



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 77 OF 2016

MARY WAMBUI GAITHO & 203 OTHERS.....PLAINTIFFS

VERSUS

UTHERI WA LARI COMPANY LIMITED....1ST DEFENDANT

KENNEDY PULEI.....2ND DEFENDANT

TINANKA OLE KANTIM.....3RD DEFENDANT

PASTOR SILAS OLE KOIL.....4TH DEFENDANT

NEKURSAI OLE MUSEI.....5TH DEFENDANT

KORIO OLE TUUKUO.....6TH DEFENDANT

KINTALEL OLE NTINA.....7TH DEFENDANT

SABAYA OLE KOTIKASH.....8TH DEFENDANT

SENTO NGUSSUR OLE MASARI.....9TH DEFENDANT

PAUL PARKINYIARO LEKERIN.....10TH DEFENDANT

TEKERO OLE POREKA.....11TH DEFENDANT

RULING

1. Proceedings herein commenced when the plaintiffs filed plaint on 9th March 2016 and alter an amended plaint on 8th September 2017. The plaintiffs state in the amended plaint that they are registered proprietors of the parcels of land known as Longonot/Kijabe Block 2/1 to 7956 (Utheri Wa Lari), hereinafter “the suit properties”. They accuse the 2nd to 11th defendants of among others entering the suit properties, erecting structures and farming thereon without their consent.

2. The 2nd to 11th defendants filed a defence in which they denied the plaintiffs’ allegations and a counterclaim against the 1st defendant herein, the plaintiffs, the Deputy Commissioner Naivasha Sub County and the Attorney General. For the avoidance of doubt, “plaintiffs” and “defendants” in this ruling refers to those parties as they appear in the amended plaint.

3. The plaintiffs also filed Notice of Motion dated 23rd August 2018 in which they seek an injunction restraining the defendants, their agents, members, servants or anybody claiming though or under them or any unauthorized persons from trespassing on, grazing, constructing, alienating, selling, encroaching or in any manner interfering with the suit properties pending hearing and determination of this suit. They also seek an order that the Cabinet Secretary in charge of Internal Security, County Police Commander Nakuru County and Nakuru County Commissioner to ensure enforcement and compliance with any order that will be issued by the court. The application is supported by an affidavit sworn by Peter Ndungu Godfrey Njihia, the 204th plaintiff. He reiterated that the plaintiffs are registered proprietors of the suit properties and that the 2nd to 11th defendants have entered the suit properties, erected structures and are farming thereon without the plaintiffs’ consent.

4. Not willing to be left behind, the defendants filed their own application, Notice of Motion dated 29th August 2018, in which they seek an

injunction restraining the plaintiffs, the Deputy Commissioner Naivasha Sub County and the Attorney General from subdividing, alienating, transferring, evicting, interfering or in any way dealing with the suit properties pending hearing and determination of this suit. In the alternative, they seek an order that status quo in respect of the suit properties be maintained pending hearing and determination of this suit. The application is supported by an affidavit sworn by Kennedy Pulei who deposed that the plaintiffs obtained titles in respect of the suit properties fraudulently and that the suit properties constitute ancestral land for him and approximately other 10,000 members of Kitet Maasai Community who are now faced with imminent eviction. That on 23rd August 2018, the Deputy County Commissioner Naivasha Sub County informed them that they would be evicted from the suit properties if they did not vacate within 7 days.

5. The defendants responded to Notice of Motion dated 23rd August 2018 through a replying affidavit sworn by Kennedy Pulei in which he generally restated the defendants case as put forth in Notice of Motion dated 29th August 2018. On their part, the plaintiffs responded to Notice of Motion dated 29th August 2018 a replying affidavit sworn by Peter Ndungu Godfrey Njihia in which he also generally reiterated the plaintiffs' case as put forth in Notice of Motion dated 23rd August 2018 and added that the defendants filed **HC Miscellaneous Civil application No. 844 of 2003 (Nairobi)** seeking cancellation of the plaintiffs titles and that the said matter was dismissed in a judgment delivered on 3rd March 2006. He further stated that the defendants also filed **HCC No. 315 of 2010 (OS) (Nakuru)** seeking an order that they had become entitled to the suit properties by way of adverse possession and that the said suit was struck out on 14th May 2015.

6. This ruling is in respect of both Notices of Motion dated 23rd August 2018 and 29th August 2018. The applications were canvassed together by way of written submissions. Both the plaintiffs and the defendants filed submissions on 3rd December 2018. I have considered the applications, the affidavits and the submissions.

7. Both sides to this litigation seek to restrain each other by way of an interlocutory injunction. The principles applicable while dealing with such an application are long settled. The respective applicants must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. They must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

8. While it is generally accepted by the defendants that the plaintiffs hold title documents in respect of the suit properties, the defendants maintain that those titles were obtained fraudulently. Of particular concern to me is that, as pleaded in the plaint, there have been litigation touching on various aspects of the dispute between some of the parties in **High Court JR Misc. Applic. No 844 of 2003 (Nairobi)** and **High Court Civil Suit No. 315 of 2010 (Nakuru)**. The final determinations by the courts that heard the said matters were exhibited. Suffice it to say that the dispute between the parties has kept the judicial system engaged for a while. This suit is yet another attempt at resolving the matters in controversy. In view of the earlier determinations, it is best that the court gets a holistic view of the matter through a hearing as opposed to the present applications which at best pose the risk of getting this court to make orders that may stand in contradiction to previous determinations. Amidst all this, none of the two applications discloses a *prima facie* case. The best recourse for the parties is to have the main suit urgently heard and determined on the merits, unless of course it is disposed of on a preliminary issue.

9. In the end I dismiss both Notice of Motion dated 23rd August 2018 and Notice of Motion dated 29th August 2018. Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 29th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kahiga holding brief for Mr Kenyatta for the plaintiffs

No appearance for the 1st defendant

Ms Gathoni holding brief for Mr Naikuni for the 2nd to 11th defendants

Court Assistants: Beatrice & Lotkomoi