the correct picture when they filed the application for committal dated **20/9/2019**. The least that they should have done after the filing of the further affidavit of Emmanuel S. Chonge dated **29/7/2019** was to file a supplementary affidavit to prove that notwithstanding the eviction exercise bemoaned in the decided contempt application, the applicants are still in possession of the suit land. That did not happen and this court is left in great doubt regarding whether the injunction application filed before the eviction can be prosecuted without proof that the eviction did not have the effect of terminating their possession or use of the suit land. An order of

injunction in the prevailing circumstances would therefore be like firing a shot in the dark and it must be declined for the reason that no court should issue orders in vain.

15. In the circumstances outlined hereinabove this court is not convinced that the instant application meets the threshold required for an order of injunction to issue.

16. In view of the foregoing I find the application **12/11/2018** has no merit and the same is dismissed. However owing to the events that have led to the dismissal of this application each party shall bear their own costs.

(b) What orders should issue?

17. For clarity, the final orders are as follows:

(a) The application dated 12/11/2018 is hereby dismissed.

(b) Each party shall bear their own costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 5th day of March, 2020.

MWANGI NJOROGE

JUDGE

5/3/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Chebii for applicant

Mr. Mukabane holding brief for Omboto for the respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

5/3/2020.