



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 254 OF 2014

PETER MURIUKI MUTOKA & 99 OTHERS.....PLAINTIFFS

VERSUS

KANG'OROTI KITHAE in trust for

TEREVASIO NGARI KANGOROTI & 119 OTHERS.....DEFENDANTS

RULING

1. By a notice of motion dated 9th July 2018 brought under **Order 1 Rules 10 (2) and (4), Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, (Cap. 21) and all other enabling provisions of the law** the Plaintiffs sought various orders including orders for joinder of parties, amendment of pleadings, substituted service of court process and a temporary injunction. All those prayers except the order for temporary injunction were granted on 24th September 2018. It was directed that the prayer for injunction be heard upon service of the new parties who were added on 24th September 2018.
2. The record shows that the firm of O.H. Oyugi & Co. Advocates entered an appearance for the 92nd – 120th Defendants (hereinafter *the Defendants*). They filed an affidavit sworn by Charles Njiru Nthiga on 17th December 2018. The affidavit was filed on behalf of all members of Mbadi clan who had been sued. They contended that the application was misconceived an abuse of the court process.
3. The Defendants contended that *Title No. Mbeere/Kirima/2244* (hereinafter *the suit property*) initially measured about 7,000 acres and that their Mbadi clan was allocated only 150 acres of the entire land. They stated that each of their members allocated the land had subsequently developed their respective portions.
4. The Defendants further contended that Mbadi clan was assigned a new parcel number, that is, *Mbeere/Kirima/2957* for their portion of land which was subsequently sub-divided and allocated to individual members who had acquired titles to their respective parcels. It was further stated that some of the clan members had since disposed of their parcels to third parties.
5. When the said application was listed for hearing on 14th February 2019 the parties consented to canvass it through written submissions. The Plaintiffs were granted 30 days to file and serve their submissions whereas the Defendants were granted 30 days upon the lapse of that period to file and serve theirs.
6. The record shows that the 92nd – 120th Defendants filed their submissions on 10th May 2019 but there is no indication of the rest of the Defendants having filed any. The Plaintiffs' submissions were also not on record at the time of preparation of the ruling.
7. The court has considered the Plaintiffs' application for interlocutory injunction, the replying affidavit in response thereto as well as the submissions on record. The Plaintiffs' contention is that the Defendants had unlawfully occupied their land comprised in the suit property and that they had even fraudulently obtained titles to the land in dispute. The Plaintiffs are apprehensive that the Defendants may dispose of the suit property before the hearing and conclusion of the suit.
8. It would appear from the material on record that the Plaintiffs who appear to be members of Marigu clan are not claiming the entire suit property which originally measured about 7,000 acres. That parcel was sub-divided amongst the 17 clans of the Mbeere tribe and Marigu clan was one of them. The Plaintiffs have not disclosed the acreage they were allocated out of the suit property. They do not also disclose in either the pleadings or application the acreage they are seeking. In their amended plaint they simply plead that they are entitled to an unspecified "portion" of the suit property.
9. The main issue for consideration is whether or not the Plaintiffs have satisfied the requirements for the grant of an interim injunction as set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**. The court is of the view that in order to establish a *prima facie* case with a probability of success at the trial, the Plaintiffs must identify with reasonable precision the portion of land they are claiming to be their ancestral land.

10. The court is aware that parcel 2244 is no longer in existence. The court is aware that it was distributed amongst the 17 clans of the Mbeere tribe and the sub-divisions assigned new parcel numbers. There is evidence on record that even the clan blocks were further subdivided and allocated to individual clan members. The Plaintiffs have annexed to their supporting affidavit copies of certificates of search for some of the existing individual parcels. In those circumstances, it would be futile for the court to issue a blanket order of injunction with respect to parcel 2244 when it is clear that it is no longer in existence and that the Defendants are not holding titles to the entire suit property.

11. It is evident that some of the 17 clans were dissatisfied with the mode of distribution of the 7,000 acres comprised in parcel 2244. It is also evident that some of the clans filed civil proceedings in a bid to secure a bigger allocation. The court is aware that some of the disputes ended up before the Minister for Lands by way of appeals **under section 29 of the Land Adjudication Act (Cap. 284)**. Some of the disputes ended up before the judicial review court. The distribution of parcel 2244 amongst the 17 clans has been a lengthy, messy and expensive affair. The Plaintiffs have not made a full and faithful disclosure on how the grievances by their clan were handled and the ultimate decision made thereon.

12. The court is thus not satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial. The Plaintiffs are at liberty to prepare the suit for hearing and take directions on the hearing of the suit since it was filed in 2014.

13. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' application for a temporary injunction. Accordingly, prayer No. 6 of the notice of motion dated 9th July 2018 is hereby dismissed with no order as to costs.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 13TH day of JUNE, 2019.

In the presence of Ms Maina holding brief for Mr. E.K. Njagi for the

Plaintiffs; Mr. Omwega for 92nd – 120th Defendants and in the

absence of the rest of the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

13.06.19