



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 153 OF 2014

THOMAS KIVINDYO1ST PLAINTIFF
JULIUS WATUKA WAMBUA.....2ND PLAINTIFF
STEPHEN MULI KILAI.....3RD PLAINTIFF
GERALD M. MBUIKI.....4TH PLAINTIFF
MORRIS N. MULUMBA.....5TH PLAINTIFF
NICHOLAS MUSYOKA SAMMY.....6TH PLAINTIFF
PETER MAINA.....7TH PLAINTIFF
FRANCIS KIVUVA KITONDE.....8TH PLAINTIFF
JOSEPH MWALILI.....9TH PLAINTIFF
SHADRACK NZIOKA.....10TH PLAINTIFF
JOHN MUTUKU MUINDE.....11TH PLAINTIFF
RICHARD WAMBUA MUSYIMI.12TH PLAINTIFF
JULIUS MUTUA.....13TH PLAINTIFF
SOLOMON MWAU.....14TH PLAINTIFF
DOMINIC KATUA.....15TH PLAINTIFF
PETER KATAMBO.....16TH PLAINTIFF
JOHN MUTUKO KIOKO.....17TH PLAINTIFF

(T/A AS FLYOVER ASSOCIATION)

VERSUS

JOSEPH MUSYOKI MUTISYA.....1ST DEFENDANT
TITO MUEKE.....2ND DEFENDANT
BENJAMIN KIOKO NDUNDA.....3RD DEFENDANT
MUTHUI MALOMBE.....4TH DEFENDANT
PETER MWANDIA.....5TH DEFENDANT
KIMILO MULONZI.....6TH DEFENDANT
JOSEPH MUINDI.....7TH DEFENDANT
JONES N. MUTUNE.....8TH DEFENDANT
JONATHAN MUTISYA.....9TH DEFENDANT
ALEX KYALO.....10TH DEFENDANT

(T/A VOLCAMO MEMBERS ASSOCIATION & SABATI MEMBERS ASSOCIATION)

RULING

Coming up before me for determination is the Plaintiffs’ Notice of Motion dated 14th February 2014 in which they seek for orders of a temporary injunction restraining the Defendants/Respondents from illegally entering into land parcel identified as L.R. No. 337/2844 Mavoko (hereinafter referred to as the “suit property”). They also seek that the OCPD Athi River be ordered to enforce those orders.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Thomas Kivindui, sworn on 14th February 2014 in which he averred that he together with the other Plaintiffs belong to Flyover Self Help Group which is registered with the Ministry of Gender, Children and Social Development and that the suit property belongs to them. He produced a copy of the Certificate of Title of the suit property in the name of Flyover Association. He further averred that on 13th February 2014, the Defendants/Respondents arrived at the suit property armed with machetes and commenced setting up structures thereon illegally. He further averred that when they went to enquire of this invasion, the Defendants/Respondents chased them away. He further averred that upon investigation, they came to learn that the invaders into the suit property were members of groups known as Volcano Members Association and Sabati Members Association.

The Application is uncontested. Despite being duly served, the Defendants/Respondents did not file any response to this Application.

The Plaintiffs filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiffs, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well

settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Have the Plaintiffs made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

Looking at the facts of this case, it is plain to see that the Plaintiffs have based their claim of ownership of the suit property upon their certificate of title a copy of which they have produced to this court. The validity of that certificate of title has not been challenged by the Defendants. The law is clear on the manner in which the courts should treat the production of a certificate of title in a claim of ownership of land. This is to be found in Section 26 (1) of the Land Registration Act which states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

Based on these legal provisions, this court is duty bound to take the produced Certificate of title as prima facie evidence that the entity being Flyover Association which is named there as the registered proprietor of the suit property is indeed valid. Hence, I do find that the Plaintiffs/Applicants have established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiffs/Applicants? Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiffs can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiffs have established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application with costs to the Plaintiffs.

SIGNED AND DELIVERED IN NAIROBI THIS 9TH

DAY OF MAY 2014.

MARY M. GITUMBI

JUDGE