



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 1672 OF 2001

VERSUS

JULIUS MAREKIA MUIGAI.....2ND DEFENDANT
SAMUEL GITAU MURIGI4TH DEFENDANT
THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

The Plaintiff by a plaint dated 2/10/2001 filed suit against the 1st, 2nd, 3rd and 4th Defendants who were stated to be sued on their own behalf and in their capacity as representatives of unregistered group comprising 3,777 persons. The Land Registrar Nakuru and the Attorney General were sued as the 5th and 6th Defendants on behalf of the Government. The Plaintiff inter alia seeks orders that:-

- (a) A declaration that the survey subdivision and subsequent transfers of portions out of **L.R. NO. 9713** are null and void.
- (b) A declaration that **L.R.NO. 9713** still belongs to the Plaintiff.
- (c) Cancellation of the registers and titles issued subsequent to the said unlawful sub division.

By an application dated 15th November 2008 the Plaintiff sought an injunction restraining the Defendants by a temporary injunction from selling alienating or disposing any portion of **L.R. NO. 9713 on plot L.R.NOS.Kijabe/Kijabe/Block.1/001** through to **Kijabe/Kijabe/Block 1/3777** until the suit is heard and determined. Honourable **Lady Justice Sitati** heard this application for injunction and on 13/5/2011 delivered her ruling granting the order of injunction sought by the plaintiff against the Defendants.

The interested party/Applicant by a Notice of Motion application dated 23rd January 2013 seeks an order that the injunction orders given by this court on the 13th May 2011 be set aside as respects the parcel of land **NO. Kijabe/Kijabe Block 1/1533** and premises the application on the following grounds set out on the face of the application:-

1. The interested party is the lawful owner of the property **L.R. NO. KIJABE/KIJABE BLOCK 1/1533** having purchased it for valuable consideration from the late Francis Macharia Kariuki.
2. The late Macharia Kariuki died before transferring it to the applicant.

3. The applicant consequently obtained transfer orders through High Court succession cause NO. 2326 of 2007.

4. On 13th May 2011 the Honourable court issued temporary orders restraining parties from selling or disposing any portion of **LR. NO.9713** on **L.R.NO. Kijabe/Kijabe Block 1/001** through **Kijabe/Kijabe Block 1/3777**.

5. The interest of third parties who acquired the property from other title holders was apparently not disclosed to the court.

6. The injunction orders have apparently lapsed since 13th May, 2011 but remain on record unless set aside officially.

7. Such a setting aside order will be necessary to enable the applicant's completion of his transaction transfer process.

The interested party has sworn a supporting affidavit that more or less reiterates the grounds in support of the application. The Plaintiff on 14/6/2013 filed grounds of objection and a replying affidavit sworn by one **Peter Ndungu Kimani** a director of the Plaintiff in opposition to the interested party's application. The respective counsel for the parties have filed written submissions in support of their respective positions.

The thrust of the interested party's submissions is that he not having been a party to the suit the injunction order issued ought not to have extended to him and/or to affect the parcel of land that he lawfully is entitled to. The interested party submits that no injunction should be issued against a party who was not before the court as that would amount to a party being condemned without being heard. The interested party further submits that the plaintiff failed to make disclosure that some of the plots/parcels of land were in the names of third parties like the interested party who were not parties to the suit. The plaintiff counters the interested party's submissions and submits that the application is misconceived and incompetent and is an abuse of the court process. The plaintiff asserts that there was full disclosure and that all the facts were disclosed before Honourable Lady Justice Sitati at the time she gave the ruling granting the injunction and thus there can be no basis to review, vary or set aside the order of injunction. The plaintiff submits that the register for **L.R. NO. 9713** is maintained at the Lands Registry at Nairobi and that the opening of a new register for the same parcel of land at Nakuru Lands office was fraudulent and that the subdivision and transfer and issuance of subtitles on the basis of the land register opened at Nakuru was fraudulent and null and void.

From the record and the filed pleadings and affidavits there does not appear to be any dispute that the plaintiff company was the registered owner of L.R. NO. 9713 and there does not appear to be any dispute that in or about 1985 a new register of this parcel of land was opened in Nakuru though the plaintiff contends that the opening of this new register was fraudulently procured by the 1st - 4th Defendants in collusion with the 5th Defendant. The plaintiff admits the land was sub-divided in 1985 albeit unlawfully and subtitles issued to 3,777 persons who the plaintiffs claim hold illegal titles. The plaintiff has filed this suit seeking the nullification and cancellation of the subdivision and these titles. The 1st and 3rd Defendants who have filed defences in the suit deny that they either jointly or in conjunction with any persons procured the opening of the register in respect of the subdivision of the parcel of land known as L.R. 9713 as claimed by the plaintiff. The Defendants claim to have been allocated their respective parcels of land following the subdivision of the suit land owing to their membership and shareholding in the plaintiff company and contend that the allocations was carried out by the directors of the company.

The Plaintiff at the time of filing the suit vide a chamber summons application dated 2nd October 2001 inter alia sought the following orders:-

(a) That this honourable court do grant leave to the applicant to file a representative suit against the 1st, 2nd, 3rd and 4th Defendants on behalf of 3,777 persons who hold illegal titles issued pursuant to

subdivision of **L.R. 9713 Naivasha**.

(b) That this Honourable court do allow the Plaintiff to serve the summons and other court process herein by way of advertisement.

This application came up before the Deputy Registrar on 16/10/2001 who fixed the same for hearing on 22/11/2001 when it was listed before **Ransley, CA** and was again adjourned to 30/11/2001 when it came up before **Honourable Githinji, Judge** when it was yet again adjourned and marked stood over generally on the application of the plaintiff. This is as far as this application went and it appears that the same was never disposed off and is therefore technically pending disposal. If that be the case, then the plaintiff did not obtain leave of the court to bring a representative action and thus there was no compliance with order 1 rule 8 of the Civil Procedure Rules. Order 1 Rule 8 provides thus:-

8.(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced and unless the court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.

The essence of order 1 Rule 8 is easy to appreciate. It is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit. It is at the point of granting leave for a representative suit to be instituted and/or defended that the court gives directions in regard to how the interested parties are to be served and/or notified of the suit. In the instant suit no leave was granted and no directions were given by the court as regards how the alleged 3,777 persons were to be served and/or notified of the suit. Indeed no particulars of these persons were furnished by the plaintiff to the court. In my view in the same way the plaintiff sought the order of injunction and ultimately the order of notification and cancellation (**if it was to be granted**) of the alleged illegal subtitles to apply to the individual titles, the plaintiff should have obtained the names of the persons to be affected so that they are informed and notified of the action the plaintiff was taking.

It was even more crucial for the persons to be affected to be notified since the plaintiff admit the subdivision and issuance of titles was done in 1985 yet the suit was being brought in 2001. One might ask why it took the plaintiff such a long time to initiate the action and if indeed the action is not statute barred? However such issues are not within my province at this stage to decide and are for the trial court to determine. The titles that the over 3,700 persons received conferred upon the recipients as proprietors of the parcels of land absolute and indefeasible rights of ownership. Their titles can only be challenged within the limited provisions of section 26 (1) (a) and (b) firstly on the ground of fraud or misrepresentation to which the title owner is proved to be a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The interested party applicant and indeed all the other title holders could not have defended the injunction application by the applicant when they were not party to the suit and it is no wonder there are several pending applications by persons who have come to learn about the existence of the injunction order seeking to be enjoined in the suit and a variation or setting aside of the order of injunction granted on 13th May 2011. The application dated 20th July 2012 is by 191 applicants whereas one **Wallace Mwaure Mungai** has filed an application dated 13th September 2013.

The subtitles under challenge by the Plaintiff have been in existence since 1985 and the injunctive order was issued on 13th may 2011 over 25 years later. The registered owners have all the time made use of

their lands without any restriction and as I have held that the plaintiff did not obtain leave to bring a representative action it is my view that other than the 6 named Defendants all the other over 3,700 Defendants cannot be deemed to have had notice of the suit. It is difficult to fathom how the orders sought by the plaintiff in the plaint even if granted can be implemented. The title holders who at any rate are alleged to have been shareholders of the plaintiff (**or at least the majority of them**) have settled and presumably developed their portions of land and uprooting them could pose a logistical nightmare. Indeed as the plaintiff's plaint contains a claim for damages the plaintiff might content itself with recovery of damages against the Defendants should its claim be successful at the trial.

While I cannot and do not propose to sit on appeal on the decision given by **Hon. Lady Justice Sitati** its my view the order of injunction she issued on the following terms:-

“ The Respondents be and are hereby restrained by an order of temporary injunction from selling, alienating or disposing any portion of L.R. NO. 9713 or plot NOS. Kijabe/Kijabe/Block 1/3777 until this suit is heard and finally determined”.

infringed on the rights of persons who were not parties to the suit. I am not convinced that had it been brought to her attention that the plaintiff had not obtained leave to bring a representative action she would have granted the injunction. I am satisfied that I need to vary the order of injunction under the provisions of order 40 Rule 7 of the Civil Procedure Rules.

Order 40 Rule 7 provides as follows:-

40(7). Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

The interested party applicant and indeed the other interested parties pending applications for setting aside and/or for variation of the injunction order are testimony of the unwelcome effect of sustaining the order of injunction. The injunction order is causing hardship to persons who are not parties to the suit and I do not think the same should be allowed to persist.

I accordingly order the injunction given on 13th May 2011 set aside and vacated and the same is hereby declared to be of no legal effect. Having regard to the circumstances of this matter I will make no order respecting the costs of the application and each party will meet their own costs.

Ruling dated and delivered at Nairobi this 7th day of February 2014

J. M. MUTUNGI

JUDGE

In presence of:

..... **PLAINTIFF**

.....**1ST DEFENDANT**

.....**2ND DEFENDANT**

.....**3RD DEFENDANT**

.....**4TH DEFENDANT**

.....**5TH DEFENDANT**

.....6TH DEFENDANT