



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CAUSE NO. 53 OF 2018**

**SAMWEL KIPKIRUI KONES & 582 OTHERS.....PLAINTIFFS**

**-VERSUS-**

**JOHNSTONE KIPKOECH LANGAT & 3 OTHERS.....DEFENDANTS**

**RULING**

The Plaintiffs/Applicants have by a Notice of Motion dated 31<sup>st</sup> August, 2018 and brought under section 1A, 1B and 3A of the Civil Procedure Act and under Order 40 Rule 1,2 and 7 and under order 51 Rule 1 of the Civil Procedure Rules sought for the following orders:-

- (a) Pending the hearing and determination of this application, the Defendants/Respondents herein be restrained from interfering with the Plaintiffs' occupation, possession and use of the part of the suit property LR NO. NAROK/CIS-MARA/IMOTIOK/54 occupied by them.
- (b) Pending the hearing and determination of this application, Defendants herein be restrained from selling, charging or otherwise dealing with the title o. LR NO. NAROK/CIS MARA/ILMOTIOK/54
- (c) Pending the hearing and determination of this suit, the defendants herein be restrained from interfering with the Plaintiffs' occupation, possession and use of the part of the suit property LR NO. NAROK/CIS-MARA/ILMOTIOK/54 occupied by them.
- (d) Pending the hearing and determination of this suit, defendants herein be restrained form selling, charging, or otherwise dealing with the title No. LR. NO. NAROK/CIS-MARA/ILMOTIOK/54.
- (e) Costs of the application be provided for.

The Application was based on the grounds that the Applicants are residents of 8 villages in Sagamain Location Narok County and are currently in occupation, use and possession of land parcel No. NAROK/CIS MARA/ILMOTIOK/54 which measures approximately about 4,900 acres in which the Plaintiff/Applicant occupies a third of the land which is registered in the name of the 1<sup>st</sup> Defendant. The Applicants further state that the 1<sup>st</sup> Defendant obtained registration of the suit land fraudulently through an adjudication and demarcation process that took place between 1974 to 1978 when the Applicant and their predecessors were in occupation.

The Applicants contend that there are about 400 families and over 4,000 people on the suit and there exists also various public facilities such as Sagamian Primary School that was established in 1965 and a Catholic Church, Trading Centres and Water points and by virtue of their occupation on the land the 1<sup>st</sup> Defendant obtained registration. They have an interest in the land which amounts as an overriding interest which did not require to be noted in the register and since their views were not heard when the land was registered in favour of the 1<sup>st</sup> Defendant the entire process was therefore null and void.

The Application was further supported by the Affidavit of Stanley Kipsang Towett in which he averred that he had the authority of his Co-Plaintiff and that they all occupy the suit land with their families. He stated that they are currently five trading centres, six churches of various denomination which he listed and that the residents keep about 3,000 herds of cattle, 1,500 goats, 1,000 sheep and about 250 donkeys and besides they also engage in subsistence agriculture on the suit land.

The Plaintiff in his affidavit averred that their ancestors lived on the land since early 1920's and when the adjudication process started they appointed a number of people from amongst themselves to take care of their interest but in 1979 the father of the 1<sup>st</sup> Defendant who was a powerful Provincial Commissioner came and displaced them and took their land save in the year 2004 when vide HCCC No. 41 of 2014 they obtained Judgement in their favour in respect of the Local Primary School.

It is the Applicants' assertion that they lived on the suit land before the same was registered in the Defendant's name.

The Application was contested by the 1<sup>st</sup> Defendant by filing a replying affidavit as his answer to the application with the authority of those other respondents and in his capacity as the administrator of the estate of the late Isaiah Kiplangat Cheuget.

The Respondent averred that he had lived on the suit land from 1990 to 2007 and he was versed with all happenings on the suit land. He stated that the deceased had informed him that he obtained ownership and possession rights over the suit land from a Senior Chief of the Purko clan in or about 1972.

The Respondent averred that the suit land was allocated to the deceased as the area in which the suit land is situated was an adjudication area and upon the completion of the exercise he was subsequently issued with a certificate of title that was issued on 11<sup>th</sup> September, 1980. He further averred that prior to issuance of the aforesaid title the deceased carried out farming activities on the suit land.

The Respondent stated on 21<sup>st</sup> August, 2003 he received letters from the area chief and the District Officer Mulet that there were invaders on the land felling trees, burning charcoal and were stealing farm produce and were engaged in destroying farm equipment, tractors and generators thus bringing the activities on the land to a standstill.

The Respondents further stated that there were two cases being High Court Miscellaneous Civil Application No. 400 of 2003 which was heard and dismissed and the subsequent Appeal at the Court of Appeal being Nairobi Civil Appeal No. 289 of 2009 which was also dismissed. It is the Respondents contention that the Applicants in the instant case were merely substituted with those of previous names in the cases that were handled.

The Respondent contends that the Applicants did not take advantage of the Adjudication Process outlined in the Land Adjudication Act and have not filed suit but waited for 38 years to lay claim on the suit land and thus the instant case is an afterthought and only meant to frustrate him and act as an impediment to the hearing and determination of the application for eviction. He further averred that being trespassers they are not entitled to an order of injunction against a registered proprietor of the suit land and the Application is only meant to legitimize the applicants' illegal occupation and possession of the suit land.

I have carefully considered the application before me and the long submissions which were filed and subsequently highlighted in which I gave credit to both counsel for the good research that they have made in the matter, however, this being an interlocutory application I will not delve into making a factual or legal determination of the issues raised in the application and the submissions made. The Applicant seeks the discretionary order of injunction in which the conditions for the grant of the same is now well settled as elucidated in the case of **GEILLA - VERSUS- CASMAN BROWN (1973) EA 358** and obtaining from the above the issues for determination before me are threefold: -

- (i) Whether the applicants have established a prima facie case with a probability of success
- (ii) Whether damages will not be adequate compensation
- (iii) In whose favour does the balance of convenience tilt

In the Application and the supporting affidavit, it is the applicants' contention that they are residents on the suit land and they carry out subsistence farming without any title to the land. The respondents contend that they are the duly registered owners of the land and have title to the same that was issued in 1980 and brand the applicants mere trespassers to the land.

In determining whether they have a prima case to warrant the grant of the order of injunction they out to demonstrate that they have a case with chances of success but from the pleadings rather than being in occupation of the land the Applicants have not demonstrated what interest they have on the land. Interest on land cannot be merely expressed but a party must show proof of the same. From the pleadings it is not contested that this suit was part of Ilmotiok Adjudication Section prior to the registration of the Respondents the applicants have not demonstrated to the court they indeed had staked their interest during the adjudication process and that being so I find that the Applicants have not demonstrated that they have a prima facie case with probability of success and on this ground the application fails.

Further to the above this being a court of equity a party approaching it for redress must come with clean hands. The Applicants have concealed from the court that there was previous litigation existing in respect of the subject land which was material that ought to have been brought to the attention of the court.

On whose favour the balance of convenience tilts since the Respondents are registered owners of the land and the applicants have nothing to proof their ownership I find that the balance of convenience in the matter rests in favour of the Respondents.

Having made the above findings, I find that the application is not merited and thus the same is dismissed with costs however, due to the large number of people residing on the suit land with number of schools and social amenities I order that parties do maintain status quo pending the hearing and determination of the suit. Costs of the application to the Respondents.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **19<sup>th</sup>** day of **July, 2019**

**Mohammed Kullow**

**Judge**

**19/7/19**

In the presence of: -

Mr. Gacheru for the Plaintiffs/Applicants

Mr Lubulellah for the Defendants/Respondents

CA:Chuma/Kimiriny

**Mohammed Kullow**

**Judge**

**19/7/19**