



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 294 OF 2015

ERERI COMPANY LTD.....PLAINTIFF

VERSUS

CORNERSTONE PREPARATORY ASSOCIATION.....1ST DEFENDANT

STEPHEN NDUNGU NJENGA.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff being a land buying company and holding a title issued under the RTA; defendants holding titles under the RLA which they assert came forth after proper subdivision of the RTA title; previous suits having been filed and different decisions reached; issue too complex to be decided on whether or not prima facie case established; decision on balance of convenience; balance of convenience tilting to maintenance of status quo)

1. This suit was commenced by way of plaint filed on 19 October 2015. The 1st defendant is described as an association running or intending to run a children's home in the name of Naomi Children's Home. The 2nd defendant is an adult of sound mind. I will come back to this later as there is a preliminary objection raised that the suit as filed is incompetent for the reason that the 1st defendant has not been properly sued. The plaintiff is a limited liability company and has pleaded to be the registered owner of the land L.R No. 8622 Longonot. It is pleaded that the 2nd defendant and other unscrupulous persons have subdivided this land and caused illegal titles to be issued in the series of Longonot/Kijabe Block 1 ...(Eleri). It is averred that the 2nd defendant has allocated himself approximately 200 acres of the plaintiff's land and issued himself with the title deed to a land parcel Longonot/Kijabe Block 1/54 (Eleri). It is averred that this was done fraudulently as there were court orders prohibiting any dealings in the land claimed by the plaintiff and that the plaintiff has never surrendered its title for subdivision.

2. It is pleaded that the plaintiff moved to the High Court vide the case Nairobi HCCC No. 512 of 2010 against the 2nd defendant and 7 others and the Court made a finding that no subdivision of the original L.R No. 8622 had taken place and that the defendants therein were ordered to deliver to the plaintiff the original title deed. It is also pleaded that one Virginia Nyakio Chege, who had been issued with a title deed to one of the subdivisions, sued the plaintiff vide Nakuru HCCC No. 220 of 2010 seeking injunctive orders and the court made a finding that the title was fraudulent. It is stated that despite these decisions, the defendants have unlawfully entered the plaintiff's land and have started putting up structures which is claimed to infringe on the plaintiff's property rights. It is the position of the plaintiff that in the event that the 1st defendant holds a title in the series of Longonot/Kijabe Block ...(Eleri) the same is illegal, together with the title deed of the 2nd defendant to the land parcel Longonot/Kijabe Block 1/54.

3. In the suit, the plaintiff has asked for the following orders (paraphrased slightly):-

i) *A declaration that any title deed held by the 1st defendant in the series Longonot/Kijabe Block...(Ereri) and the 2nd defendant's title deed number Longonot/Kijabe Block 1/54 (Ereri) are fraudulent.*

(ii) *A permanent injunction to restrain the defendants from constructing any structures , entering , cultivating or using the any portion of the land parcel L.R No. 8622.*

(iii) *Costs and interest.*

4. Together with the suit, the plaintiff filed an application for injunction which is the subject of this ruling. The application seeks to restrain the defendants from constructing structures, entering or interfering and dealing with any portion of the land parcel L.R No. 8622. The supporting affidavit has more or less enumerated the plaintiff's case as outlined above. It was averred inter alia that the defendants have embarked on construction on the suit property and should be stopped.

5. The application is opposed by the defendants. The replying affidavit in respect of the 1st defendant is sworn by one Mary Wanjiku Thuo who has described herself as a director of the 1st defendant. It is averred that the 1st defendant is on its land parcel Longonot/Kijabe Block 1/17 (Ereri) of which it is the legally registered owner. It is not denied that the 1st defendant has embarked on construction in this parcel of land. It is stated that the 1st defendant is a Society registered under the Societies Act and a Certificate of Registration is annexed. It is averred that the 1st defendant purchased the land parcel Longonot/Kijabe Block1/17 (Ereri) which measures about 15 hectares from the previous registered owner, one Beth Kabura Njau in June 2014. A sale agreement dated 24 June 2014 is annexed showing that the land was sold at a consideration of Kshs. 7.5 Million. Also annexed is a Land Control Board letter of consent for the transaction. The land was then transferred to the 1st defendant who made plans to develop it and obtained approvals for its intended construction. The 1st defendant engaged a contractor to construct on the land and it is averred that it stands to suffer loss and damages as it has contractual commitments. It is also stated that the 1st defendant has commitments from well wishers and sponsors and is likely to be painted in bad light if it fails to meet its targets. It may also not obtain grants and sponsorship and would be unable to fulfill its mandate. It is averred that the 1st defendant is a bona fide purchaser for value and has claimed protection under Sections 26 and 53 of the Land Registration Act, 2012, and Section 39 of the Registered Land Act (repealed). It is deposed that the cases Nakuru HCCC No. 20 of 2010 and Nairobi HCCC No. 512 of 2010, and Nakuru HCCC No. 187 of 2012 involved different parties and not the 1st defendant. It is further deposed that the plaintiff has deliberately not mentioned the case Nairobi HCCC No. 3746 of 1988 consolidated with Nairobi HCCC No. 3200 of 1990 and Judicial Review No. 76 of 2011 which they filed and obtained adverse orders, and are currently the subject of Civil Appeal Nos. 172 of 2006 and 21 of 2014.

6. On the part of the 2nd defendant, it was deposed that he is the duly registered owner of the land parcel Longonot/Kijabe Block 1/54 (Ereri) and that he has held this title deed since the year 1991. He has deposed that he has since occupied and developed the said property and has had exclusive possession of it. He has stated that from 1991, no one has laid claim to the said land. He has averred that he obtained the said land lawfully after the successful conversion and subdivision of the mother title, L.R No. 8622 which was a title under the Registration of Titles Act, Cap 281, (RTA) regime. He has stated that this title now no longer exists and that the plaintiff cannot purport to hold an interest in a non-existent title. It is averred that this title was surrendered for subdivision and new titles issued under the Registered Land Act (RLA) regime. It is said that the current office bearers of the plaintiff company unlawfully retrieved back this mother title from the Land's office. It is his view that in Judicial Review No. 76 of 2011, it was held that the land parcel L.R No. 8622 was legally subdivided and it does not now exist. It is said that the court upheld the title held by the 2nd defendant. He has pointed out that there is an appeal against this decision which has not yet been disposed of. He has stated that at the moment he is in the process of erecting a permanent residential house on his land and the architectural drawings are complete. It is his view that the question of the validity of his title has already been decided in JR No. 76 of 2011. He has stated that the decisions in HCCC No. 20 of 2010, HCCC No. 512 of 2010 and HCCC No. 240 of 2012 mentioned by

the plaintiff were rulings on interlocutory applications and do not represent authoritative findings.

7. The 1st defendant did raise a preliminary objection the gist of which it is argued that the 1st defendant in its capacity has been improperly joined to the proceedings. I directed that the preliminary objection be subsumed in the hearing of the application.

8. There is a further affidavit filed by the plaintiff in which it asserts that the status of L.R No. 8622 has never changed and that the title is still intact. The deponent has averred that indeed the plaintiff has been paying land rates and rents on this land. He has further averred that Beth Kabura Njau is a shareholder of the plaintiff company and is only entitled to 5 hectares of land and not 15 hectares. It is his view that this title was fraudulently acquired. It is averred that the plaintiff on 25 January 2014 placed a "caveat emptor" warning any intending purchasers. It is also stated that there were restrictions placed on the property and transactions would have been impossible. It is further averred that the titles issued under the RLA are fraudulent as they were issued when there were orders of injunction issued by Justice Mbiti on 14 September 1988 and the same have never been lifted. Another order of injunction is said to have been issued on 22 June 1992 by Akiwumi J and a third issued by Justice Githinji on 16 December 1994. It is further averred that the mother title is a leasehold title and it could not be that the titles issued under the RLA are freehold titles. It is averred that the Chief Land Registrar wrote a letter dated 30 December 1991 to stop the Land Registrar Nakuru from issuing the RLA titles. This was followed up by other letters copies of which were annexed. It is thus the view of the plaintiff that any RLA titles are null and void. It is further averred that the dismissal of the suits HCCC No. 3746 of 188 and HCCC NO. 3200 of 1990 did not validate these titles.

9. I took in both written and oral submissions and I have considered these submissions in my ruling.

10. What I have before me is essentially an application for injunction. The principles to be followed in an application of this nature were well set out in the case of *Giella vs Cassman Brown (1973) EA 358*. An applicant needs to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss if the injunction is not allowed. If the court is in doubt, it will decide the application on a balance of convenience. I have no problem with the above principles. I am however alive to the fact that what the court is being asked to do in an application for injunction is to pronounce how best the subject matter of litigation ought to be preserved and my usual approach in an application for injunction is not to simply make a mechanical application of the principles in *Giella vs Cassman Brown*. The court needs to have a wholistic look at the case before it and make an intelligent decision on how best the subject matter is to be maintained pending hearing of the suit after taking into account all aspects of the case.

11. In the case before me, the plaintiff's position in a nutshell is that it holds the title to L.R No. 8622 and it is its case that this title is still intact and has never been subdivided, and if it has, then these subdivisions are illegal. The plaintiff's case is that the subdivisions cannot be lawful as the original title has never been surrendered, and in any case, when the subdivisions were done, there was a court order stopping any dealings in the property which were issued in Nairobi HCCC Nos. 3200 of 1990 and 1002 of 1993. It is further its case that even though the two cases were dismissed there has been no order issued raising the inhibitions registered therein.

12. On the other hand the case of the defendants is that they have valid titles issued under the regime of the Registered Land Act (RLA) (now repealed) after the subdivision of L.R No. 8622 which is a title under the regime of the Registration of Titles Act (RTA) (now repealed). It is their submission that the title L.R No. 8622 no longer exists and therefore cannot be the subject of litigation. It is further their position that the decision in Nakuru HCCC JR No. 76 of 2011 upheld their titles. I note at this juncture that the said decision was subjected to appeal which appeal is still pending in the Court of Appeal. In his submissions, Mr. Njengo, for the 2nd defendant, did indeed argue that the litigation in the Court of Appeal must be allowed to proceed to its logical conclusion. Prof. Ojienda inter alia argued that there was substantive non-disclosure of material facts, especially because the plaintiff never disclosed the existence of other previously decided cases. He pointed out at Nakuru JR No. 76 of 2011 and the decision in Nairobi HCCC No. 3746 of 1988 which was consolidated with Nairobi HCCC No. 3200 of 1990.

13. Probably this is a good point to have a look at the previous decisions touching on the land in issue. Eleri Ltd is a land buying company and it purchased several parcels of land including the suit property so as to later subdivide the same to its members. In these two latter cases filed in Nairobi, several persons moved the court to compel Eleri Ltd to subdivide certain properties, including the suit land, amongst its shareholders. There was a complaint that the company was irregularly subdividing the land by including other persons who are not shareholders. In a judgment rendered by Mbitio J on 19 November 1997, the learned Honourable Judge held that the plaintiffs had no locus standi to sue and declined to interfere with the subdivision of the land. There is now a pending appeal against this decision being Nairobi Court of Appeal, Civil Appeal No. 172 of 2006.

14. Some persons did derive title which they believe they legitimately obtained after what they argue was a proper subdivision of L.R No. 8622. One of the persons who obtained title was Virginia Nyakio Chege. She did file a case registered as Nakuru HCCC No. 220 of 2010 against Eleri Ltd who were said to be interfering with her said land. In a ruling delivered on 6 May 2011, Emukule J, was of the thought, that the plaintiff's title was not properly procured, for the reason that the land L.R No. 8622 was not properly subdivided. This however must be appreciated to have been a ruling on an interlocutory application and not after hearing the suit on merits. But his opinion did shape his ruling vide which he dismissed the application for injunction.

15. There is also a suit Nairobi HCCC No.512 of 2010. The plaintiff is Eleri Ltd and it sought the return of various properties including the head title to L.R No. 8622 from the previous directors, one of whom is the 2nd defendant herein. An application compelling return of this title was allowed by Kimondo J, in a ruling delivered on 4 November 2011. The learned Honourable Judge was of opinion that the defendants had not tabled evidence of a proper subdivision scheme backed by company resolutions.

16. Apart from the above, there is also Nakuru JR No. 76 of 2011. It is a suit that was filed by Eleri Ltd. One of the orders sought was an order of mandamus to revoke all titles issued under the Registered Land Act purporting to be subdivisions of L.R No. 8622. In a ruling delivered on 4 December 2013, H.A. Omondi J, dismissed the suit and refused to revoke the said titles. I am made to understand that her decision is now the subject of Civil Appeal No. 21 pending in the Court of Appeal.

17. I think Prof. Ojienda backed by Mr. Njengo, have a point when they state that there has been some material non-disclosure, for the plaintiff never disclosed the existence of Nairobi HCCC No. 3746 of 1988 , Nairobi HCCC No. 3200 of 1990, and Nakuru JR No. 76 of 2011 and the resultant appeals when the application herein was initially made. It appears to me as if the plaintiff only wanted to disclose the cases that were decided in its favour and conceal the cases that were not decided in its favour. This is not good practice and must be discouraged. A party approaching the court must disclose all material facts especially when he/she appears before the Court ex-parte in the first instance, for a court is bound to make a decision based on the material tabled before it, and it is improper for a party to attempt to sway the decision of the court for failing to disclose all facts. That alone, on discovery, can make the court dismiss an application or set aside interim orders. On this, I must castigate counsel for the plaintiff for he had a duty to make full disclosure considering that he also acted for the plaintiff in the other cases.

18. Be as it may, I can see for myself that the plaintiff believes that its title to L.R No. 8622 is intact, whereas the defendants believe that this title no longer exists as it was subdivided and new RLA titles issued. The plaintiff does still hold the title to L.R No. 8622 which raises legitimate questions as to whether the said title was properly surrendered and subdivided. The defendants on the other hand do also hold titles which they consider to be genuine.

19. I think in the circumstances of this case, given the accusations and counter accusations leveled by the two sides, and the multitude of the issues raised, it will be unwise, at this stage of the proceedings, to enter into an in-depth investigation as to which title between that of the plaintiff and the defendants, is the legitimate title. What has emerged before me is a complex litigation and I better not say much at this stage of the proceedings. I further observe that different judges appear to have held different opinions on the matter of the subdivision of the parent title and the resultant titles issued under the RLA. In their interlocutory rulings, Emukule J, and Kimondo J, appear to have held the view that the subdivision of the

parent title was suspect. Omondi J, in her decision appears to have held the view that the subdivisions under the RLA could not be interfered with. I do note that the substantive litigation in the two cases decided by Emukule J and Kimondo J, is yet to be determined but their holdings cannot be taken lightly.

20. Given the above, I am of the opinion that the application is best decided on a balance of convenience.

21. In my view, the balance of convenience tilts towards having the current status quo prevail, with regard to both the titles and the occupation on the ground. I say so, because I also do not want to make an order that can jeopardize the appeals pending before the Court of Appeal. I am indeed of the opinion that the decisions that may be rendered by the Court of Appeal may have a bearing on this suit. If for example the Court of Appeal reverses the decision of Omondi J, and holds that the orders of judicial review were merited, this may lead to the cancellation of the RLA titles, including the titles of the defendants. I do not however wish to pronounce at this juncture as to whether or not this suit is res judicata. I can only assess that if a substantive application is filed and I have before me all pleadings and materials. But I do see the need to maintain the status quo of the properties.

22. Therefore in respect of the titles, I do issue an order stopping any dealings in the land parcels Longonot /Kijabe Block 1/17 (Ereri) held by the 1st defendant and Longonot/Kijabe Block 1/54 (Ereri) held by the 2nd defendant. As for the utilization on the ground, I am aware that the plaintiff sought the stoppage of constructions on these two properties. I am afraid that I am unable to give the order. I have seen that the construction being made by the 1st defendant is at an advanced stage. I think in the circumstances of this case, the plaintiff ought to have moved the court earlier and immediately it saw that construction has commenced. The plaintiff has come rather late in the day, and in the circumstances, I am unable to stop the construction or use of the land by the 1st defendant. The balance of convenience in this regard lies with the 1st defendant. I am also in the same vein not going to stop any construction by the 2nd defendant if he is indeed minded to construct. It will be up to him to decide whether or not to undertake construction despite his title being questioned and despite the risk that the said title may be cancelled and any developments may be lost.

23. I have not forgotten the preliminary objection. It was submitted that the suit is incompetent in the manner in which the 1st defendant was sued. That may be so, but I think this can be cured by amendment. Courts are generally more forgiving when it comes to the identity of a defendant because sometimes the plaintiff may not be aware of the correct identity or legal capacity of a defendant. On my part, I think so long as there is no doubt as to whom the defendant is meant to be, no prejudice is caused and the pleadings can be corrected through amendment. I trust that the plaintiff will take cue and effect the amendment.

24. On the reasons above, my summary on this application is that status quo be maintained in the manner described above. Costs will be in the cause.

25. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 5th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr Macharia for plaintiff/applicant.

Prof. Tom Ojienda (Senior Counsel) for 1st defendant /respondent.

Mr Njengo for 2nd defendant/respondent.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU