



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
E.L.C NO. 156 OF 2012

JOSEPH MUYA NJURUPLAINTIFF/RESPONDENT

VERSUS

STEPHEN NJOROGE GUDA.....1STDEFENDANT

MWANGI KAMAU..... .2ND DEFENDANT

LUCY GATHONI WANYEKI.....3RD DEFENDANT

NAFTALY NJOGU KINYANJUI.....4TH DEFENDANT

TERESIA WANJIKU5TH DEFENDANT

RULING

By A Notice of Motion dated 4th October, 2012 the Plaintiff/Applicant has brought this application seeking for review of this court's ruling/order delivered on 17th September, 2012

The Application is premised on the grounds that the Plaintiff is now the registered proprietor of Naivasha/OL Jorai 11/ 1493(here after referred to as the suit land) and that the title document which would have been the decisive piece of evidence in the notice of motion dated 1st March, 2012 is now in the possession of the Plaintiff: That the court's decision declining to grant the injunction was based on the fact that both parties relied on allotment letters placing both parties on the same footing as neither had a title; That the title held by the plaintiff tilts the balance decisively in favour of the plaintiff/applicant, thus justifying a review of this court's ruling.

The application is supported by the affidavit of Joseph Muya Njuru sworn on 4th October, 2012 where he depones that he filed a suit to evict the defendants/respondents from the suit land, sought an order of injunction against the defendants to restrain them from interfering with the suit land and an order compelling them to vacate the suit land: That the court declined to grant the orders of injunction as both parties only held allotment letters putting them on the same footing: That he has now obtained a title deed making him the registered proprietor and therefore no existing justifiable cause to deny him the orders sought.

The application is opposed.

The respondents filed a replying affidavit through the 1st defendant, Stephen Njoroge Gunda sworn on 12th February, 2013 who depones as follows: That the Defendants have resided on the suit land since 1992 and are in possession : That on 17th September,2012 the court dismissed the plaintiff's application which sought to compel the defendants to vacate the suit land: That the court did not only rely on the fact that neither party had a title deed but took into consideration other facts: That it is only fair that the Plaintiff who has continued to interfere with the defendants possession of the suit land be restrained until the hearing and determination of the suit :That the defendants have also filed a defence and counter-claim which should be considered: That the plaintiff's application does not meet the standards for review and that the authenticity of the plaintiff's title is questionable.

While this application was pending, the defendants filed a Notice of Motion dated 21st January, 2012 seeking among other orders an injunction restraining the Plaintiff/Respondent either by himself, his agents, employees, assignees and /or any person claiming through him from evicting, trespassing, constructing or in any way interfering with the applicant's each 10 acres portion of land in **Oljarai Phase II – Kapkures Area (ADC)**(hereinafter referred to as the suit land) peaceful enjoyment pending the hearing and determination of this suit.

The application is premised on the grounds that the plaintiff/respondents have sent tractors on the suit property which may now displace the applicants: That attempts to stop the respondents from trespass have been futile despite the fact that the respondents lost his application to evict the applicants from the suit land.

The application is supported by the affidavit of Stephen Njoroge Gunda sworn on 21st January, 2013, who depones that in May, 2012 after the hearing of the application dated 1st March 2012 and before the ruling, the plaintiff/applicant started to engage in acts of interference of the suit land: That on 3rd August, 2012, the respondent sent tractors to the suit land which destroyed all the food crops and animal feeds: That the defendants reported this matter to Elementaita police station and to the Agricultural officers in Nakuru prompting the agricultural officer to visit the suit land and assess the damage: That although the Plaintiff's application for injunction was dismissed on 17th September, 2012, he still sent tractors on the suit land but they were restrained by the police from destroying the crops and were ordered to leave: That thereafter the plaintiff hired youths manned by police officers who destroyed crops and animal feeds: That despite seeking the intervention of the police the respondents have continued to cause anguish to the applicants and should be restrained by this court pending the hearing and determination of this suit.

The application is opposed.

The plaintiff/respondent filed a replying affidavit sworn on 5th February, 2013. He depones that he has now obtained a title deed to the suit property: That the defendants have no proprietary rights or interests over the suit land and their continued occupation of his land amounts to trespass: He denies having destroyed any crops belonging to the defendants and states that the applicants have not annexed any evidence to prove this: That because the defendants are currently using his land without paying him any money they should be made to put up some form of security for their continued used of the suit land, in the event their claim collapses.

The two applications were disposed off by way of written submissions which I have carefully considered.

H. Omondi J, in her ruling dated 17th September, 2012, while declining to grant the injunction sought held as follows :

- i. “The applicant held an allotment letter similar to that of the 1st respondent, thus placing them on the same footing. Neither allotment was superior to the other.
- ii. The applicant was aware of the other respondents (who did not have allotment letters) presence in the suit land since 2000, and he could not suddenly have got a wakeup call 12 years later to seek orders barring their presence in the land.
- iii. The Respondents claimed that they had farmed on the suit land since 1994 and exhibited photographs. The applicant on the other hand had not demonstrated what he intended to use the

property for.....the balance of probability tilts in favour of the 1st respondent who is on the land with his family and has food crops on it unlike the applicant, who (if, he is the owner) has left it idle.

- iv. the effect of the orders sought would end up disposing off the suit without it proceeding to full trial. This would be prejudicial to the interests of all the respondents and I do not think it is prudent to allow the mandatory orders seeking their removal. The upshot is that the application fails and is dismissed with costs to the respondent."

Now going back to the applications dated 4th October, 2012 and 21st January 2012. In my view, although the plaintiff is now in possession of a title deed for the suit land it is noteworthy that the Honorable Judge did limit herself to the issue of title. She also took into consideration that the respondents had been in occupation of the suit for a long time with their families and that granting mandatory orders would finalize the suit at an interlocutory stage. I wish to echo the learned Judge's words. Although the plaintiff has now obtained title to the suit property and is the registered owner, reviewing the ruling granted on 17th September, 2012 and allowing the application dated 1st March, 2012 will amount to the respondents eviction from the suit land. This as observed by the learned judge will finalize the suit.

The rights of registered a owner must be protected and are absolute as per section 24, 25 and 26 of the Land Registration Act 2012 and I agree, but the respondents also have a beneficial interest which are by dint those of the provisions of section 30 of the Registered land Act (which governed the suit property when registration was effected) subject to overriding interest that may affect the property even though not noted in the register.

Such overriding interests are expressed under Section 30 (supra) to include the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed. See section 30 (g) of the Registered Land Act.

This being a land matter and highly emotive, the defendants should be granted an opportunity to state their claim and their case determined on merit, similar to that of the plaintiff.

The upshot of the foregoing is that the application dated 4th October, 2012 is dismissed.

Since it is common ground that the respondents are in occupation of the suit land, I will allow the defendant's application for injunction dated 21st January, 2012 only to the extent of maintaining Status Quo until the hearing and determination of this suit.

Each party shall bear their costs for the applications.

Dated, signed and delivered in open court at Nakuru this 5th day of July 2013.

L N WAITHAKA

JUDGE

PRESENT:

Ms Wachira for Plaintiff

N/A for Defendant

Stephen Mwangi : Court Clerk

