



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 2 OF 2018

IN THE MATTER OF THE JUDICIAL REVIEW APPLICATION NO. 34 OF 2010

AND

IN THE MATTER OF THE ORDER OF CERTIORARI DATED 26TH OCTOBER 2011

AND

IN THE MATTER OF THE SUBDIVISION OF LAND PARCEL NO. MBEERE/KIRIMA/2976

BETWEEN

ZAKAYO NJERU NGARI.....APPLICANT

VERSUS

DAUDI NGARI NJIRU.....1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

MICHAEL KINYUA NAMU & 51 OTHERS.....INTERESTED PARTIES

RULING

1. By a notice of motion dated 31st July 2018 brought under **section 68 (1) of the Land Registration Act 2012, Orders 51 Rule 10 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21)**, the Applicant sought the following orders;

a. *That this application be certified as extremely urgent and service hereof be dispensed with in the first instance.*

b. *That this honourable court be pleased to issue an inhibition order against land parcel numbers Mbeere/Kirima/3882 (0.60 Ha), 3891 (0.60 Ha), 3888 (0.60 Ha), 3879 (0.60 Ha), 3877 (0.60 Ha) 3912 (0.30 Ha), 3913 (0.30 Ha), 3914 (0.30 Ha), 3915 (0.30 Ha), 3916 (0.30 Ha), 3917 (0.60 Ha), 3918 (0.60 Ha), 3919 (1.50 Ha) 3921 (0.60 Ha), 3924 (0.80 Ha), 3907 (0.60 Ha), 3910 (0.60 Ha), 3887 (0.60 Ha), 3884 (0.60 Ha) 3902 (0.60 Ha) 3901 (1.60 Ha) 3899 (1.80 Ha), 3898 (0.90 Ha), 3903 (0.60 Ha), 3904 (0.60 Ha), 3905 (0.60 Ha) 3908 (0.60 Ha) 3909 (0.60 Ha), 3911 (0.60 Ha) 3894 (0.90 Ha) 3893 (0.60 Ha) 3886 (0.60 Ha) 3885 (2.43 Ha) 3883 (0.60 Ha), 3890 (0.60 Ha), 3889 (0.60 Ha), 3892 (0.90 Ha), 3878 (0.60 Ha), 3876 (0.90 Ha), 3900 (15.00 Ha), 3880 (0.60 Ha), 3881 (0.60 Ha), 3881 (0.60 Ha), 3920 (1.50 Ha), 3923 (0.60 Ha), 3925 (1.50 Ha), 3936 (1.50 Ha), 3895 (3.00 Ha), 3896 (0.60 Ha), 3906 (0.60 Ha), 3897, 4077, 4079 and 4048 pending the hearing and determination of this application and the originating summons.*

c. *That this honourable court be pleased to issue an order of temporary injunction restraining the Respondents and/or the interested parties from making any further subdivisions and developments on land parcel numbers Mbeere/Kirima/3882 (0.60 Ha), 3891 (0.60 Ha), 3888 (0.60 Ha), 3879 (0.60 Ha), 3877 (0.60 Ha) 3912 (0.30 Ha), 3913 (0.30 Ha), 3914 (0.30 Ha), 3915 (0.30 Ha), 3916 (0.30 Ha), 3917 (0.60 Ha), 3918 (0.60 Ha), 3919 (1.50 Ha) 3921 (0.60 Ha), 3924 (0.80 Ha), 3907 (0.60 Ha), 3910 (0.60 Ha), 3887 (0.60 Ha), 3884 (0.60 Ha) 3902 (0.60 Ha) 3901 (1.60 Ha) 3899 (1.80 Ha), 3898 (0.90 Ha), 3903 (0.60 Ha), 3904 (0.60 Ha), 3905 (0.60 Ha) 3908 (0.60 Ha) 3909 (0.60 Ha), 3911 (0.60 Ha) 3894 (0.90 Ha) 3893 (0.60 Ha) 3886 (0.60 Ha) 3885 (2.43 Ha) 3883 (0.60 Ha), 3890 (0.60 Ha), 3889 (0.60 Ha), 3892 (0.90 Ha), 3878 (0.60 Ha), 3876 (0.90 Ha), 3900 (15.00 Ha), 3880 (0.60 Ha), 3881 (0.60 Ha), 3920 (1.50 Ha), 3923 (0.60 Ha), 3925 (1.50 Ha), 3936 (1.50 Ha), 3895 (3.00 Ha), 3896 (0.60 Ha), 3906 (0.60 Ha), 3897, 4077, 4079 and 4048 pending the hearing and determination of this application and the originating summons.*

d. That the costs of this application be in the cause.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Respondents had unlawfully interfered with the original suit property which was *Title No. Mbeere/Kirima/2976* (hereinafter *parcel 2976*) and sub-divided it into 53 *parcels* (hereinafter *the suit properties*) which are set out in the prayers sought. It was further alleged that the Respondents had alienated some of the suit properties and commenced construction of access roads thus reducing the original size of parcel No. 2976.
3. The said application was supported by an affidavit sworn by the Applicant on 31st July 2018 in which he reiterated and expounded upon the grounds set out in the motion. It was contended that the Respondents had closed some water points in the process of alienating and dealing with parcel No. 2976 to the prejudice of the Applicant.
4. The 15th, 16th, 17th, 18th and 30th interested parties filed similarly worded replying affidavits all sworn on 25th September 2018 in opposition to the said application. No wonder all those Respondents described themselves as the “15th” interested parties. It was stated that the 1st Respondent was deceased hence no suit could be maintained against him. It was also contended that some of the interested parties such as Stephen Njagi Ngungi, Joseph Nyaga Waweru, Paul Njagi and Mukuru Makonge were deceased. It was contended that the interested parties acquired the suit properties lawfully hence there was no valid justification to restrict them in dealing with their properties. It was denied that any watering points had been closed.
5. The interested parties also contended that the Applicant had not demonstrated what legal interest he had in the suit properties since he was not claiming ownership thereof. They denied that they intended to waste the suit properties. It was further contended that some of the suit properties had changed hands and that the current owners had not been joined in the proceedings. They consequently asked the court to dismiss the Applicant’s said application.
6. When the said application was listed for hearing on 9th October 2018, it was directed with the consent of the parties present that the said application shall be disposed of through written submissions. The parties were given 42 days to file and exchange their respective submissions. By the time of preparation of the ruling, however, none of the parties had filed submissions.
7. The court has considered the Applicant’s notice of motion dated 31st July 2018, the replying affidavits filed on behalf of the 15th, 16th, 17th, 18th and 30th interested parties as well as the material on record. The Applicant has not stated his case in the clearest of terms. His interest in parcel No.2976 or the suit properties has not been clearly pointed out. From the scanty material on record, it would appear that the Applicant and the 1st Respondent were at some point jointly registered as proprietors of parcel 2976 on behalf of members of Ikandi clan. The two were described as cousins in the replying affidavit filed by the interested parties. They were not holding the property in their individual capacities.
8. It would further appear that when the said persons fell out, the 1st Respondent moved the Mbeere Land Disputes Tribunal in *Tribunal Claim No. 379 of 2009* which made certain orders which enabled him to sub-divide and distribute parcel 2976 amongst various beneficiaries who have now been joined in this suit as interested parties.
9. The record further shows that the Applicant being aggrieved by the decision of the Tribunal, he moved the High Court in *High Court Misc Application No. 34 of 2010* to quash the decision of the Tribunal. It would appear that by consent of the parties, an order of *certiorari* to quash the award of Tribunal was made and a decree to that effect dated 26th October 2011 was subsequently issued.
10. For reasons which are not clear from the record, the 1st Respondent appears to have proceeded to sub-divide parcel 2976 and distributed it to various members of Ikandi clan who were joined in the suit as interested parties. The Applicant contends that such action was unlawful and a violation of the order of *certiorari* issued by the High Court. He has sought cancellation of the sub-division.
11. The court is of the opinion that there are two (2) main questions for determination herein. First, whether the Applicant is entitled to the order of inhibition sought in the motion. Second, whether the Applicant has made out a case for the grant of a temporary injunction sought in the motion. The court shall deal with both questions together.
12. The court has considered the entire material on record. The court has perused a copy of the death certificate of the 1st Respondent which was exhibited by some of the interested parties who responded to the application. The court has noted that the 1st Respondent who was the main actor in the processes complained of died on 12th August 2017 well before the filing of the suit. His personal representative was not joined in the proceedings.
13. The court has also noted that both the Applicant and the 1st Respondent were registered as proprietors of parcel 2976 as representatives of Ikandi clan and not in their individual capacities. It was not contended by the Applicant that the beneficiaries of the suit properties were not members of Ikandi clan. The nature of the dispute which precipitated the filing of a claim before the Tribunal was not disclosed. It was not clear why the Applicant was not keen on concluding the process of distribution of the suit properties amongst the clan members after a long and tortuous process of land adjudication.
14. For the foregoing reasons, the court is far from satisfied that the Applicant has made out a case for either an order of temporary injunction or an order of inhibition. The Applicant’s case against the 1st Respondent who died in 2017 is simply a non-starter. There can be no *prima facie* case with a probability of success against the 1st Respondent within the meaning of the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358** in the absence of his personal representative. The allegation by the interested parties that some of the interested parties are deceased was not controverted by the Applicant. A court of law ought not to proceed or make orders against persons without according them an opportunity of being heard.

15. For the said reasons, the court is not satisfied that an order of inhibition ought to be issued to prevent any dealings with the suit properties. There is no evidence on record to demonstrate that the suit properties have fallen into the wrong hands or that there is a real danger of such eventuality. The Applicant is not at liberty to encumber the suit properties without a lawful justification.

16. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 31st July 2018. The same is consequently dismissed with costs to the 15th, 16th, 17th, 18th and 30th interested parties who participated in the application by filing replying affidavits.

17. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7TH day of MARCH, 2019.

In the presence of Mr. Wachira holding brief for Mr. Eddie Njiru for the Applicant, Mr Momanyi for 15th, 16th, 17th, 18th and 30th interested parties and in the absence of the 1st and 2nd Respondent.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

07.03.19