



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 20 OF 2018

HENRY NJUE NJIRU

PHILIP NJERU NAMAN

STEPHEN NJIRU NAMU AND OTHERS.....PLAINTIFFS

VERSUS

JENARD JOSIAH NYAGA & 78 OTHERS.....DEFENDANTS

RULING

1. By notice of motion dated 14th June 2018 brought under the provisions of **Order 51 Rule 1 and Order 5, Rule 17 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap 21)** and all **other enabling statutes**, the Plaintiffs sought the following orders;

- a. *That this application be certified as urgent and heard ex-parte in the first instance, service thereof being dispensed with.*
- b. *That pending the hearing and determination of this application, this honourable court be pleased to grant orders of interim injunction restraining the 1st – the 77th Defendants from encroaching onto, interfering with, attempting to take over or in any way dealing with the suit property, P/No. Mbeere/Kirima/2958, or any portion thereof.*
- c. *That pending the hearing and determination of the suit herein, this honourable court be pleased to grant an interlocutory injunction restraining the 1st – the 77th Defendants from encroaching onto, interfering with, attempting to take over or in any way dealing with the suit property, P/No. Mbeere/Kirima/2958, or any portion thereof.*
- d. *That pending the hearing and determination of this application, this honourable court be pleased to issue an order stopping any dealings/transactions whatsoever relating to the suit property by any persons including the Defendants including but not limited to sale, transfer, lease or any other disposition of interest in the suit property and sub-division, allotment and registration of any portion of the suit property by any persons in favour of whomsoever.*
- e. *That pending the hearing and determination of the suit herein, this honourable court be pleased to issue an order stopping any dealings/transactions whatsoever relating to the suit property by any persons including the Defendants including but not limited to sale, transfer, lease or any other disposition of interest in the suit property and sub-division, allotment and registration of any portions of the suit property by any persons in favour of whomsoever as well as processing of any land control board consents in respect of the suit property and any portions thereof.*
- f. *An order be and is hereby issued directing the 1st Defendant to account for the suit property; and each and every portion thereof to enable the court dispose of the main suit efficiently and effectively.*
- g. *An order be and is hereby issued directing the 1st Defendant to account for the identity of persons allocated the suit property or any portions thereof to enable the court dispose of the main suit efficiently and effectively.*
- h. *An order be and is hereby issued directing the 1st Defendant to render accounts of all funds collected from the clan members and also from the 2nd to the 77th Defendants or other third parties in relation to the suit property to enable the court dispose of the main suit efficiently and effectively.*
- i. *That given the large number of Defendants, leave be and is hereby granted allowing the Plaintiffs' advocates to serve the numerous Defendants by substituted service including through newspapers and pinning summons in a conspicuous section of the courthouse and where possible pinning summons at the last known premises of the Defendants.*

j. That the costs of this application be awarded to the Plaintiffs.

2. The said application was based upon the numerous grounds set out on the face of the motion. It was alleged that the 1st Defendant, who appears to be an official or representative of Ikambi clan in allocation of clan land, had fraudulently and clandestinely allocated substantial portions of the land to non-members; that he had through nepotism allocated large parcels of land to his several sons, sons-in-law, daughter and brother-in-law; that he had gluttonously allocated himself 766 acres of clan land; and that the clan and its members had been denied their constitutional right to own property as guaranteed by **Article 40 of the Constitution of Kenya**. It was further contended that there were numerous transactions currently going on with respect to the land in question and that there was a danger of the 77 Defendants, who are registered as proprietors of various parcels derived from the suit property, evicting the Plaintiffs and other clan members from the land they currently occupy.

3. The said application was supported by an affidavit sworn by Henry Njue Njiru who is the 1st Plaintiff. He swore a 35-paragraph affidavit detailing the history of the suit property and the alleged wrongful actions and dealings by the 1st Defendant. It was contended that the process of allocation of clan land was not accountable or equitable hence most of Ikambi clan have been dispossessed and disinherited by the actions of the 1st Defendant. It was further claimed that the Plaintiffs could not trace the relevant register for parcel No. 2958 and those of the numerous resultant sub-divisions.

4. Due to the numerosity of the Defendants to be served, the court granted the Plaintiffs leave to serve court process including the said application through substituted service by advertising in a newspaper of nationwide circulation on 10th July 2018. There is evidence on record that such service was effected. It would appear that only a small number of the 77 Defendants who were sued responded to the suit and application.

5. When the Plaintiffs' said application was scheduled for hearing on 25th September 2018 the advocates for the Defendants who had appeared were granted time within which to file their responses and written submissions to the Plaintiffs' said application. The Plaintiffs were also granted leave to file a further or supplementary affidavit within 30 days listing all the parcels of land resulting from the subdivision of the suit property i.e. 2958. The application was thereupon fixed for ruling on 28th February 2019.

6. The record shows that only the 1st and the 11th Defendants filed replying affidavits to the Plaintiffs' said application. The 1st Defendants' replying affidavit sworn on 24th September 2018 was filed on his own behalf and on behalf of the 10th, 11th, 12th, 13th, 23rd, 30th and 34th Defendants. The 1st Defendant stated that the orders sought by the Plaintiffs were vague and incapable of being granted. It was contended that parcel No. 2958 was no longer in existence and that the said parcel had been sub-divided into numerous other parcels whose proprietors were not party to the suit. The 1st Defendant denied that parcel No. 2958 was meant for the entire Ikambi clan. He asserted that it was meant only for members of Njeru's house of the Ikambi clan.

7. It was the 1st Defendant's further response that because the cost of land demarcation and surveying was quite high, the clan members had agreed to sell part of the clan land in order to defray those expenses. It was contended that the process of surveying and allocation was undertaken in a legal and transparent manner and that the Plaintiffs and their children were allocated land commensurate with their respective contributions to the process of land demarcation and adjudication. The 1st Defendant further contended that the process was concluded over 10 years ago and wondered why the Plaintiffs did not raise any objections at the material time.

8. The 11th Defendant, who was said to be a son of the 1st Defendant, filed a separate replying affidavit on his own behalf. The affidavit was dated 23rd January 2019 and filed on 24th January 2019. He stated that the various properties attributed to him were purchased for valuable consideration from various persons including the 1st Defendant. He further stated that the dispute regarding the adjudication of the suit property was raised and determined in previous litigation in at least four cases which were cited therein.

9. The court has noted that apart from the Plaintiffs, none of the Defendants have filed written submissions. At least by the time of preparation of the ruling none of the Defendants had filed any submissions.

10. The court has considered the Plaintiffs' said application, the responses thereto as well as the Plaintiffs' submissions on record. It would appear that the Plaintiffs are having some internal clan disputes amongst themselves and their officials, or some of them. As a consequence, the Plaintiffs who are apparently dissatisfied with the manner in which clan land was allocated are now up in arms against the beneficiaries and the purchasers for value. They claim to have sued on behalf of other members of the clan.

11. The 1st issue for consideration is whether or not the Plaintiffs have satisfied the requirements for the grant of an interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. The first requirement is demonstration of a *prima facie* case with a probability of success at the trial. So, have the Plaintiffs demonstrated a violation or threatened violation of their legal rights?

12. The Plaintiffs' claim is in respect of parcel No. 2958 which is said to be a sub-division of parcel No. 2244. There is abundant evidence on record to demonstrate that the said parcel ceased to exist a long time ago. It was sub-divided and the title closed way back in 2008. There are definitely new parcel numbers for the resultant sub-divisions. The Plaintiffs may have captured some of them in their application but not all of them were included. The Plaintiffs were granted leave to file a supplementary affidavit detailing all the subdivisions of parcel No. 2958. By the time of preparation of the ruling, however, none had been filed.

13. The court is of the opinion that it would be futile to grant orders with respect to a non-existence parcel of land or in respect of sub-divisions which have not been described with precision. The court is also apprehensive that doing so would be prejudicial to the rights of the current registered owners who might not be parties to the instant proceedings.

14. The court is not satisfied that with respect to the Defendants who were actually joined in the suit the Plaintiffs have demonstrated a *prima*

facie case with a probability of success. Although the court is not required to make any definitive findings at this stage, the Plaintiffs have not alleged any fraud, illegality, or corruption with respect to the 2nd – 77th Defendants who were allocated clan land in the plaint. Unless, therefore, the plaint is amended at some point, it may be an uphill task for the Plaintiffs to successfully challenge these titles under **section 26 of the Land Registration Act**.

15. For the foregoing reasons, the court is not satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial. The Plaintiffs shall, of course, get every opportunity to prove their case at the trial. The trial court shall not be bound, in the least, by the provisional opinion expressed herein. The Plaintiffs' application shall, therefore, fail on account of the first principle. In the circumstances, it shall not be necessary to consider the other two principles.

16. The court is also concerned with the considerable delay in the institution of the instant proceedings. It is not clear what the Plaintiffs have been waiting for over the years instead of seeking legal redress within a reasonable period. The court is of the opinion that such undue delay may disentitle an applicant, who is otherwise entitled to an injunction, to such order.

17. The 2nd issue is whether the Plaintiffs have made out a case for the grant of an order for the 1st Defendant to account for each and every portion of the suit property. This is an unusual order to seek at the interlocutory stage. **Black's Law Dictionary (10th Edition)** quotes the following passage from **Benjamin J. Shipman, Handbook of Common Law Pleading** on an action for account;

“The action of account lies where one has received goods or money for another in a fiduciary capacity, to ascertain and recover the balance due. It can only be maintained where there is such relationship between the parties, as to raise an obligation to account, and where the amount due is uncertain and un-liquidated.”

18. It is not altogether clear from the material on record so far if there exists a fiduciary relationship between the Plaintiffs and the 1st Defendant. Whereas the Plaintiffs claim that parcel No. 2958 was placed at the disposal of the 1st Defendant as a representative of the entire Ikambi clan, the 1st Defendant contended that the suit properly was only meant for one house of the Ikambi clan. The parties would certainly require to tender oral and documentary evidence at the trial of the suit to enable the court conclusively determine that issue. The court is further of the opinion that it would be premature to grant such an order at the interlocutory stage when the same relief is sought as one of the reliefs in the plaint. The Plaintiffs should await the trial of the suit to establish their claim to an account.

19. The 3rd issue is whether the Plaintiffs have made out a case for the 1st Defendant to render an account of all funds collected from clan members and from the 2nd – 77th Defendants or other parties in relation to the suit property. The court would adopt the reasoning contained in paragraphs 17 and 18 hereof in respect of this prayer. The court has noted that the Plaintiffs are also seeking a similar relief in the plaint. The Plaintiffs should await the determination of the rights of the parties at the trial. The court is, accordingly, not inclined to grant that prayer.

20. The 4th issue is whether the 1st Defendant should be directed to furnish a list of all the persons to whom he allocated the suit property or any portions thereof. The court is aware that there is an elaborate legal and institutional framework for the holding, alienation and record keeping with regard to landed property in this country. It is the duty of the Plaintiffs to undertake their own inquiries and obtain the relevant details from public records maintained by the Ministry responsible for matters relating to land. There is no good reason why that burden should be shifted to the 1st Defendant. The court is of the view that such a request is merely a fishing expedition. It was the responsibility of the Plaintiffs to undertake their homework comprehensively before filing suit. The court shall not grant that order.

21. The court is of the opinion that the dispute of the nature which has been presented to court is best resolved through alternative dispute resolution (ADR). The court was not informed if Ikambi clan has any structures for such ADR. It is also not clear if ADR has been attempted in this instance. The court shall encourage the parties to explore ADR before they set down the suit for hearing.

22. The upshot of the foregoing is that the court finds that the Plaintiffs have not made out a case for the grant of any of the interim orders sought. Accordingly, the Plaintiffs' notice of motion dated 14th June 2018 is hereby dismissed. Costs of the application shall be in the cause.

23. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th** day of **FEBRUARY, 2019**.

In the presence of Mr. Omoke for the Plaintiffs, Ms Nzekele holding brief for Mr. Okwaro for the 1st, 10th, 12th, 13th, 23rd, 30th, 34th Defendants. Ms. Nzekele holding brief for P. S. Onduso for the 11th Defendant, the 5th Defendant in person and in the absence of the rest of the Defendants.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

28.02.19