



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 1102 OF 2016

JAPHES ARISA MAKORI

(Chairman suing on behalf of Ndonyo Grazing Ground

Community Based Organization.....1ST PLAINTIFF

ELLIAM OKACHI MAKORI (Member).....2ND PLAINTIFF

VERUS

COUNTY GOVERNMENT OF KISII.....1ST DEFENDANT

SAFARICOM LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs are members of Ndonyo Grazing Ground Community Based Organization who claim to be the beneficial owners of land parcel No. SOUTH MUGIRANGO/NYATAARO/1202. The Plaintiffs claim that the said parcel of land was reserved as a grazing ground for the members of Ndonyo Grazing Community Based Organization but during the process of adjudication, it was erroneously registered in the name of Gusii County Council.

2. The Plaintiffs moved the court by way of a Notice of Motion dated 18th November 2019 seeking the following orders:

a) Spent

b) That pending the hearing and determination of the this application, the Defendants either by themselves, their servants or otherwise be restrained by an order of injunction from trespassing and erecting or interfering with the land in issue being land parcel number SOUTH MUGIRANGO/NYATAARO/1202 lawfully held and managed by Ndonyo Grazing Community.

c) That pending the hearing and determination of this suit, the Defendants either by themselves, their servants, agents or otherwise be restrained an order of injunction from trespassing, alienating or interfering with the parcel of land namely SOUTH MUGIRANGO/NYATAARO/1202 managed and held by Ndonyo Grazing Community.

d) The OCS Etago Police Station/Nyamaiya Police Station to assist in the enforcement of this order once granted.

e) The costs of this application be provided for.

3. The application is based on the grounds stated in the Notice of Motion and the affidavit of Japhes Arisa Makori, the 1st Plaintiff herein sworn on the 18th November, 2019 in which he deposes that the Respondent has started demarcating the suit property, which was reserved for the Plaintiffs while the case is still pending for hearing and he fears that they may be dispossessed of the same.

4. The 1st Respondent have resisted the application through the Replying Affidavit of Patrick Achoki the Director, Physical Planning at the County Government of Kisii sworn on the 30th January 2020. In the said affidavit he depones that the Applicant has not provided any evidence that there is imminent threat to the suit property to warrant granting an injunction. He also contends that they have raised a preliminary objection that the suit herein is statute barred. The application was canvassed by way of written submissions and counsel for the Applicant and the 1st Defendant filed their submissions. The 2nd Defendant did not file any submissions.

ISSUES FOR DETERMINATION

5. The main issue for determination is whether the Applicants are entitled to an order of injunction.

In the exercise of its discretion to grant injunctive relief, the court is guided by the principles set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one 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”

6. Counsel for the Applicants has submitted that the suit property was registered in the name of Gusii County Council in 1970 although it was reserved for Ndonyo Grazing Community. However, the Applicants did not bother to attach any document to their supporting affidavit to prove their claim to the suit property. It is also not clear whether the Applicants have been using the suit property for grazing their animals as was originally intended or whether the entire parcel of land has been leased to the 2nd Defendant.

7. Even though the Applicants have alleged that the suit property is being demarcated, they have not stated when the alleged acts of trespass by the Respondents were committed nor have they provided any evidence that the suit property is in danger of being alienated. In the circumstances, I agree with counsel for the Respondent that the Applicants have failed to demonstrate that they have met the conditions in the Giella case.

8. Although the 1st Respondent has raised the issue of limitation in his Replying affidavit and submissions, I have perused the defence filed by the Defendant on 30.1.20 and there appears to be some mix-up. I also note that the Applicants either deliberately or through inadvertence, did not submit on the issue of limitation. I will therefore address the issue of limitation separately once the apparent confusion in the defence is sorted out.

9. In view of the foregoing I find no merit in the application and I dismiss it.

The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii via video link this 29th day of July 2020.

J.M ONYANGO

JUDGE