



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C. NO. 404 OF 2013

NAFTALY NGUGI GAKERA

(Suing as the legal representative of

JOHN GAKERA KIMANI (deceased)...PLAINTIFF/APPLICANT

VERSUS

ASENWA KIPCHAKEA TIROP alias

TIROP ASENWA1ST DEFENDANT/ RESPONDENT

KIPRONO MWEI2ND DEFENDANT/ RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 4th June, 2013. It is taken out by Naftaly Ngugi Gakera, the legal representative of John Gakera Kimani (deceased). The application seeks the following orders *inter alia*:

- a) That service of this application be dispensed with the first instance, the same be heard *ex-parte* and be certified urgent and temporary orders be given in terms of the prayers 2 & 3 herein.
- b) That the 1st defendant/respondent be and is hereby restrained by way of an injunction whether by himself, servants, agents assigns or in any other manner howsoever from alienating or dealing in the 1st suit premises L.R. NO. Tulwet/Tulwet Block 3 (Rironi)/15 until this suit is heard and determined;
- c) That the 2nd defendant/respondent be and is hereby restrained by way of an injunction whether by himself, servant, agents, assigns or in any other manner howsoever from remaining in or continuing in occupation or possession of or from entering, interfering with alienating, dealing in the 2nd suit premises L.R. No. Dundori/Mugwathi Block 2/297 until this suit is heard and determined.
- d) That inhibitions be placed over the 1st and the 2nd suit premises being L.R. NO. Tulwet/Tulwet Block 3 (Rironi)/15 and L.R. No. Dundori/Mugwathi Block 2/297 until this suit is heard and determined.

e) That the defendants/respondents do pay the costs of this application.

2. The application is supported by the affidavit of **Naftaly Ngugi Gakera**, and is based on the grounds stated on the face thereof.

3. It is deposed that the 1st Defendant is the registered owner and in possession of a parcel of land known as L.R. NO. Tulwet/Tulwet Block 3 (Rironi)/15 (hereinafter referred to as Tulwet). The plaintiff on the other hand is in possession of a parcel of land known as L.R. No. Dundori/Mugwathi Block 2/297 (hereinafter referred to as the suit property). Both the Plaintiff and 1st Defendant were members of land buying companies, namely Rirono Farmers Co-operative and Kalenjin Enterprises Limited respectively. On 29th November, 1984, the plaintiff and the 1st Defendant entered into an exchange agreement in which the 1st Defendant was to benefit from seven acres of land out of the shareholding in Rirono Farmers Co-operative while the Plaintiff was to benefit from 4.5 acres of land from the shareholding of 1st Defendant in Kalenjin Enterprises Limited. It was purely land for land exchange without monetary consideration. The parties signed the respective transfer of shares forms.

Subsequently, the parties took possession of their respective parcels of land and the 1st defendant had the Tulwet Property registered in his name. The plaintiff on the other hand has never been able to have the suit premises registered in his name. He avers that the 1st defendant failed and neglected to cause and ensure that he was issued with the title deed for the suit property. The plaintiff claims as a result of the breach of the exchange agreement by the 1st defendant, the 1st defendant be compelled to return Tulwet parcel of land to the plaintiff.

4. He further avers that the suit property which ought to have been registered in his name was fraudulently and irregularly registered in favour of the 2nd Defendant. That the 2nd Defendant abused his position as a member of the probe team which had been set up to streamline the register of members of the Kalenjin Enterprises Limited to irregularly allocate himself the suit property. After being aware of the defective title, the 2nd Defendant intends to dispose off the suit property and has threatened to evict and demolish structures put up by the plaintiff. The plaintiff thus avers that he will suffer irreparable damage and prays to court to grant interim orders pending the hearing and determination of the suit.

5. The application is opposed vide the 2nd Defendant's Replying Affidavit dated 9th July, 2013. It is sworn by **Kiprono Mwei**, who contends that he is the registered owner of the suit property. In 1985, he was allocated the said parcel of land by Kalenjin Enterprises Limited in consideration of the shares he held in the Company. That he applied and was issued with the title deed for the parcel regularly.

6. In 2005, the 2nd defendant filed before Bahati Land Dispute Tribunal an ownership claim over the suit parcel. The Tribunal made an award in favour of the plaintiff which was subsequently adopted by the Chief Magistrate's Court on 13th July, 2007. Aggrieved by the decision, the 2nd Defendant filed Judicial Review Proceedings and successfully quashed the decision of Bahati Land Dispute Tribunal and its subsequent adoption. Further the court prohibited the Land Registrar, Nakuru from acting on the determination of the Tribunal. Mr. Mwei therefore avers that the application before this court is an abuse of the court process and the same is *res judicata* and ought to be struck out. In the alternative he seeks to be declared the rightful owner and proprietor of the suit land.

7. **Mr. Mwei**, further avers that it was within his knowledge that the exchange agreement between the plaintiff and the 1st Defendant was in respect to L.R. No. Dundori/Mugwathi Block 2/296 which was the parcel of land allocated to the plaintiff by Kalenjin Enterprises Limited. That the plaintiff therefore has no claim whatsoever over the suit property. That in total disregard of the court order, the plaintiff has leased out the suit property to third parties. He avers that the actions of the Plaintiff infringes on his proprietary interest and he is unable to enjoy and develop the suit property. He finally deposes that it is in the interest of justice that the application is disallowed.

8. Despite service of the instant application upon the 1st Defendant, he did not file a response nor has

he entered appearance in this matter.

9. The application came up for hearing on 10th July, 2013. **Mr. Njogu**, learned counsel for the plaintiff and **Mr. Kurgat**, learned counsel for the 2nd Defendant were present in court. **Mr. Kurgat** effected service of his Replying Affidavit to **Mr. Njogu** on the day of the hearing. Counsel for the plaintiff upon perusing the replying affidavit intimated to court a need for him to respond to issues raised in the affidavit. By consent, the parties agreed that the plaintiff remains in possession of the suit land pending the hearing and determination of the application. Further the parties agreed that the application be disposed off by way of written submissions. I ordered the same be filed and exchanged within fourty days from the date thereof. Despite a further extension, the 2nd Defendant had not filed his submissions for my consideration.

10. **Mr. Njogu** filed his submissions dated 18th November, 2013 in support of the application. I have read the said submissions which only enunciate the averments contained in the Supporting Affidavit of the Applicant. The submissions are to the effect that the 1st Defendant is in breach of the exchange agreement for failing to cause and ensure that the plaintiff was issued with the title deed to the suit property. According to counsel, the plaintiff having been deprived of his right as the registered proprietor of the suit land is entitled and court should compel the 1st defendant to return the Tulwet parcel of land.

11. Further counsel submitted that the title deed to the suit property was fraudulently, illegally and irregularly issued to the 2nd Defendant. He states that the 2nd Defendant used his position as a member of the committee of Kalenjin Enterprises Limited to irregularly allocate himself the suit parcel. This has further deprived the Applicant the proprietary rights over the Tulwet parcel of land. He further submits that the 2nd Defendant intends to sell off the land which will not only cause the plaintiff to suffer irreparable loss and damage but the suit property shall also waste away. He thus prays that the application be allowed.

12. I have considered the application, replying affidavit and the submissions filed by the respective parties. The issues before this court are whether the suit is *res judicata* and whether the Applicant is entitled to an interlocutory injunction in the circumstances of the case on the basis of applicable principles.

13. The law on *res judicata* is found in section 7 of the Civil Procedure Act, which reads;

“No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

14. From the foregoing provision, for *res judicata* to be invoked in a matter, the issue in the present suit must have been decided by a competent court; the matter in dispute in the earlier case between the parties must be directly and substantially the matter in dispute in the subsequent case; the parties in the former suit should be the same parties, or parties under whom they or any of them claim. See the case of **Karia and Another V Attorney General and others** (2005) 1 EA 83.

15. I have perused the court record and note that the second Defendant obtained court orders in a Miscellaneous Application No. 1001 of 2007 in which Wendoh J ordered;

a) That an order of Certiorari be and is hereby issued bringing into this court and quashing the decision/determination of the Bahati Land Dispute Tribunal in dispute No. 33 of 2005 previously No. 15 of 2001 and the subsequent adoption by the 2nd Respondent in Nakuru Civil Suit No. 21 of 2007.

b) That an order of Prohibition be and is hereby issued prohibiting the 3rd Respondent (Land Registrar) from acting on the determination of the 1st Respondent in land Dispute No. 33 of 2005 previously Number 15 of 2001 and the subsequent adoption by the 2nd Respondent in Nakuru Civil Suit No. 21 of 2007.

16. The matter was heard before the High Court, a court of concurrent jurisdiction to this court. The parties are also similar to the present parties but for the 1st Defendant who was not a party to the proceedings. However, it is not clear from the record that the issue before the High Court is directly and substantially similar to the issue before this court. The 2nd Defendant did not produce a copy of the ruling of the court which would inform this court whether the issues dealt by Wendoh J are directly and substantially similar to the present case. It is therefore not possible for this court with the evidence placed before it to determine if the Judicial Review application was heard and determined on its merit. I therefore find no merit in the 2nd Defendant's objection of this application.

17. Injunctions are equitable remedies that are granted at the discretion of court. The principles of granting such injunctions were laid down in the celebrated case of **Giella vs Cassman Brown and Company Limited (1973) EA 358** where the Court held at page 360 as follows:-

“First, an applicant must show a *prima facie* case with 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 an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. Industries vs Trufoods, 1972) EA 420.”

18. I am alive to the fact that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases. The principle was considered and Lord Diplock made the following observation in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510.

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

19. Both parties to this case have made out affidavits based on *prima facie* ownership of the suit property. On the one hand, the applicant basis his claim over the suit property on an exchange agreement between himself and 1st Defendant. He not only annexed the said exchange agreement but also the transfer of shares and evidence of payment of land rates in respect of the suit land.

20. On the other hand, the 2nd defendant claims that he was allocated the suit land by virtue of his membership in Kalenjin Enterprises Limited. He produced evidence of ownership being the title deed for the suit property and sought to clarify that the plaintiff's claim ought not to be over the suit property but a different property as per the company's approved register. He also attached the approved company's register to support this assertion.

21. The balance in deciding whether to grant the injunction or not lies on the balance of probabilities. It is not in dispute that the Applicant herein is in occupation of the suit land. This was further affirmed by a consent entered by the parties on 10th July, 2013 to the effect that the applicant was in possession and should continue holding possession of the suit land pending this ruling. It is my humble view therefore that if the injunction is denied then the 2nd defendant may proceed to evict and dispose off the suit land as alleged by the Applicant. In such an occurrence, it will be difficult to quantify the loss incurred in the event that the Applicant proves his claim against the 2nd Defendant.

22. Accordingly, I do allow the Notice of Motion dated 4th June, 2013 and grant prayers 1 and 2 as contained therein. Costs to be in the cause.

Dated and Signed at Nakuru this 9th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Chege holding brief for Mr Njogu for plaintiff

N/A for 1st Defendant

Mr Koima for 2nd defendant

L N WAITHAKA

JUDGE