



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2401 OF 1997

MARTIN MIYAWA AND

TWENTY OTHERS.....PLAINTIFFS

versus

ROBIN MUNYUA KIMOTHO

AND THREE OTHERS.....DEFENDANT

RULING

This is an application by way of Chamber Summons under order 6 Rule 13(b) of the Civil Procedure Rules for orders:

1. THAT the claims against the first defendant made in the plaint filed herein dated 24th September, 1997 be struck out and dismissed with costs to the first defendant on the ground that the said claims are scandalous, frivolous or vexatious and

2 THAT the costs of this application be provided for.

In their plaint dated and filed on 24th September, 1997, the plaintiffs state that they have been residents of Mahuti Crescent & Lane in South C Estate Nairobi since 1958 or thereabout and have been enjoying use of plots numbers L.R. 209/5052 and L.R. 209/5041 as recreational facilities and the same having been set aside as such a recreational facility for the residents of that estate.

The plaintiffs are proprietors and registered owners and occupants jointly and severally of several properties that adjoin L.R. No.209/5041 and L.R. NO. 209/5052 which have become and are part of the heritage for the plaintiffs and their children.

On or about 30th June, 1997, the plaint avers, the first and second defendants took possession of the suit property, felled trees fenced the same and commenced construction thereon. As a result, the plaintiffs say, they and their children have been deprived of the use and right of enjoyment of the aforesaid land.

The orders sought against the defendants are that an injunction do issue restraining the first and second defendants from encroaching upon, remaining on or continuing occupation of the land adjoining Mahuti Crescent & lane South C, Nairobi, an order that the grabbing of land parcels L.R. 209/5041 and 209/5052 is a legal nullity and an order for demolition of illegal structures erected thereon and removal of construction materials that are thereon; that the commissioner of lands be ordered to recall, cancel and or a null the documents allocating the property L.R. 209/5041 and 209/5052 to the first and second

defendants respectively; general damages for the aforesaid illegal allocation and the loss of user of the aforesaid recreational facility.

As this application is by the first defendant alone, the subject matter to be addressed is L.R. NO. 209/5041. The first defendant has filed a defence and counterclaim against the plaintiffs.

The defence details the history relating to the acquisition of the parcel of land and subsequent transfer to the first defendant. This has been repeated in the affidavit in support of this application.

Until December, 1994, Land Parcel No. L.R. 209/5041 was unalienated Government land. It was then alienated to one Joseph Kiragu Kariuki and a certificate of title issued under the provisions of the Registration of Titles act Cap 281 Laws of Kenya.

It is the first defendant's case that in terms of the provisions of section 23 of the Registration of Titles Act aforesaid the certificate of Title is to be taken by all the courts as conclusive evidence that the said Joseph Kiragu Kariuki was the proprietor of the land as the absolute and indefeasible owner. The title of the owner is not subject to challenge except on the grounds of fraud or misrepresentation to which the owner is proved to be a party.

There is evidence that the said parcel of land was transferred by the said Joseph Kiragu Kariuki, with the consent of the Commissioner of Lands, to the first defendant,. Following the said transfer, at a consideration set out therein, the registration thereof conferred title upon the first defendant. He became the absolute and indefeasible owner of the said parcel of land and is not subject to challenge as there is no evidence or allegation of fraud or misrepresentation in the acquisition of the title to which he was a party.

Mr Joseph Kiragu Kariuki is not a party to these proceedings and there are not any allegations of fraud or misrepresentation in the plaint against him or the first defendant. The first defendant is a purchaser for value without notice. As the plaintiffs claim equitable rights, the title of the first defendant takes precedence and is supreme over all other alleged equitable rights of title. see **Wreck motor Enterprises - v- The Commissioner of Lands & Others. C.A. NO. 71 of 1997 and Civil Application NO. NAI 60 of 1997 Dr. Joseph N.K. Arap Ng'ok -v- Justice Moiwo ole Keiwua & 4 Others.**

___It has been submitted on behalf of the respondents that the application is incompetent as it has not set out the grounds upon which it is premised as required under order 50 Rule 7 Counsel cited C.A. No. 211 of 1996 - National Bank of Kenya -v- Ndungu Njau to back up his submission.

It is true that the application has to set out in general the grounds upon which it brought. The learned Judges in the cited case held that the omission was fatal but went ahead and heard counsel in the broad interest of justice. Further, I believe that if the grounds can be found by cross reference to the affidavit in support of the application, the applicant should not be shut out. in view of the foregoing I have come to the conclusion that the first defendant's application must succeed. accordingly the plaintiffs claims against the first defendant made in the plaint filed herein on 24th September, 1997 are hereby struck out and dismissed with costs to the first defendant. Orders accordingly.

Dated and delivered at Nairobi 16th July, 1998.

A. MBOGHOLI MSAGHA

JUDGE