



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 77 OF 2017**

**MWAGO GATUWAI GITWARU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ANTHONY NGARURI NJUKI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**BENARD NJUKI KIARIE.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**JOSEPH WARURU KIARIE.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**BERNARD NJUKI KARIE.....DEFENDANT/RESPONDENT**

**RULING**

This is in respect to the plaintiffs' Notice of Motion dated 2<sup>nd</sup> June 2017 in which they seek the following orders:

**1. Spent.**

**2. Spent.**

**3. That this Honourable Court be pleased to stay proceedings in LDT No. 85 of 2011 MWAGO GATUWAI GITWARU VS BERNARD NJUKI KIARIE pending the hearing and determination of the suit herein.**

**4. Allowed by consent on 25<sup>th</sup> September 2017.**

**5. Spent.**

**6. That the costs of this application be provided for.**

The application is premised under the provisions of **Section 3 (1) and (2) and Section 13 (6) and (7) of the Environment and Land Court Act, Section 6 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules**. At this stage, I need to remind counsel for the plaintiffs that **Section 13 (5) and (6) of the Environment and Land Court Act** were deleted by **Act No. 12 of 2012**.

The application itself is premised on the grounds set out therein and supported by the affidavit of **MWAGO GATUWAI GITWARU** the 1<sup>st</sup> plaintiff herein dated 2<sup>nd</sup> June 2017 and sworn also on behalf of the other plaintiffs. Annexed to that affidavit are the proceedings in Tribunal Case No. 35 of 2001 involving the 1<sup>st</sup> plaintiff and the defendant with respect to land parcel No. **KABARE/NYANGATI/89**.

The gravamen of the application is that following the determination of the dispute between the 1<sup>st</sup> plaintiff and defendant with respect to the land parcel No. **KABARE/NYANGATI/89** (the suit land), execution proceedings are on-going in **LDT CASE No. 85 of 2001**. It is therefore fair and just that the said proceedings be stayed pending the determination of this suit where the orders issued by the said Tribunal are being challenged for being null and void as they contravened the provisions of the **repealed Land Disputes Tribunal Act**.

In opposing the application, the defendant filed a replying affidavit in which he deponed, inter alia, that he is the registered proprietor of the suit land and has no intention of selling it and that the status quo prevailing thereon can be maintained. He however denied holding the suit land in trust for the plaintiffs and added further that the Tribunal had the jurisdiction to determine the dispute before it and this application should therefore be dismissed.

The application was, by the consent of the parties, to be determined on the basis of their respective pleadings and on 25<sup>th</sup> September 2017, the parties consented to prayer No. 4. That prayer reads:

***“Upon grant of prayer No. 2 hereinabove, this Honourable Court be pleased to grant temporary injunction against the defendant restraining him from selling, leasing, disposing, alienating and/or charging land parcel No. KABARE/NYANGATI/89 pending the hearing and determination of this suit”***

What remains therefore is whether this Court should grant prayer No. 3 which seeks the stay of proceedings in **LDT No. 85 of 2001** pending the hearing and determination of this suit. I must at this stage point out that it is not clear if the proceedings sought to be stayed are **LDT No. 85 of 2001** as per the Notice of Motion dated 2<sup>nd</sup> June 2017 or **LDT No. 83 of 2001** as per the defendant’s replying affidavit and the main plaint filed herein on 2<sup>nd</sup> June 2017. The confusion is compounded by the fact that none of the parties annexed the pleadings in **LDT No. 85 or 83 of 2001**. I will therefore for purposes of this ruling refer to the **LDT CASE as No. 83/85 of 2001**. Again I must caution parties and their counsel to be vigilant in their pleadings as the Court is not supposed to presume what is sought by them.

It is clear that by their plaint filed herein on 2<sup>nd</sup> June 2017, the plaintiffs are challenging the jurisdiction of the Tribunal to make orders relating to registered land. A casual perusal of the annexed proceedings indicates that it determined a dispute relating to ownership of registered land. It is now common knowledge that a Tribunal exercising its jurisdiction under **Section 3 (1) of the repealed Land Disputes Tribunal Act** could not determine a dispute relating to ownership of registered land – **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU)**. The plaintiffs have therefore filed this suit seeking, inter alia, a declaration that the proceedings in **LDT CASE No. 83/85 of 2001** are null and void having contravened the now **repealed Land Disputes Tribunal Act**. It is also now well settled that a party can move to this Court to impeach the decision of a subordinate Court or Tribunal arrived at in excess of its jurisdiction – **JOHANA BUTI VS WALTER OMARIRA & OTHERS C.A CIVIL APPEAL No. 182 of 2006 (KISUMU)**. It is therefore proper that this Court stays the proceedings in the subordinate Court pending the determination of this suit as failure to do so would amount to a great injustice to the plaintiffs should the Court find in their favour after execution has proceeded to its finality. Indeed in paragraph five (5) of his replying affidavit, the defendant is not averse to any orders of inhibition being lodged on the suit land but pleads that due to his advanced age, the hearing and determination of this suit be done expeditiously!

Ultimately therefore and upon considering all the matters herein, I make the following orders with respect to the plaintiff’s Notice of Motion dated 2<sup>nd</sup> June 2017.

- 1. There shall be a stay of proceedings in LDT CASE No. 83/85 of 2001 pending the hearing and determination of this suit.***
- 2. A temporary injunction is issued restraining the defendant from selling, leasing, disposing, alienating and/or charging land parcel No. KABARE/NYANGATI/89 pending the hearing and determination of this suit.***
- 3. The parties to expedite compliance with the pre-trial directions and have this suit heard and determined within the next twelve (12) months otherwise the order of temporary injunction shall lapse.***
- 4. As the parties are family, each shall meet their own costs of this application.***

**B.N. OLAO**

**JUDGE**

**23<sup>RD</sup> FEBRUARY, 2018**

Ruling dated, delivered and signed in open Court at Kerugoya this 23<sup>rd</sup> day of February, 2018

Mr. Ngigi for Ms Wangechi for Plaintiffs present

Defendant present.

**B.N. OLAO**

**JUDGE**

**23<sup>RD</sup> FEBRUARY, 2018**