



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 429 OF 2017

NICOLAS MACHARIA NJOROGE.....PLAINTIFF

VERSUS

MACHARIA NJOROGE.....DEFENDANT

RULING

1. The litigation in this matter involves close relatives: the defendant is a step brother of the plaintiff. The dispute concerns a parcel of land known as Nakuru/Rare/Nguriga/349 (the suit property). Both parties claim ownership of the suit property.

2. Pursuant to Notice of Motion dated 13th November 2017, the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit, there be orders of injunction restraining the defendant/respondent, his agents and or servants from alienating, disposing, charging, cultivating, constructing structures or in any way interfering with the plaintiff's quiet possession of the property known as Nakuru/Rare/Nguriga/349.

4. That costs be provided for.

3. The application is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that the plaintiff is the registered owner of the suit property pursuant to a title deed issued on 8th August 2016. The plaintiff further states that he acquired the land from Nakuru Rare Nguriga Settlement Scheme in 1979 and that the land was registered in his two names Macharia Njoroge in 1979 as by then he had not been baptized to 'Nicolas'. He conducted a search in respect of the property on 24th July 2017 and was shocked to discover that a title deed for the property was re-issued on 12th June 2017 despite the fact that the title deed had never been lost and was in fact in his hands.

4. He subsequently obtained a copy of the green card and discovered that the defendant had given false information to the police and also swore a false affidavit that the original title deed was lost. As a result, the defendant obtained a police abstract, got the Land Registrar to issue a gazette notice on 5th May 2017 regarding the alleged loss of title deed and ultimately got the Land Registrar to re-issue the title deed on 12th June 2017 before the 60 days given in the gazette notice had lapsed.

5. The defendant responded to the application through a replying affidavit sworn on 30th November 2017. He stated that the plaintiff's full names are Nicolas Macharia Njoroge and not Macharia Njoroge. He added that he was allocated the suit property in 1972 when he was 30 years old and that the plaintiff was then a minor aged less than 10 years old and was not therefore eligible for allocation of land. He stated that he has been residing on a 2 room mud house on the suit property which he constructed 25 years ago and that he had another house erected on the land 35 years ago. That he has had tenants on the land since 1984 and further that he sold 5 acres of the land.

6. The defendant further stated that he conducted a search at the Lands Registry and learnt that a title deed had been issued on his name on 8th August 2016 but he had not received it. He therefore reported loss of the title and was issued with a new one on 12th June 2017. Regarding the affidavit that he swore on 6th April 2017 regarding loss of the title deed, he stated that the affidavit had serious errors and that it had not been read to him prior to him putting his thumb print on it. He added that it is the plaintiff who is trying to take his land by false pretences.

7. The application was argued by way of written submissions. The applicant filed submissions on 23rd January 2018 while the respondent filed submissions on 1st February 2018. I have carefully considered the application, the affidavits filed as well as the submissions.

8. In an application for an interlocutory injunction such as the present one, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and were reiterated by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR**.

9. Despite the accusations and the counter-accusations flying all over, it is clear that on 8th August 2016 title deed serial No. 1611498 was issued in respect of the suit property to Macharia Njoroge, holder of Kenyan National Identity Card No. 0099343. There is also no dispute that following a report of an alleged loss of title deed, a new title deed serial number 1729324 was re-issued on 12th June 2017 this time to Macharia Njoroge holder of Kenyan National Identity Card number 36178642. It is important to note the change in the national identity card number. The re-issued title deed appears to have been issued to a person bearing a different national identity card from the original owner. The latter title deed was issued following a gazette notice that was published by the land registrar Nakuru on 5th May 2017 giving a period of 60 days within which an objection to re-issuance of title deed was to be made. The earliest that the new title could have been issued was 5th July 2017. Needless to state, the new title deed was issued on 12th June 2017, before expiry of the 60 days' period.

10. The power of the registrar to issue a new certificate of title upon loss of the old one is provided for under Section 33 of the **Land Registration Act** which states:

33. Lost or destroyed certificates and registers

(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the

issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease

has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the *Gazette* and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the *Gazette* or circulation of such newspapers; whichever is first.

..... [Emphasis supplied]

11. It is important to note that the new certificate of title can only be issued after the publication of a notice in the Gazette and in any two local newspapers of nationwide circulation and upon expiry of a period of 60 days from the date of publication of the gazette notice or circulation of the newspapers bearing the publication. In this case, we are not told whether there was any publication in any two local newspapers.

12. The reissuance of the title deed herein was done on 12th June 2017 therefore appears to have been done in breach of the law. Further, the reissuance can only be in favour of the original registered owner. It is strange that the reissuance herein was in favour of a person bearing a different national identity card from that of the owner prior to loss of title deed.

13. All in all, I am satisfied that the applicant has established a prima facie case. There is need to preserve the suit property pending determination of the suit. I do not think that damages would be an adequate remedy.

14. In the circumstances, I grant:

(a) An injunction restraining the defendant, his agents and/or servants from alienating, disposing, charging, carrying out any new construction on the parcel of land known as **Nakuru/Rare/ Nguriga/349** pending hearing and determination of this suit.

(b) An inhibition to be registered against **Nakuru/Rare/ Nguriga/349** pending hearing and determination of this suit.

(c) costs of the application to the plaintiff.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 10th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Ndungu holding brief for Mr. Orina for the plaintiff.

Mr. Waiganjo for the defendant.

Court Assistant: Gichaba