



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 135 OF 2017

PAULINE WANJIRU MIGWI.....PLAINTIFF

VERSUS

MUKA MUKUU FARMERS COOPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

NDETO NGILU.....2ND DEFENDANT

LUCY WAIRIMU KOMBO.....3RD DEFENDANT

NGAU TANGA.....4TH DEFENDANT

PETER KIIA NDETO.....5TH DEFENDANT

CHARLES NGILU MUSEI.....6TH DEFENDANT

RULING

1. In the Notice of Motion dated 29th March, 2017, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to grant a temporary injunction restraining the Respondents, by themselves, their servants, agents, employees and/or any person duly authorized by them to act on their behalf from interfering with or dealing in any way with those plots otherwise known as:- Kyeleni KYC 432, C433, C434, C435, C436 and Silanga C34, C147, C53, C86 and C18 pending the hearing and determination of this suit.

b. That the costs and incidentals of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that in 1995, she purchased five parcels of land from the 1st Defendant for Kshs. 75,000 per plot; that the plots she purchased were identified after she participated in balloting and that she became the registered allottee of the five parcels of land whose land reference numbers was KYC 432, 434, 435, 436 and Silanga C34, C147, C53, C86 and C18.

3. It is the Plaintiff's case that she took possession of the suit land after the said purchase; that in the year 2013, the 2nd Defendant purported to lay claim over her land and that an order of injunction should issue.

4. In a Further Affidavit, the Plaintiff deponed that the 1st Defendant cut down about 75 to 100 trees that she planted in 1996; that the 2nd Defendant has been misled to abandon his five (5) acres of land for a Public Catholic Secondary School and in return he has been given the suit land and that she is a widow whose constitutional rights are being infringed upon.

5. In reply, the Vice Chairman of the 1st Respondent deponed that the 1st Respondent never allocated or sold to the Plaintiff the suit properties; that the suit plots are part of a larger parcel of land measuring over 25,000 acres in the name of the Society and that the suit properties were allocated to the members of the Society by virtue of their shareholding.

6. According to the 1st Defendant, plot numbers KYC 432, 433, 434, 435 and 436 belong to Ndeto Ngilu (*the 2nd Defendant*); Silanga C34 was allocated to Joseph Jomo Munyao which he sold to Peter Mule Makau; that Silanga C147 was allocated to Shadrack Mutua Muui and Silanga C53 was allocated to Agnes Mutave while Silanga C86 was allocated to Ann Kanini.

7. The 1st Respondent's Vice Chairman finally deponed that the Plaintiff could not have obtained title to the suit property because the same could only be allocated to the members of the Society and that the Co-operative Societies Tribunal held that the Plaintiff was never a member or a former member of the 1st Defendant.

8. The Plaintiff did not file submissions. The 1st Defendant's advocate submitted that apart from the impugned beacon certificate and survey fee receipts, the Applicant has not exhibited a certificate of allotment as proof of ownership; that the Applicant is not a member or former member of the 1st Defendant and that she could not have acquired the land from the Society.

9. It is now settled that for one to succeed in an Application for injunction, he/she has to show that he/she has a prima facie case with chances of success and that unless the injunction is granted, he/she might suffer irreparable injury which cannot be adequately compensated by an award of damages. If the court is doubt about the two principles, it will decide an Application on the balance of convenience (*See Giella vs. Cassman Brown (1973) E.A 358*).

10. A prima facie case in civil cases includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter (*Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125*).

11. The Plaintiff in this matter has deponed that in 1995, she purchased the suit properties from the 1st Defendant, whereafter she took possession of the same. The 1st Defendant herein is a Co-operative Society. In his Replying Affidavit, the 1st Defendant's Vice Chairman has denied the 1st Defendant ever selling or allocating the suit land to the Plaintiff and that in any event, the Plaintiff has never been its member.

12. To support the averment that she acquired the land from the 1st Defendant, the Plaintiff annexed on her Affidavit the beacon certificate dated 21st August, 1996 for Plot Nos. 432, 433, 434, 435 and 436. The Plaintiff also exhibited copies of receipts by the 1st Defendant dated 3rd February, 1996. All the five receipts are in respect of "survey fees for central farm plot." The said receipts do not indicate the parcels of land that the Plaintiff purportedly purchased.

13. The Plaintiff has produced a letter dated 4th July, 2013 in which the 1st Defendant informed her to furnish to them any transfer document for them to authenticate her claim. It would appear that the Plaintiff did not respond to the said letter.

14. The Plaintiff has not denied that she is not a member or former member of the 1st Defendant. Indeed, the Plaintiff's claim is that she bought the suit properties directly from the 1st Defendant. However, the Plaintiff has not annexed a copy of the Sale Agreement that she entered into with the 1st Defendant, or a letter of allotment or a share certificate that she was issued with by the Plaintiff.

15. Notwithstanding the absence of the Sale Agreement, or the share certificate issued by the 1st Defendant, the Plaintiff has deponed that she is the one in occupation of the suit land and that she has been in occupation of the land since 1995. The Plaintiff deponed that she has more than 500 blue gum trees on the land.

16. The circumstances under which the Plaintiff entered the land and planted the blue gum trees will have to be explained by the 1st Defendant. Indeed, I am aware that before the Law of Contract Act was amended in the year 2003, one could prove that he purchased land even without a written contract. The pre-2003 Law of Contract Act provided that a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser has in part performance of the contract taken possession of the property.

17. The pre-2003 Law of Contract Act therefore allowed Agreements not necessarily wholly written or formal to be enforceable through action in court. Consequently, and on the basis that the Plaintiff was issued with some receipts by the 1st Defendant, and took possession of the suit land, the Plaintiff is likely to suffer irreparable injury if she is evicted from the suit land before the matter is heard on merit.

18. Indeed, to the extent that the 1st Defendant is capable of owning land which it can sell to third parties, and the fact that the Plaintiff has always been in possession of the suit land, the balance of convenience tilts in favour of the Plaintiff. For those reasons, I shall, which I hereby do, allow the Application dated 29th March, 2017 as follows:

a. A temporary injunction be and is hereby issued restraining the Respondents, by themselves, their servants, agents, employees and/or any person duly authorized by them to act on their behalf from interfering with or dealing in any way with those plots otherwise known as:- Kyeleni KYC 432, C433, C434, C435, C436 and Silanga C34, C147, C53, C86 and C18 pending the hearing and determination of this suit.

b. The 1st Defendant to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE