



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 54 of 2010

ROSE JERONO SIRMA.....PLAINTIFF

VERSUS

JUDITH ABUYA ABONGA.....1ST DEFENDANT

MICHAEL O OKOTH.....2ND DEFENDANT

MIRIAM NJERI NJOROGE.....3RD DEFENDANT

ESTHER GACHABA.....4TH DEFENDANT

EVANS NYARIENGA.....5TH DEFENDANT

LEONARD K KIRUI.....6TH DEFENDANT

SAMUEL M BAKORA7TH DEFENDANT

JOSEPH K ARAP KERIYO.....8TH DEFENDANT

ANNIE AMOLLO OKELLA.....9TH DEFENDANT

ELIZABETH NASERIAN NKAKI.....10TH DEFENDANT

DARLEEN SUE ODHIAMBO.....11TH DEFENDANT

PHILI CHERUIYOT LANGAT.....12TH DEFENDANT

JACKSON NANOTI N.....13TH DEFENDANT

FLORENCE KEMUNTO.....14TH DEFENDANT

ANN WAITHERA MURITU.....15TH DEFENDANT

WILLIAM O ISABOKE.....16TH DEFENDANT

SAMUEL N AGWATA.....17TH DEFENDANT

HARUN NGAMATE.....	18 TH DEFENDANT
DAVID O OBONYO.....	19 TH DEFENDANT
ESINA NANJALA K	20 TH DEFENDANT
ANN MOGUSU.....	21 ST DEFENDANT
JOSEPH BOWEN	22 ND DEFENDANT
GIDEON K LAGAT.....	23 RD DEFENDANT
DANIEL CHERUIYOT.....	24 th DEFENDANT

RULING

This is the Plaintiff's application by way of Chamber Summons dated 3rd March, 2010 expressed as brought under order XXXIX Rule 1,2,9 of the old Civil Procedure Rules and section 3A of the old Civil Procedure Act and all other provisions of the law.

The Applicant is seeking an order of temporary injunction to restrain the Defendants/Respondents severally and jointly by themselves, their servants, agents, representatives, or anyone acting through or under the Defendants from entering, further construction, remaining on, occupying or in any other way interfering with the Plaintiff's ownership, possession, occupation and quiet enjoyment of the **Land Parcel IR No. 51998 LR No's 13287/129 and 13287/131**, (herein after referred to as the suit property) situated in Ngata within Nakuru District pending hearing and determination of this application. They also seek and further orders restraining them until the hearing and final determination of this suit and costs.

The application is premised on the following grounds, as supported in the Applicant's affidavit dated 12th March 2010:

- 1. The Defendants have encroached on the Plaintiff's Land and they have put up houses and fences.**
- 2.The Defendants have even fenced off the portion that house septic tank and are threatening to destroy it so as to occupy the land.**
- 3.That the Plaintiff will suffer irreparable loss and damage of the orders prayed for are not granted.**

The suit property was transferred to the plaintiff as the legal and personal representative of her deceased husband Timothy Kipkemboi Sirma through certificate of confirmation of grant issued to her by Nakuru High Court Succession Cause No.201 of 2008 on 11th August and 15th June 2009 respectively to hold in trust for herself and her children for their beneficial usage.

The application is contested. The 2nd , 3rd , 4th , 5th , 8th , 9th , 10th , 11th , 12th , 13th , 14th , 15th , 16th , 17th and 18TH Defendants have sworn an affidavit through the 8th Defendant on 3rd May 2010 who has deponed that the applicant did not come to court with clean hands. She had obtained the Grant of Letters of administration without full disclosure of all material facts. Each of the Defendants had properly executed sale agreements between themselves and her late husband dated between 2004 and 2007 which the applicant was fully aware of as the same were done in her presence and she had even received some of the money. The defendants also had been in occupation of the suit property for over six years, and had even put up permanent structures

The 23rd Defendant in his affidavit sworn on 2nd September 2010, deposes that he too is a bona fide purchaser having purchased his portion of land from the deceased. In his counterclaim, he avers that if the Applicant had changed her mind about the sale transaction between himself and her late husband, she should compensate him as per the terms and conditions of the sale agreement.

This is the motion that came up for hearing before me on 19th November 2012. Mrs Mbeche appeared for the Applicant while Mr Wamaasa and Mr Simiyu appeared for the Defendants/Respondents. Mrs Mbeche in her submissions contended that the Plaintiff was indeed the sole registered owner having always been in possession of the title to the land and holding the same on her own behalf and that of her children. She maintains that the land in question was agricultural land, and therefore controlled. The sale transactions signed between her husband and the Defendant/ Respondents were therefore void as the Land Control Board consent was not obtained as required by section 6(1) of the Land Control Act (Cap 302, Laws of Kenya). She further averred that the Respondents had not effected the land into their names and had given no reason for the absence of the consent from the Land Control Board.

Mr Wamaasa, on opposing the application, stated that the application lacked merit and should be dismissed with costs to the Defendants as the Plaintiff had failed to satisfy the conditions to be granted an injunction. The Defendants could not be restrained as they were already in occupation and had even constructed permanent structures having spent millions of shillings.

Secondly, the Plaintiff had changed the cause of action. In her plaint, she had stated that the Respondents were trespassers but was now not even challenging the sale between the Respondents and her late husband transactions. The Plaintiff had also failed to explain how strangers had trespassed and constructed permanent houses without her knowledge why she had not stopped them from doing so leaving the only logical explanation to be that the Respondents' presence in the land was legal.

Mr Simiyu for the 1st, 2nd, 5th, 6th, 7th, 9th 10th to 17th Defendants also opposed the application and associated himself with the replying affidavit dated 19th November 2012 and Mr Wamaasa's submissions. He argued that the suit was defective and should be dismissed as the Applicant should have brought the suit in her capacity as the Administrator of the estate of the deceased but not on her own behalf.

He finally stated that lack of the Land Control Board consent was not fatal as this was curable by obtaining the consent out of time.

Before considering the merits of the Plaintiff's application, it is necessary to first look at the principles governing the grant of injunctions as set out in **Giella v Cassman Brown [1973] EA 358** namely that:-

- (a) An application must show that he/she has a *prima facie* case with a probability of success.
- (b) An interlocutory injunction will not normally be granted unless the Applicant would suffer an injury which cannot be adequately compensated in damage and
- (c) Where the court is in doubt, it should decide on a balance of convenience.

I have carefully considered the opposing views in this matter and the law and have taken the following view of the Plaintiff's case as against the Defendants herein. Although the Plaintiff is the registered owner of the suit parcel and is in possession of the titles, sale agreements have been exhibited by the Defendants that there were indeed sale transactions between themselves and the Applicant's/ Plaintiff's late husband. The Defendants have also been in occupation of the suit land for over six years and had during this period constructed permanent structures with full knowledge of the Plaintiff. The Plaintiff's argument that the Defendants had encroached on the suit land and were therefore trespassers is in my opinion hostile.

A question has been raised before this court on whether the absence of consent by the Land Control Board is incurable. This was answered in **Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njonjo (Civil Appeal No. 26 of 1979)**, where the Court of Appeal held that failure to obtain consent from the Land Control Board is indeed incurable, and further held that the only remedy available to a party to a transaction which has become void under the Act is to recover money or other consideration paid in the course of the transaction under section 7 of the Land Control Act.

Article 40 of the Constitution has also been advanced in the submissions as protecting the rights of the Applicant who is the registered owner to the suit property. However, 40(6) of the constitution also protects the rights of those who have not acquired property illegally. In this instance, can the Defendants be deemed to have acquired the land illegally?

As against all the Defendants, I am of the view that the Plaintiff has approached the court with unclean hands and the equitable relief sought is final in nature. She has sought continued occupation which is essentially an eviction order and this cannot be sought in a temporary nature. The Applicant has failed to meet the test of making out a *prima facie* case with a probability of success, nor has she demonstrated that the loss she is likely to suffer cannot be adequately made good by payment of damage.

The application is therefore dismissed with costs to the Defendants and urge the parties to consider resolving this matter out of court.

Dated and delivered at Nakuru this 1st day of February 2013.

L N WAITHAKA

JUDGE

Present

N/A for plaintiff

Ms Odhiambo holding brief for Mr Waamasa for Defendants
CC: Stephen Mwangi

L N WAITHAKA

JUDGE