



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 71 OF 2019 (OS)

IN THE MATTER OF THE NGONG/ NGONG/ 1418 NOW subdivided to NGONG/ NGONG/ 65357, 65358 and 65359

AND

IN THE MATTER OF THE TRUSTEE ACT, CAP 167 LAWS OF KENYA

JOHN NJOROGE KINYUA.....1ST APPLICANT

SAMUEL GITHUKU KINYUA.....2ND APPLICANT

VS

WALLEN GITAU WANGAL.....1ST RESPONDENT

JAMES RUO WANGAL.....2ND RESPONDENT

POTTERS GROUP LIMITED.....3RD RESPONDENT

RULING

What is before Court for determination is the Applicants' Notice of Motion Application dated the 27th November, 2019 brought pursuant to section 13(7) of the Environment and Land Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act; Order 40 Rule 10(1) (a) and Order 51 Rule 1 of the Civil Procedure Rules. The Applicants seek for the following orders:

1. Spent
2. Spent
3. The court be pleased to grant an order preserving the property known as NGONG/NGONG/ 65358, pending the hearing and determination of the main suit.
4. The Court be pleased to grant an order restraining the 3rd Defendant, his servants, workmen and agents, from entering on the said property NGONG/ NGONG/ 65358, from erecting or causing to be erected any constructions thereon, or from in any way further developing the said property pending the hearing and determination of this suit.
5. The Court be pleased to grant a temporary restraining order against the 1st and 2nd Defendants/ Respondents, their servants, workmen and agents from selling, transferring or disposing of the properties known as NGONG/ NGONG/ 65357 and 65358 pending the hearing and determination of this suit.
6. The costs of this application are provided for.
7. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

The application is premised on the grounds on the face of it and the affidavit of SAMUEL GITHUKU KINYUA the 2nd Plaintiff herein where he deposes that the 3rd Defendant is the registered proprietor of land parcel number NGONG/ NGONG/ 65358 where it claims to rear chicken and cows for commercial purposes. He insists only a small portion of the 3rd Defendant's land is utilized. He claims that prior to the

fraudulent subdivision and purchase of the suit land by the 3rd Defendant from the 1st and 2nd Defendants, the Plaintiffs had drilled a borehole, built a two roomed iron sheet house and laid pipes for purposes of farming with the latter two seemed to have been destroyed by the 3rd Defendant. He contends that they are apprehensive that the 3rd Defendant will develop the undeveloped portion of the suit land during the pendency of the main suit. He avers that the 1st and 2nd Defendants are in the process of selling and/or transferring the parcels of land known as NGONG/ NGONG/ 65357 and 65359 which are jointly registered in their names which actions will be detrimental to the Applicants as the ownership of land is a contested issue within the main suit. He reiterates that they will suffer irreparable damage unless the Defendants are stopped.

The 1st and 2nd Defendants opposed the application by filing a replying affidavit sworn by WALLEN GITAU WANGAI where he deposes that the Plaintiffs have absolutely no interest in the land parcel numbers NGONG/ NGONG/ 65357, 65358 and 65359 hereinafter referred to as the 'suit lands', to warrant the grant of the orders sought. He explains that the suit lands were resultant subdivisions of NGONG/ NGONG/ 1418. Further, that all interested families including the Plaintiffs in NGONG/ NGONG/ 1418 had agreed to sell NGONG/ NGONG/ 65358 to the 3rd Defendant. He contends that the 1st Plaintiff received Kshs. 600,000/= on behalf of his family pursuant to the sale of the aforementioned parcel of land to the 3rd Defendant and signed an acknowledgment. Further, that upon completion of the transaction, the remaining payment of the balance of the purchase price by the 3rd Defendant for the portion belonging to the Plaintiffs' family was made to AUGUSTA NJERI HINGA who was the wife to the Plaintiffs' deceased brother who had children with him and therefore entitled as a beneficiary. He states that as for NGONG/ NGONG/ 65357 and 65359, the titles were handed over to the families who were not interested in selling and are in actual occupation thereon. He reiterates that the Plaintiffs do not have proprietary interest in the three parcels of land and the application lacks a proper basis. He contends that the orders sought against them are in vain as well as inconsequential as they do not maintain any interest in the aforementioned parcels of land and therefore cannot purport to undertake the actions sought to be stopped.

The 3rd Defendant opposed the application and filed a replying affidavit sworn by EPANTUS NDIRITU GAKUU one of the Directors where he deposes that it is the registered proprietor of NGONG/ NGONG/ 65358 which it purchased from a group of fourteen families including the Plaintiffs. He contends that the Plaintiffs were paid their share of the purchase price which had been paid by the 3rd Defendant. Further, that it is a bona fide purchaser for value. He reiterates that the Plaintiffs have not demonstrated any proper basis for the orders sought.

All the parties herein filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion Application dated the 27th November, 2019 including the respective parties' affidavits and submissions, the only issue for determination at this juncture is whether the Court should grant a preservation order of status quo in respect to the suit lands pending the outcome of the suit.

The Plaintiffs seek injunctive reliefs against the Defendants in respect to the suit lands. In their submissions, they have reiterated their claim above and relied on the case of **Aniello Storelli V Damaris Mwongeli and Another (2019) eKLR** to support their arguments.

The 1st and 2nd Defendants insist the Plaintiffs are not entitled to the orders sought. They deny ownership of land parcel numbers NGONG/ NGONG/ 65357 and 65359 and insist the families who are the owners are not parties to the suit, hence orders cannot issue against them. Further, that they have no interest in the suit lands. They have relied on the cases of **Salim Seif Ambunya Andanje & Another V Alex Jepkoech Yano & Another (2019) eKLR and Mbaki & Others V Macharia & Another (2005) 2 EA 206** to support their averments. The 3rd Defendant submitted that it only has an interest on land parcel number NGONG/ NGONG/ 65358 and contended that the Court could only issue status quo orders after the balance of all factors and circumstances. It reiterated its claim above and relied on the decisions of **Thugi River Estate Limited & Another V National Bank of Kenya Limited & 3 Others (2015) eKLR as well as International Air Transport Association & Another V Akarim Agencies Company Limited & 2 Others (2014) eKLR** to support its averments.

It is not in dispute that the 3rd Defendant is the proprietor of NGONG/ NGONG/ 65358. The 1st and 2nd Defendants deny being registered proprietors of NGONG/ NGONG/ 65357 and 65359 respectively and insist the same are owned by families who are currently in possession thereon. From the Green Cards annexed to the Originating Summons, it indicates the 1st and 2nd Defendants were owners of NGONG/ NGONG/ 65357 and 65359 as at 17th November, 2014 but no party has furnished court with the latest Certificate of Official Searches to confirm the names of the new proprietors. As per the Sale Agreement dated 12th October, 2012 with the 3rd Defendant (annexure ENG 1), I note Kinyua Muiro who was the Applicants' father is indeed indicated therein as one of the beneficial owners. I further note that he even signed the Affidavit of Mandate which was sworn on 21st April, 2008 allowing the 1st and 2nd Defendants' father and one Stephen Waweru Waitara to pursue all matters relating to the suit lands. As per annexures 'WGW 6,' the 1st Plaintiff acknowledged receipt of Kshs. 600,000/= in respect to the purchase price of suit land owned by the 3rd Defendant. Further, from annexure 'WGW 2' it is evident that the 1st Plaintiff indeed participated in various meetings to deliberate on the sale of the suit lands. I note all these averments were not controverted by the Plaintiffs.

Rule 32 of the **PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS** provides that: 'During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.'

In the case of **Thugi River Estate Limited & Another V National Bank of Kenya Limited & 3 Others (2015) eKLR** the Learned Judge held that: 'Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts. This is achieved through the issuance of formal

prohibitory injunctive orders or through conservatory orders or stay orders. Such status quo orders do not extend to future circumstances however unlikely. “Status quo” in this respect, as maintained by an injunctive or conservatory or stay order, is the then existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in *American Cyanid Co.-v- Ethicon* [1975] 1 All ER 504 at 511

“where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.....”

Further in the case of *Mbaki & Others V Macharia & Another* (2005) 2 EA 206, the Court held that:’ to grant orders against the National Land Commission compelling them to conduct investigations is tantamount to condemning them unheard and this would be in breach of natural justice. Further, the court cannot issue orders against a person that is not party to the suit.’

Based on the facts as presented above and in associating myself with the decision of *Thugi River Estate Limited & Another V National Bank of Kenya Limited & 3 Others* (2015) eKLR, I am unable to grant an order of status quo as against the 3rd Defendant to block it from developing its parcel of land. As for the two remaining parcels of land, the 1st and 2nd Defendants were categorical that they do not own them. No party furnished court with the latest search to confirm ownership. Since the Plaintiffs failed to controvert these averments and since the new owners are not parties to the suit and in associating myself with the case of *Mbaki & Others V Macharia & Another* (2005) 2 EA 206, I am unable to grant status quo orders in respect to the two parcels of land NGONG/ NGONG/ 65357 and 65359.

It is against the foregoing that I find the Notice of Motion Application dated the 27th November, 2019 unmerited and will proceed to dismiss it with costs to the Defendants.

Dated Signed and Delivered via email this 12th Day of May 2020.

CHRISTINE OCHIENG

JUDGE