



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 318 of 2011

ENDONYO KETE KUTO GROUP RANCHPLAINTIFF

VERSUS

MURIKEVEN OLOLMANTANY & 428 OTHERSDEFENDANT

RULING

Endonyo Kete Kuto Group Ranch – a body corporate established under Group Representatives Act, (*Cap. 287, Laws of Kenya*), (*the Applicants*), seeks an order of temporary injunction in a Notice of Motion and filed on dated 1st November 2011 (*the Application*).

The application was supported by Affidavit of one Tianta Ole Leperes sworn on 1st November, 2011 and the grounds on the face thereof. An interim injunction was granted on the same day pending the hearing of the application inter partes. The application was heard inter partes on 12th June, 2012.

The dispute giving rise to the suit herein and the application itself has a long history, and can only be understood if described as part of a chain of land transactions in the greater Maasai land which continues to give agitation and raise questions of land ownership in this vast area of fertile lands. Mr. Ogola, learned counsel for the applicant gave a long history relating to the disputes, which is best captured in the grounds to the application itself -

- (a) The Plaintiff was the original proprietor of the suit land known as Title Number Narok/CIS–Mara/Olololunga/132 measuring 2104 hectares
- (b) The suit land borders Title Numbers **Narok/CIS. MARA/OLOLOLUNGA/120 measuring 132.5 Ha.** and **NAROK/CIS – MARA/OLOLOLUNGA/121 MEASURING 255.5** hectares.
- (c) That the Defendants/Respondents have encroached and/or trespassed into the suit land and are in occupation of a portion in excess of over 981 hectares; and
- (d) That the plaintiff's members have been dispossessed of, and the defendants are wasting, the suit land.

In essence the Supporting Affidavit aforesaid, and the Further Affidavit of Tianta Ole Leperes and sworn on 11th January, 2012 in response to the Replying Affidavit of Simon Kipkoros Maritim sworn on 13th January 2012 and filed on 16th January, 2012, reiterates the above grounds, and adds that the applicants do not have a dispute with the buyers, except that one of the buyers registered himself as the owner of the land sold to them (buyers).

After the hearing of the application inter partes, I directed counsel for the two parties to file written submissions.

The respondents Counsel's written submission are dated and were filed on 12th January, 2012. counsel for the applicants did not file any written submissions and relied upon the Applicant's grounds and Supporting and Further Affidavit respectively. I will therefore commence with the Respondents case.

THE RESPONDENTS' CASE

Firstly the Respondents contend that the Applicants had not established any case for the grant of injunctive orders. While admitting that Parcels Numbers **NAROK/CIS-MARA/OLOLOLUNGA 120 AND 121** are adjacent to Parcel No. NAROK/CIS-MARA/OLOLOLUNGA/132 (which parcel was previously owned by the applicants), the Respondents contend that, they have been in occupation of their parcels from the time of adjudication. Further, the Respondents contend that KUTOSET SELF HELP GROUP was disbanded in 1991 after the conclusion of the sub-divisions and issuance of title deeds to the Respondents.

Secondly, the Respondents also contend that the applicants have brought trespass charges against the Defendants over the same parcels of land in Narok Chief Magistrates Court Criminal Case No. 66 and 67 of 1991 both of which cases were dismissed on 4th November, 1991.

Thirdly, there has been a multiplicity of suits by the Applicants involving -

- (a) a boundary dispute reported to Land Registrar under the Registered Land Act (*Cap. 300, Laws of Kenya*), the dispute was heard on 18th March, 1991, and upon investigation with the help of the District Surveyor concluded that there had been no interference and tampering with beacons or boundaries as laid out during the demarcation nor boundary encroachment by the Defendants.
- (b) Miscellaneous application No. 942 of 1991 by way of Judicial Review was dismissed on 21st November, 1991.
- (c) Miscellaneous Application No. 431 of 2002 seeking Judicial Review orders to quash the decision and award of the Provincial Land Disputes Appeals Committee was dismissed on 19th December 2008.

Fourthly the Respondents contend that applicants have been in court on numerous occasions and were heard and their cases were dismissed, and that there are no new circumstances which have arisen between them and the Respondents so as to warrant the disturbance of the orders in place.

Fifthly the Respondents contended that the present suit and the application amounts to an abuse on the court's process since the court is being asked to sit over a matter which it has already dealt with and which is now *res judicata*. Counsel relied on the case of **KIBWOGY -VS- CHEMWENO [1981]KLR P.35**, where the court held;

“That where a matter in issue has been directly and substantially in issue between the same parties, it is a condition precedent on to the application of the doctrine of res-judicata that the issue has been finally decided by the court”

Sixth, the Respondents also plead that the Applicants have been guilty of non-disclosed of material facts, namely that the matter has been dealt with on three occasions by courts of competent jurisdiction, and on all occasions dismissed with costs. Counsel for the Respondents relied on the English case of **REX VS. THE GENERAL COMMISSIONERS FOR PURPOSES OF INCOME TAX EXPARTE PRINCE EDWARD DE POLIGUNAC [1917] IKB 486** where the English Court of Appeal held up the law as stated by Viscount Reading CJ where he said:

“Where an ex-parte application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the applicant in support of the application was not candid and did not fairly state the facts, or stated them in such a way as to mislead the court as to the true facts, the court ought, for its own protection and to prevent the abuse of its process, to refuse to proceed any further with examination of the merits. This is a power inherent in the court but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived”.

Seventh, the Respondents contend that the Applicants are not deserving of any equitable orders as the Defendants obtained their individual titles in 1991 upon disbandment of KUTOSET SELF – HELP GROUP and that therefore the Plaintiffs' claim is not only time barred but that the applicants are also guilty of laches and the present application cannot be sustained.

Eighth and for the foregoing reasons, the Applicants have not shown a prima facie case with a probability of success within the principles established in the case of **GIELLA -VS- CASSMAN BROWN & CO. LTD. (1973) E.A 358** – that before an injunction is granted an applicant ought to show

- (a) *A prima facie case with a probability of success,*
- (b) *an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss which cannot be adequately compensated in damages,*
- (c) *When in doubt the court will decide the application on the balance of convenience.*

Ninth, on the question of convenience the Respondents' counsel contended that they have been on their lands for more than twenty (20) years and the Applicants are aware of those facts, the balance of convenience would therefore be on the Respondents not being disturbed by the Applicants in the instant suit which is meant to reverse their ownership.

Tenth that having been on their lands for more than twenty (20) years, and the dispute having been arbitrated severally pursuant to the provisions of the Registered Land Act, and the several Judicial Review applications, the present suit is intended to appeal against the Judicial Review Orders dismissing the applicants' applications.

Eleventh the Respondents contend that the present application is malicious, vexatious and an abuse of the court process since the Applicants have not controverted the facts that the matters herein have been dealt with by the High Court and that therefore the case has no merit.

Twelveth the Respondents contend that the applicants have sworn false Affidavits and that as held in the case of **KITUR & ANOTHER -vs- TWO OTHERS [2002] KLR 421** that a false affidavit is a non-affidavit and may be struck out.

APPLICANTS' CASE

Mr. Ogola, the Applicant's counsel on the other hand contended that the orders sought are deserved and ought to be granted. In response to the specific issues raised by the Respondents, Mr. Ogola submitted -

Firstly, that the Replying Affidavit to the Application only relates to the deponent thereof as there is no authority that it was sworn on behalf of other respondents;

Secondly, the matter was not res-judicata. The issues dealt with in the Judicial Review Applications were restricted to the matters in issue on these applications and not merit.

Thirdly, that there were no falsehoods in the supporting affidavit of the plaintiffs.

Fourthly, on the question of alleged purchases, that there was no evidence that the Respondents

purchased land from the applicants.

Fifthly, that all the Respondents derive their titles from original plots Nos 120 and 121 that the prayers over allotment are specific.

Sixth, that there was no dispute between the plaintiffs and Kamongo Co-operative Society. The applicants case is that they cannot give possession to the said society the lands it purchased because of the encroachments by the respondents.

On those grounds, and the supporting affidavit, the further affidavit of the applicants, and the grounds on the face of the Application to which I have already referred to above, Counsel for the Applicants urged the court to allow the application.

OPINION AND CONCLUSION

I have deliberately set out in extenso the respective submissions. The question is whether the Applicants have made out a prima facie case with a likelihood or probability of success or generally whether the applicant is deserving of the orders of injunction.

However before those questions can be answered, I will address my mind to two specific issues raised by the Respondents which I will summarize as whether the suit herein is **res judicata**, and whether the matter is time barred.

Firstly, there is no application objecting to the suit herein on the grounds of either res-judicata or on limitation of actions. The application herein is for temporary injunctive orders and not even eviction of any of the respondents.

Secondly, judicial review is a special jurisdiction. It is established under Section 8 of the Law Reform Act (*Cap. 26, Laws of Kenya*). It is neither civil nor criminal. Decisions arising out of applications for judicial review are not subject to the doctrine of res-judicata. Omission to refer to previous Rulings on such applications do not constitute either omission of material facts or non-disclosure. The Applicants Supporting Affidavit cannot therefore be regarded as false or averments therein are falsehoods.

The suit herein as I said at the beginning of this Ruling, epitomizes the sources of land unrest in the greater Maasai land and this cannot be wished away by technical arguments merely. The situation must be faced boldly and squarely with facts.

In this application, both the Applicants and the Respondents admit that -

“it is not in dispute that the maps in the area had numerous errors whereby the acreage on the maps and certificates of title did not tally with what was on the ground”.

That is paragraph 9 of the Replying Affidavit of Symon Kipkoros Maritai. That averment ties in with that of TIANITA OLE PERERES. Paragraphs 15 and 16 (*exhibits “TOL 10” and “ 11”*).

The Applicants case is best captured by paragraph 14 of the supporting affidavit of Tianta Ole Peres. -

“That through irregular sub-divisions and mutations parcels No. NAROK/CIS MARA/OLOLOLUNGA 120 AND 121, the defendants in collusion with the Departments of Lands and Survey fraudulently annexed the suit land measuring between 981 and 1297 hectares”.

A committee comprising the District Commissioner, the District Officer (I), the Principal Land Adjudication and Settlement Officer and District Lands Registrar was formed to inquire into and deliberate over the issue of irregular subdivision of parcels Nos. NAROK/CIS-

MARA(OLOLOLUNGA/120 AND 121, and established that the Applicants complaints were both genuine and correct.

For example, according to both the Committee's findings and Records from the Land Registrar's Office.

(1) Parcel No. 120 registered in the name of Sankei Group had 132.5Ha. It was sub-divided into four parcels -

(a) No. 1143 Somet Ole Taiysh – 165 Ha.

(b) No. 1144 Morogobe Ololoimatai –165 Ha.

(c) No. 1145 Rem Ole Sankei – 165 Ha.

(d) No. 1145 1146 Parkitoyon Ole Sankei – 165 Ha.

Total - 660 Ha

It is clear that the area of Plot No. 120 grew from 132 Ha by 527.5 Ha. Similarly parcel Parcel No. 121 registered in the name of Olo Enterit Group had 255.5 Ha. It was purportedly divided into Parcel Nos. 492 – 930 total of 439 titles with 70KHa. and given to KUTOSET GROUP. Again Parcel No. 121, grew from 255.5 Ha. to 453.5 Ha.

(2) On the other hand parcel No. 132 registered in the name of Endonyo Kete Kuto Group had 2104 Ha. and was sub-divided into parcels Nos.2662 and 2663 of 1052 Ha. Each.

(i) Parcel No. 2662 was further subdivided and produced

(a) Parcel No. 3862 – 180 Ha. To Oluntu Gai

(b) Parcel No. 3817 – 33.8 Ha – Dorobo Endonyo Kese Luto

(c) Parcel No. 3818 – Dorobo – Endonyo Kese Kuto

This made a total of **1026.8 Ha.**

(ii) Parcel No. 2663 was also further subdivided into:-

(a) Parcel No. 3811 – 874 Ha. Kamongo

(b) Parcel No. 3812 – 40 Ha. Endopnyo/Kete Kuto (Leperes)

(c) Parcel No. 3813 – 24.3 Endinyo Kete Kuto (Leperes)

(d) Parcel No. 3815 – 40.5 Endonyo Kete Kuto Leperes

This also means that parcel No. 2663 grew by 96 Ha. From original sub-division of 1052 Ha. It means that some, 96 Ha. which were part of the original parcel No. 132 also disappeared into the sub-divisions of parcels from the original 132.5 Ha. to 527.5 Ha. to 660 Ha. And parcel No. 121, which was originally 255.5 by 709 Ha.

Although neither the Land Officer nor the Surveyors are sued, it is unlikely that the Respondents could themselves have falsified the maps and issued titles in respect of parcels of land which did not belong to the Respondents or any of them.

These transactions are matters which a court upon full hearing of the parties will be able to determine with finality. In the meantime, and in as much as it is inconvenient to the Respondents, it is

best that no further transaction is carried out on the suit lands, pending the hearing and determination of the plaintiffs Applicants' suit.

An injunction order shall therefore issue restraining the 1st – 428th

Defendants either by themselves, servants and or agents whatsoever from selling, disposing/or any other dealing by way of lease, charge, parcels known as **NAROK/CIS–MARA OLOLOLUNGA/3811 – 3813, 3814, 3816 and 3819** being original No. **NAROK/CIS–MARA/OLOLOLUNGA/132** pending the hearing and determination of this suit.

The costs herein shall be in the cause.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE
JUDGE