



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 56 OF 2018

BENSON MUTHOKA KIMEU1ST PLAINTIFF/APPLICANT

PAUL MWOLOLO KAVITI2ND PLAINTIFF/APPLICANT

VERSUS

HARRISON MUNYOKI1ST DEFENDANT/RESPONDENT

PAUL MUEMA KITUU2ND DEFENDANT/RESPONDENT

PETER NDAMBUKI KITUU3RD DEFENDANT/RESPONDENT

MUTUA KITUU4TH DEFENDANT/RESPONDENT

MWAIWA KITUU5TH DEFENDANT/RESPONDENT

KITONGA KITUU6TH DEFENDANT/RESPONDENT

RULING

1. What is before this Court for ruling is the Applicants' Notice of Motion application expressed to be brought under Sections 3, 13 (7) (a) & 19(2) of the Environment and Land Court Act, Section 63(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 159 of the Constitution of Kenya, 2010 and all other enabling provisions of the Law for orders:-

1) Spent.

2) Spent.

3) That an order of injunction do issue restraining the defendants/Respondents, their servants and/or agents and/or anybody working under them or claiming through them from trespassing into, cultivating, grazing, construction or carrying out any kind of development leasing or selling a portion of land in land parcel registration title number Nzau/Nziu/294 which the plaintiffs and beneficiaries of the estate of Kakewa Kaviti Nyange (Deceased) have been in occupation and use until the hearing and determination of this suit.

4) The County Land Surveyor for Makueni County do visit the site and establish the acreage of the portion in land parcel registration title number Nzau/Nziu/294 which has been in use and under occupation of the plaintiffs and beneficiaries of the estate of Kakewa Kaviti Nyange as per boundary established following the decision of the Land Adjudication Committee in Case No. NZU/49/69 and file his report in this court within the time directed by the court.

5) The costs of this application be borne by the defendants/Respondents.

2. The application is predicated on the grounds on its face and is supported by the supporting, supplementary and further affidavits of Benson Muthoka Kimeu, the 1st Applicant herein sworn on 30th May, 2018, 03rd August, 2018 and 16th October, 2018 respectively. The application is dated 30th May, 2018 and was filed in court on even date.

3. The Respondents have opposed the application vide their replying and further affidavits sworn at Nairobi on the 28th August, 2018. The further affidavit has no date of when it was sworn.

4. On the 24th July, 2018 the Respondents filed a Preliminary Objection dated 23rd July, 2018 based on the following grounds:-

(a) THAT the parcel of land known as NZAUI/NZIU/294 is registered in the name of KITUU NZUO MUKUKU (deceased).

(b) THAT the above named KITUU NZUO MUKUKU has since passed on and grant of letters administration given to the Defendants.

(c) THAT as such the Defendants have been wrongly enjoined in the present suit contrary to Order 31 Rule 1 of the Civil Procedure Rules, 2010.

(d) THAT this suit is frivolous vexatious and fatally defective.

5. Directions were given that the application together with the notice of Preliminary Objection be disposed off by way of written submissions. Parties herein have filed their respective submissions.

6. At the outset, I wish to point out that the Applicants' prayer to have the name of one Lucas Muendo Kyuma struck out of the pleadings is superfluous in light of the order of 24th July, 2018 whereby the replying affidavit which the said Lucas Muendo Kyuma had sworn jointly with Victor Mutua Kituu and Harrison Munywoki Kituu, the 1st Defendant/Respondent herein was struck out since the said Muendo is not a party to this suit.

7. Both parties are agreed that for the order of injunction to be issued, the Applicants have to satisfy the principles set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. I need not repeat the three principles herein.

8. On the principle that the Applicant must show that he has a prima facie case with probability of success, the Counsel for the Applicants submitted that they have demonstrated that the suit property has been in possession of the family of Kakewa Kaviti Nyange since 1938 when the boundary was established. The Counsel went on to submit that the boundary was confirmed by the Land Adjudication Committee case No.NZU/49/69 annexed as BMK 3 to the Applicants' supporting affidavit. The Counsel added that the Applicants have demonstrated that this suit emanates from wrongful documentation and survey which led to the suit property being included in land parcel number NZAUI/NZIU/294 instead of NZAUI/NZIU/503. The Counsel termed the action as act of fraud or mistake which goes to the root of the title given for land parcel number NZAUI/NZIU/294. The Counsel added that the Respondents have not shown any homestead they have established in the suit property and pointed out it is the Applicants who have shown what the Respondents have done in the said property in the month of July, 2018 as is deposed in paragraphs 12 and 13 of the supplementary affidavit.

9. The Counsel relies on the case of **Naftali Kinyua vs. Patrick Thuita Gachure & Another [2015] eKLR** where the court of Appeal held thus,

“It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.”

10. The Counsel further cited the case of **Lucy Wangui Gachara vs. Minudi Okemba Lore[2015]** where the Court of Appeal observed that:-

“Where allegations of fraud are made, determination of whether or not a title is defeasible ought not to be made summarily on affidavit evidence, but after a proper hearing involving adducing of evidence duly tested by cross-examination.”

11. On the other hand, the Counsel for the Respondents submitted that the Respondents have annexed a copy of the proceedings in Land adjudication committee file case number NZU/49/69 which show that the plaintiff was one Ndambuki Kaviti as opposed to the proceedings relied upon by the Applicants which show the 1st Applicant as the plaintiff. The Counsel submitted that the question arises as to which of the two proceedings is genuine.

12. On the principle of if interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Applicants' Counsel submitted that the family of Kakewa Kaviti has been in occupation of the suit property since 1938 until January, 2018. He added that the home of one of the Applicants has been destroyed. The Counsel termed the disruption that was caused by the Respondents as one that cannot be compensated by way of general damages.

13. On their part, the Respondents through their Counsel submitted that the Applicants in their supporting and further supplementary affidavits have not attempted to explain the kind of damage that they will suffer if in any event, the application is denied.

14. On the principle of if the court is in doubt, it will decide the application on a balance of convenience, the Applicants' Counsel submitted that the same tilts in favour of the Applicants in that a decision was made in 1970 in favour of retaining 1938 boundary. The Counsel added that the Applicants have shown a clear history of how they acquired the suit property. In response, the Counsel for the Respondents submitted that the Applicants having failed to establish a prima facie case as well as the irreparable damage that they will suffer if the application is denied, the balance of convenience tilts in favour of the plaintiff (sic).

15. Before I make my determination on the application, I propose to dispose off the Respondents' Notice of Preliminary Objection dated 23rd July, 2018.

16. The Respondents Counsel dwelt on the following issues namely that the Applicants ought to have brought this suit in their capacity as the administrators of the estate of the late Kakawa Kaviti. For those reasons, the Respondents' Counsel submitted that the suit must fail for being frivolous, vexatious and fatally defective. On their part, the Applicants have submitted that the Applicants have sought orders against the Respondents in their personal capacity for interfering with peaceful possession and occupation of the suit property.

17. The case of **Mukisa Biscuits Manufacturing and Company Ltd vs. West End Distributors Ltd [1969] EA 698**, Charles Newbold, P had this to say regarding what constitutes a Preliminary objection;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.”

18. From the pleadings herein, it is in dispute as to who was the plaintiff in Land Adjudication Committee Proceedings in case No.NZU/49/69. That fact has to be ascertained at the substantive hearing. In the circumstances, my finding is that the Preliminary Objection herein does not raise a pure point of law. Same must fail and I proceed to dismiss it with costs to the applicant.

19. What has come out clearly in this application is that there is a boundary dispute involving land parcels numbers Nzai/Nzi/294 and Nzai/Nzi/503. The exact location of the boundary can only be determined by the Land Registrar in accordance with Section 20 and 18 of the Land Registration Act No.3 of 2012. Given those circumstances, my finding is that the most appropriate order to grant under the circumstances is an order for status quo as at the time of filing this suit. None of the parties herein is to carry out further development on the disputed portion of the land until further orders of this Court.

Signed, dated and delivered at **Makueni** this **03rd** day of **May, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Langalanga holding brief for Mr. Mutia for the plaintiff

Mr. Hassan holding brief for Mr. Masika for the Defendants present

Ms. Nzioka – court assistant

MBOGO C.G, JUDGE,

03/05/2019