



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. NO. 18 OF 2019

IN THE MATTER OF THE REGISTRATION OF LAND ACT 2012

AND

IN THE MATTER OF PARCELS OF LAND MBEERE/MBITA 2092, 2087, 2119, 2169, 2184, 2185, 2282, 2548, 2571, 3771, 3773, 3774, 3776, 3778, 3779, 3780, 3781 and 3782 (2548 & 2571), (2361, 2362, 2167)

SOSPETER KITHUMBU MURANGIRI.....1ST PLAINTIFF

JOSPHAT NYAGA MUKEMBO.....2ND PLAINTIFF

ELIAS NJERU NJAGI.....3RD PLAINTIFF

VERSUS

FAUSTINO N. NJOKA.....1ST DEFENDANT

MARY NTHURAKU NJERU.....2ND DEFENDANT

STEPHEN MACHAKI KAGAI.....3RD DEFENDANT

KIMUNYE TEA FACTORY.....4TH DEFENDANT

RULING

A. Introduction

1. a notice of motion dated 29th October 2019 brought under the provisions of **Order 51 (1), Order 40 (1) (a) and Order 40 (3) of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21)** the Plaintiffs sought an order of interim injunction to restrain the Defendants from selling, leasing, charging, alienating or from howsoever from dealing with various properties viz *Mbeere/Mbita/2092, 2087, 2119, 2169, 2184, 2185, 2282, 2548, 2571, 3771, 3773, 3774, 3776, 3778, 3779, 3780, 3781 and 3782 (2548 & 2571), (2361, 2362, 2167)* (“*the suit properties*”). The Plaintiffs also sought for costs of the application to be provided for.

B. The Plaintiffs’ case

2. The said application was based upon 19 grounds set out on the face of the motion. The gist of the application was that the Plaintiffs were representatives of Ikandi clan of the Mbeere tribe who were said to be the legitimate owners and custodians of the suit properties. The Plaintiffs further suspected fraud in the Defendants’ acquisition of the suit properties especially with respect to the 1st and 2nd Defendants who were members of a rival clan known as Nditi clan. The Plaintiffs were fearful that unless the interim injunction sought was granted the Defendants might alienate the suit properties before the conclusion of the suit.

3. The said application was supported by an affidavit sworn by the 1st Plaintiff on 29th October 2019 in which he reiterated the grounds set out in the motion and the allegations contained in the amended plaint. There was, however, no allegation or demonstration of what irreparable loss, if any, the Plaintiffs might suffer if the interim injunction was declined.

C. The 1st & 3rd Defendants’ response

4. The 1st Defendant filed a replying affidavit sworn on 28th January 2020 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of the 3rd Defendant whose authority to do so he claimed to have. He stated that he was the proprietor of parcel 2167 having been awarded the same in *Minister's Land Appeal Case No. 314 of 2003*. He further stated that he was the previous owner of parcel 2087 which he later sold to the 4th Defendant.

5. The 1st and 3rd Defendants further stated that the registered proprietors of most of the suit properties had not been disclosed hence there was a risk of the court granting orders against proprietors who were not parties to the proceedings. They contended that the Plaintiffs had not demonstrated that they were in occupation of any of the suit properties or any developments they had undertaken thereon. They further contended that the Plaintiffs had failed to demonstrate a *prima facie* case with a probability of success at the trial or that they would suffer any irreparable damage which could not be compensated by an award of damages.

D. The 4th Defendant's response

6. The 4th Defendant filed a replying affidavit sworn by its Factory Unit Manager, Robert Kibagendi Maina, on 2nd March 2020 in opposition to the said application. The gist of the response was that the 4th Defendant was a *bona fide* purchaser for value without notice of any defect in title of *parcel Nos. 2087 and 2092*. It was contended that the 4th Defendant conducted due diligence and searches at the relevant Land Registries and that all legal requirements were followed in the acquisition of the two parcels, including procurement of the consent of the relevant Land Control Board.

7. The 4th Defendant further stated that it took possession of the two parcels upon purchase and that the Plaintiffs had never been in possession thereof. It was contended that the Plaintiffs had previously unsuccessfully sought an injunction against parcel 2092 in *Embu ELC Case No. 71A of 2014 (O.S.)* hence the instant application was an abuse of the court process. Finally, it was contended that the Plaintiffs had failed to meet the threshold for the grant of an interim injunction hence the court was urged to dismiss the application with costs.

E. Directions on submissions

8. When the said application was listed for hearing on 29th January 2020 it was directed, upon the request of the parties present, that the same be canvassed through written submissions. The Plaintiffs were granted 21 days to file and serve their submissions whereas the Defendants were granted 21 days upon the lapse of the Plaintiffs' period to file and serve theirs. The record shows that the Plaintiffs filed their submissions on 18th February 2020 whereas the 4th Defendant filed its submissions on 4th March 2020. However, there were no submissions on behalf of the 1st, 2nd and 3rd Defendants by the time of preparation of the ruling.

F. The questions for determination

9. The court has perused the notice of motion dated 29th October 2019, the replying affidavits in opposition thereto and the submissions on record. The court has considered the pleadings, documents and annexures to the affidavits on record. The court is of the opinion that the main questions which arises for determination is whether the Plaintiffs have satisfied the requirements for the grant of an interim injunction.

G. Analysis and determination

10. The court has considered the nature of the dispute in this matter. It would appear that the Plaintiffs are members of Ikandi clan of the Mbeere tribe whereas the 1st and 2nd Defendants appear to be members of Nditi clan (Mbwe house). It would appear that the suit properties were the subject of a dispute between the two clans during the land adjudication process. It would further appear that the dispute was escalated to the Minister under **Section 29 of the Land Adjudication Act (Cap. 284)** who made a decision in favour of the Plaintiff's Ikandi clan. However, that decision was subsequently quashed by the High Court in *High Court Misc. Application No. 72 of 2003* hence ownership reverted to members of Nditi clan.

11. It would further appear that the Plaintiffs did not take steps to challenge the High Court decision which was rendered on 15th December 2004 by the Hon. Isaac Lenaola J (as he then was). In the meantime, members of Nditi clan filed *Embu ELC Case No. 71A of 2014 (O.S.)* for enforcement of the fruits of their success. By a judgement dated 26th September 2019 this court granted the application for rectification of the relevant land register and an order for their registration as proprietors.

12. However, by a plaint dated 24th June 2019 and amended on 29th October 2019 the Plaintiffs filed the instant suit seeking an order of interpretation of the judgement of the High Court dated 15th December 2004. The Plaintiffs contended that the said judgement should be interpreted to mean that the dispute between the two clans ought to have been remitted for a fresh hearing either at the committee stage, objection stage, or even the Minister's level. The Plaintiffs also sought various orders vesting ownership of the suit properties upon Ikandi clan and for registration of their members as proprietors.

13. So, have the Plaintiffs demonstrated a *prima facie* case with a probability of success at the trial within the meaning of the principles enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**? The court must confess that it finds the mode of litigation adopted by the Plaintiffs to be quite unusual in a land dispute which has been subject to the process of land adjudication under the **Land Adjudication Act (Cap. 284)**. It has been held that where parliament has provided clear mechanisms for redressing particular grievances then such procedure must be strictly followed. See **The Speaker of the National Assembly V Karume [2008] 1 KLR 426 (EP)** and **Peter Muturi Njuguna V Kenya Wildlife Service [2017 eKLR]**.

14. So, where a party has fully exhausted such mechanisms all the way to judicial review proceedings before the High Court he is not at liberty to commence fresh proceedings by way of plaint for recovery of the properties he was unable to recover through the mechanism and

procedure set out by parliament. The court is of the opinion that where a party is aggrieved by a decision rendered by the High Court the appropriate recourse would be to seek a review or to prefer an appeal to a higher court. If a party were to be allowed to commence fresh proceedings each time he reached a dead-end, there would be no end to litigation. However, since the court is dealing with an interlocutory application, the Plaintiffs shall still be at liberty to persuade the trial court that the course they have adopted is legally tenable.

15. The court has also anxiously considered the question of 'interpretation' of the High Court judgement of 15th December 2004. Again, the court finds it utterly strange that the Plaintiffs had to file a fresh suit for interpretation of a judicial review judgement rendered more than 15 years ago. So far as this court is aware, all matters relating to interpretation of a judgement or decree should be dealt with at the forum where it was passed or the court executing the decree. Indeed, **Section 34(1) of the Civil Procedure Act (Cap. 21)** stipulates as follows:

“34 (1) All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

16. The court is thus far from satisfied that the Plaintiffs have demonstrated any *prima facie* case with a probability of success at the trial hereof on both the question of recovery of the suit properties and on interpretation of the judgement of the High Court dated 15th December 2004. However, as indicated before, this opinion is merely provisional and limited to the instant application. The Plaintiffs shall still be at liberty to persuade the trial court otherwise. In the premises, the court finds and holds that the Plaintiffs have failed to satisfy the first principle for the grant of an interim injunction.

17. However, in case the court is wrong on the first principle it shall consider the second principle as well. It has been held that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage or injury, that is, harm which cannot be adequately compensated by an award of monetary damages. So, what kind of damage might the Plaintiffs suffer unless the interim injunction is granted? In both the notice of motion and the supporting affidavit, the Plaintiffs did not identify or demonstrate what irreparable harm or damage may ensue if the injunction was denied. All they stated was that no party would suffer prejudice if the injunction was granted and that they were apprehensive that the Defendants might alienate the suit properties. The fear or apprehension referred to cannot by itself constitute irreparable damage. The court thus finds and holds that the Plaintiffs have failed to satisfy the 2nd requirement for the grant of an interim injunction.

18. Since the Plaintiffs have failed to demonstrate the 1st and 2nd principles, they are not entitled to an order of injunction. However, even if the court were to consider the 3rd principle on the balance of convenience, there is scanty evidence on who is in possession of the suit properties. Although the Plaintiffs conceded that the 4th Defendant was in possession of the 2 parcels it bought, they claimed to be in possession of the rest of the suit properties. There was, however, no evidence of their possession and of any developments or activities being undertaken thereon. On the contrary, they pleaded in paragraph 35 of the amended plaint as follows:

“The Plaintiffs’ claim against the Defendants is that they ought to vacate from the Plaintiffs’ subject parcels so that the Plaintiffs can start the process of distribution and registration of titles.”

19. Finally, there are two other reasons why the Plaintiffs’ application ought to fail. First, apart from the 4 Defendants who were sued the registered proprietors of the rest of the suit properties do not appear to have been joined in the suit. In fact, apart from the green cards for parcel Nos. 2087, 2092, and 2167 the rest of the greencards on record relate to parcels of land which were excluded from the proceedings by the amended plaint dated 29th October 2019. It would be against the cardinal rules of natural justice for the court to grant adverse orders against property owners who are not before court. See **Nicholas Njeru Vs The Hon. Attorney General & 8 Others [2013] eKLR**.

20. The second reason why the application ought to fail is on account of delay. The material on record indicates that the judgement whose interpretation the Plaintiffs are seeking was rendered more than 15 years ago. That is when the Plaintiffs’ Ikandi clan lost their properties to Nditi clan. It was not explained why the Plaintiffs look more than 15 years to file suit and to seek interim orders. A party who seeks the aid of equity must act diligently for equity aids the diligent and not the indolent. See **Ibrahim Mungara Kamau V Francis Ndegwa Mwangi [2014] eKLR**.

21. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed to satisfy the requirements for the grant of an interim injunction. Consequently, the court finds no merit in the Plaintiffs’ notice of motion dated 29th October 2019 and the same is accordingly dismissed with costs to the 1st, 3rd and 4th Defendants only.

RULING DATED and SIGNED in Chambers at EMBU this 30TH DAY of APRIL 2020

In the absence of the parties due to the prevailing Covid-19 situation. The ruling was transmitted to M/s Kamunda Njue & Co. Advocates for the Plaintiffs, M/s Duncan Muyodi & Co. Advocates for the 1st & 3rd Defendants and M/s J.K. Kibicho & Co. Advocates for the 4th Defendant through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

30.04.2020