



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 335 OF 2017

FORMERLY ELC (KISII) CAUSE NO. 359 OF 2010

MICHAEL KISHON OLE RISA & 8 OTHERS.....PLAINTIFFS

VERSUS

HON. GIDEON KONCHELLAH & 15 OTHERS.....DEFENDANTS

RULING

The Application before me is the 1st Defendants/Applicants Notice of Motion dated 26th October, 2016 which was brought under Article 40 of the Constitution of Kenya, section 24, 25, 26 and 30 of the Land Registration Act. Order 40 Rules 1,2,3,4,5 and order 51 Rule 1 of the Civil Procedure Rules. The Applicant sought the orders of temporary injunction to compel the Plaintiff/Respondent to give vacant possession to the Applicant of the parcel of land known as NAROK/TRANS MARA/OLALUI/11. The Applicant also sought for further orders of temporary injunction against the Respondents from interfering with or in any way dealing with the suit property pending the hearing and determination of suit herein and last an order directing the OCPD Trans Mara Division to enforce the said order.

The Application was based on various grounds inter alia that the suit property was registered in the name of Honourable Gideon Konchellah around 22nd July, 2016 and he was issued with a title and he is still the registered owner of the suit property. The Applicant alleges that despite the above the Respondents have trespassed on the suit property.

The Applicant contends that he lodged a complaint with the National Land Commission complaining that the Respondents despite his title to the land have trespassed on the same and he sought the intervention of the Commission to investigate the matter and take measures for redress.

The Applicants action to seek the intervention of the National Land Commission resulted the commission to summon all the concerned parties and investigated the matter and thus ordered the respondents are trespassers on the suit property and recommended that they should vacate from the land.

The Applicant states that the continued presence of the Respondents on the land amounts to violation of his rights to protect his private property and he needs urgent court protection and thus the result application to the court.

The Application was supported by the Affidavit of Honourable Gideon Konchellah wherein he expounded on the grounds indicated on the face of the Application he averred that being the duly registered owner of the suit land and after the National Land commission summoned the parties and investigated and found that the Applicants are trespassers it will only be fair and in the interest of Justice that the court allows the Application in order to protect his right to private property and he annexed certificate of title, National Land Commission report and mutation form.

The Application was opposed by the Plaintiffs/Respondents by way of a Replying Affidavit that was sworn and filed by Michael Ole Kishon Ole Risa who is the chairman of the Plaintiff/Respondent.

The Respondent contends that when the applicant wrote to the National Land Commission, the commission wrote to the court to request to be allowed to mediate the court mutually allowed the same but on the 10th April, 2016 the court stayed the said decisions. The respondent contends that the order staying the involvements of the National Land Commission was extended by the consent of all the parties and therefore the National Land Commission had no authority to purport to investigate and adjudicate upon the matter and the Respondents deny to have appeared before the said commission and the action of the National Land Commission are blatant contravention of the constitution and the court should not be bound by the decision of the National Land Commission.

When the Application came up for hearing counsel for both parties made oral submissions on the matter. Mr. Koceyo counsel for the Applicant submitted that the essence of the Application was that the applicants' right to property has been violated and he followed the law and the National Land Commission ruled that he is the registered owner of the suit. He submitted that a party who gains possession contrary to the law cant keep that advantage and that a trespasser must give way before he is heard. He stated that the Respondent have invaded the suit land, fell tress and continue to live on the land and there is no single day that they want to proceed with the suit since 2004 when the suit here was filed in court and its pendency gives them rights to remain on the land and he thus states the conduct of the parties speak for itself and thus prays for the application.

Mr. Ogolla counsel for respondent opposed the application stating that parties are bound by their pleadings. He states that the Applicant is seeking mandatory orders of injunction but the same are not pleaded.

On the National Land Commission he stated that the letters sent by the National Land Commission to the parties for mediation was only addressed to Ms. Koceyo and company advocates and left out the respondents.

He contends that even though the court initially allowed the National Land Commission to adjudicate over the matter the same order was set aside. He states that the respondents have not appeared before the National Land Commission as claimed by the Applicant.

I have read the Application before me and Respondents replying affidavit in opposing the same. I have heard the submissions made by the counsel for the parties and at this juncture the issue for determination before the court are three. Firstly Whether the Applicant has made a prima facie case with probability of success and whether the court can grant a mandatory injunction at the interlocutory stage.

Having considered the foundation of the application is the report from the National Land Commission which found the applicants as the registered owners of the suit property clarified the respondents as trespassers who ought to be evicted.

The court on the 30th March, 2016 made an order that the suit be referred to the National Land Commission for investigations. However by an application made to court Mutunga J on 17th February, 2017 had set aside the orders referring the suit to the National Land Commission for investigation. From the ruling of the court hereinabove stated it is clear that the National Land Commission did not have any power to purport to adjudicate on Applicants complaints against the Respondent.

Once that order was made to set aside the court was seized of the proceedings. There is no indication that the applicant has appealed against that decision and therefore the setting aside of the order referring the suit to the National Land Commission stands.

Having so decided on the fate of the National Land Commission that formed the basis of the application it is my view that the other prayers sought shall amount to an academic exercise as those prayers were hinged on the above report.

The upshot of the above is that the application dated 26th October, 2016 is not merited and the same is dismissed with costs.

Since this matter has been pending in court since 2004 I do direct that the same be heard on day to day basis commencing on 16th, 17th, 18th and 19th July, 2018.

Orders accordingly.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **18TH** day of **MAY, 2018**

Mohammed Noor Kullow

Judge

18/5/18

In the presence of:

CA:Chuma

Mr Koceyo for the 1st defendant

Mr Nanda for the Plaintiff/Respondents