



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 346 OF 2017

MATHEW MUSYIMI NZUBE.....1ST PLAINTIFF

RAYMOND NDIVO KYEVA.....2ND PLAINTIFF

PHILOMENA MUKINI MWOLOLO.....3RD PLAINTIFF

VERSUS

JOSEPH MWANTHI NYEZE.....1ST DEFENDANT

LUCAS KALA.....2ND DEFENDANT

EZEKIEL MWAKA MUSAU.....3RD DEFENDANT

EUNICE KOKI MUSAU.....4TH DEFENDANT

MINISTRY OF LAND, HOUSING & URBAN DVMT.....5TH DEFENDANT

DISTRICT LAND REGISTRAR MAKUENI.....6TH DEFENDANT

RULING

1. By their notice of motion application expressed to be brought under order 40 Rules 1 and 2, order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act (cap 21) laws of Kenya, section 13(7) (a) of the Environment and Land Court Act (Cap 12A) Laws of Kenya, Land Adjudication Act (cap 284) laws of Kenya and all enabling provisions of the law, the applicants pray for orders;

1. Spent

2. Spent

3. Spent

4. An order of temporary injunction be issued against the 5th defendant, his servants and/or agents restraining them from printing Title Deeds in respect of P/Nos. 1415, 1295, 1292, 1283 & 3972 Kisekini Adjudication Section pending hearing and determination of the main suit.

5. Costs of this application be provided for.

The application which is dated 5th October, 2017 was filed in court on even date. It is predicated on the grounds on its face and is supported by the affidavit of Mathews Musyimi Nzube, the first applicants herein, sworn on 5th October, 2017.

2. On the 6th November, 2017, the second and the third applicants filed a notice to authorize the first applicant to act, appear and plead on their behalf.

3. The application is opposed by Joseph Mwanthi Nyenze, the first respondent, Ezekiel Mwaka Musau, the third respondent and Eunice Koki Musau, the fourth respondent vide their replying affidavits sworn on the 2nd November, 2017 and filed in court on the 3rd

November, 2017.

4. On the 6th November, 2017 the court directed that the application be disposed off by way of written submissions. The fifth to sixth respondents though served with the application, they did not file their reply nor did they file their file their submissions.

5. The applicants as well as the respondents are agreed that in order for the order for injunction to be issued herein, the application must satisfy the principles set out in the case of *Giella vs Cassman Brown & Company Ltd [1973] EA 358.*

6. The counsel for the applicant urged the court to find merit in the application and proceed to grant the orders sought. He cited the *Giella Case (Supra)* as well as the case of *Richard Mecha Kibagendi Vs John Mongare Nyarondia [2014] eKLR* which case had referred to the case of *Mrao Vs First American Bank of Kenya & 2 others [2003] e KLR 125* on what constitutes a prima facie case. The counsel further relies on the case of *Sun Palm Limited & 4 others V Pierre Lopoite Ltd in Nairobi Civil Application Number 242 of 1997* and *Jonson Kyai Ndoos Vs Good News Church of Africa & 3 others [2013] eKLR* with regard to the principles of balance of convenience and whether or not the applicant would suffer irreparable damage.

7. On the other hand, the counsel for the first to the fourth respondents urged the court to dismiss the application with costs as it lacks both in merit and in substance.

8. Regarding the principle of prima facie case with probability of success, the counsel for the first to the fourth respondents submitted that the orders sought are for stopping the fifth respondent from printing title deeds in respect of Plot Nos. 1415, 1295, 1292, 1283 and 3972 Kisekeni Adjudication Section. The counsel added that this ideally implies that the adjudication process has already been conducted and as such, the counsel submitted, the Land Adjudication Officer wrongfully issued consent herein to the applicants. The counsel opined that the process cannot reach the stage of printing title deeds unless the adjudication process and records is complete.

9. The counsel further submitted that the crux of the application is that plot number 3972 was curved out of inter alia their Plot Nos. 1415, 1295 and 1292. He pointed out that the replying affidavits sworn on 2nd November, 2017 by the first and the third respondents confirm that all the aforementioned parcels have existed since 2001. The counsel added that the first, third and fourth respondents plots are no. 3972 and 1283 and that the first respondent has deponed inter alia that plot number 3972 exclusively arose from the subdivision of his plot number 1283. The counsel went on to submit that the applicants have not demonstrated by any tangible evidence that respondents secretly curved and/or grabbed portions of plot numbers 1415, 1295 and 1292. The counsel pointed out that the third respondent has in paragraph 5 of his replying affidavit annexed copies of the objection proceedings against the first respondent who successfully defended his plot number 1283 before he curved out plot number 3972 which he sold to the fourth respondent. The counsel further submitted that if the applicant felt dissatisfied by the decision of the adjudication officer, they had an option to file an appeal up to the minister before they came to court.

10. I am in agreement with the counsel for the first to the fourth respondents in seeking to stop the process of printing of title deeds in respect of Plot Numbers 1415, 1295, 1292, 1283 and 3972, this implies that adjudication process is complete. The adjudication officer wrongfully issued consent to applicants. If the applicants were dissatisfied with outcome of the objection proceedings that was filed against the respondents they had the option of filing an appeal to the minister as is required under section 29(i) (a) and (b) of the Land Adjudication Act Chapter 284 of the laws of Kenya before coming to this court. I hold that the applicants have not demonstrated that they have a prima facie case with probability of success.

11. On the principle of irreparable injury which cannot be adequately compensated by an award of damages, the counsel for the first to the fourth respondent submitted that adjudication process in Kisekeni Adjudication Section is closed even though parties herein are yet to be issued with title deeds. The counsel added that the third respondent has annexed a copy of a letter from the ministry of lands dated 5th May, 2017 confirming that plot number 3972 is in the name of the third and the fourth respondents. The counsel pointed out that the applicants who have not demonstrated their interest in the respondent's parcels of land will not suffer any irreparable injury that cannot be compensated by an award of damages.

12. I have perused the affidavit in support of the application. I have not deciphered any interest that the applicants have in the respondents' parcels of land and I am in agreement with the counsel for the latter that principle number two is not proved by the applicants.

13. Regarding the issue of balance of convenience, the respondent's counsel correctly submitted that the applicants having failed in the objection proceedings and having failed to appeal against the same, the balance of convenience tilts in favour of the respondents who have been in possession and occupation of their respective portions of land.

14. Arising from the foregoing, my finding is that the application lacks merit and I will proceed to dismiss it with costs to the first and the fourth respondents.

Signed, dated and delivered at Makueni on this 5th day of February, 2018

MBOGO C.G

JUDGE

In the presence of:

Mr. Kisongo for the Applicants

Mr. Mulei holding brief for Mr. F.M Mulwa for the 1st, 3rd and 4th Defendants

Mr. Kwemboi – Court Assistant .

MBOGO C.G

JUDGE

5/2/2018