



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 78 OF 2017

FORMERLY NAKURU HCC NO. 249 OF 2014

JORAM OLE SANKEI.....PLAINTIFF

-VERSUS-

ESTHER MORAA GWAKO & 26 OTHERS.....DEFENDANTS

RULING

By an application dated 16th October, 2015 and brought under order 8 Rule 3, order 41 rule 1 and order 5. The Applicant sought for orders to amend their written statement of defence to include a counter claim and the amended statement of defence be deemed to have been filed and a permanent injunction to restrain the Plaintiff/Respondent, his employees and servants from selling, leasing, disposing and/or dealing with the Applicant's occupation of 400 acres being portion of Land Reference No. NAROK/CIS MARA/LEMEK/138.

The Application was based on the grounds that the Applicant entered into a Sale Agreement with the Respondent on 18th September, 1987 in which the Plaintiffs sold to the Defendants 400 acres of land parcel no. NAROK/CIS MARA/LEMEK/138 at an agreed price of kshs. 2,160,000 and that the Defendants took possession of the suit land pursuant to a court order issued on 7th August, 2003 vide Narok SRMCC No. 13 of 2003 and that they have been in occupation and possession of the land to date.

The Applicant contends that despite the sale and occupation the Respondents have commenced to evict the Applicants from the suit land and that they seek the court's protection and further that they wish to amend their Defence to include a counter claim for the refund of the purchase price together with interest and damages for breach of contract as an alternate prayer.

The Application was opposed by the Respondent who filed a replying affidavit and he contends that the Application has no merit and that it ought to be dismissed. He further contends that his title to the land can't be challenged and that the applicants must prove that he had obtained title to the land by fraud, misrepresentation and further that the Applicants have voluntarily left the suit land and abandoned their homes.

When the Application came up for hearing that they be disposed of by way of written submissions and it took long for both parties to file their respective submissions despite the court's indulgence and the applicants filed their submissions on 23rd November, 2018 and the Respondents are yet to file their submissions.

I have considered the Application before me and the Replying Affidavit and the Applicants submissions. The Applicants are seeking two main prayers; leave of the court to amend their defence and an order of injunction.

On leave of the court to amend their defence it is the Defendants contention that they purchased the suit land and that they have been in occupation of the same. I have read the replying affidavit and I find no paragraph in which the Respondent controverted their claim of purchase of the land though the Respondents state that the Applicants have voluntarily abandoned the land and I have not seen any prejudice that the Respondent will suffer in the leave for amendment to the Defence as I find that this will be able to assist the court in determining the real question between the parties. The courts have readily allowed parties to amend their pleading subject to the fact that no party will suffer any injustice and in this regard I see no likely injustice the respondent will suffer if the amendment sought is granted.

On the second prayer for injunction the condition for the grant of injunction are now well settled and it is my findings that the applicant has demonstrated a prima facie case with a probability of success and damages will not be adequate compensation and the balance of convenience tilts in his favour.

From the foregoing, and having considered the pleadings before me I find that the Notice of Motion dated 16th October, 2015 is merited and I will allow the same in the following terms:-

1. That leave is granted to the Defendants/Applicants to amend their statement of defence to include a counter claim and the draft amended statement be deemed as duly filed subject to the payment of court fees.
2. That the amended Defence be served on the Respondent/Plaintiff within 14 days
3. That pending the hearing and determination of the suit herein an order of injunction do issue restraining the Respondents, their agents, employees or any person act in on their instructions from selling, leasing, transferring or interfering with the applicants occupation of 400 acres being portion of LR NO. NAROK/CIS MARA/LEMEK/138.
4. The costs of the application to the applicants.

DATED, SIGNED and DELIVERED in open court at NAROK on this 17th day of July, 2019

Mohammed Noor Kullow

Judge

17/7/19

In the presence of: -

Ms Cheloti for the Defendants/Applicants

N/A for the Plaintiff/Respondent

CA:Chuma

Mohammed Noor Kullow

Judge

17/7/19