



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC No. 544 OF 2016

ELISHA CHEBII CHESINYA.....PLAINTIFF

VERSUS

DOMIZIANO KABURU NJERU.....DEFENDANT

Consolidated with

ELC CASE NO. 21 OF 2017

DOMIZIANO KABURU NJERU.....PLAINTIFF

VERSUS

ELISHA CHEBII CHESINYA.....DEFENDANT

RULING

1. On 5th December 2017, this court delivered a ruling pursuant to which it dismissed Notice of Motion dated 5th December 2016 and Notice of Motion dated 19th December 2016. Some background of what has led to this new ruling is necessary.
2. On 8th December 2016 Elisha Chebii Chesinya, hereinafter 'Chesinya', filed ELC case No. 544 2016 (Nakuru) against Domiziano Kaburu Njeru, hereinafter 'Njeru'. The genesis of the dispute is that Chesinya and Njeru entered into a sale agreement on 1st April 2013 pursuant to which it was agreed that Njeru sells to Chesinya 15 acres out of parcel of land known as plot No. 33 Olongai Scheme at a consideration of KShs.27, 000, 000/=. Chesinya contends that he paid the purchase price fully while Njeru maintains that Chesinya only paid a total of KShs.11, 000, 000/=. Together with the plaint, Chesinya filed Notice of Motion dated 5th December 2016 in which he sought an injunction to restrain Njeru by himself, his servants or agents from cultivating, ploughing or in any way interfering with the 15 acres forming part of plot No. 33 Olongai scheme pending hearing and determination of ELC No. 544 of 2016. The application was supported by an affidavit sworn by Chesinya in which he reiterated that he purchased the 15 acres from Njeru and that he paid the purchase price. He accused Njeru of trespassing into the portion sometime in November 2016 and cutting down trees, pulling down fences and ploughing it in readiness for planting.
3. Njeru also filed a new suit, being ELC No. 21 of 2017 against Chesinya on 30th January 2017. He averred in the plaint that he sold the 15 acres to Chesinya at a consideration of KShs.27, 000, 000/= out of which Chesinya paid only KShs.11, 000, 000/=. Simultaneously with the plaint, Njeru also filed Notice of Motion dated 19th December 2016 in which he sought an injunction to restrain Chesinya, his agents or servants from remaining on, cultivating, or in any way interfering with the 15 acres until the suit is heard and decided. The application is supported by an affidavit sworn by Njeru on 19th December 2016 in which he deposed that he sold the 15 acres to Chesinya on 1st April 2013 at a consideration of KShs.27, 000, 000/= out of which Chesinya had paid KShs.11, 000, 000/= but was unable to pay the balance. He further deposed that the parties did not apply for consent of the Land Control Board within the stipulated period and therefore the agreement was nullified.
4. As previous indicated, I dismissed both applications on 5th December 2017. I did so because I was not persuaded that any of the parties had established a prima facie case. I found the affidavit evidence which had been placed before the court by the parties to be rather scanty. So as to preserve the suit property pending the hearing and determination of the consolidated suits, I ordered that the status quo in respect of the 15 acres of plot No. 33 Olongai Scheme be maintained and that no party shall subdivide, sell, transfer, lease or make any disposition in respect thereof until the suit shall have been heard and determined.

5. Slightly over seven (7) months after delivery of the aforesaid ruling, Chesinya filed a Certificate of Urgency on 14th July 2018 stating that there are two orders of status quo which need to be clarified so as to avoid conflict between the parties. No application was filed alongside the Certificate of Urgency. Instead, Chesinya swore an affidavit in support of the Certificate of Urgency. He deposed therein that following the ruling of 5th December 2017, Njeru extracted orders in ELC Case No. 21 of 2017 which are similar to those that were made in ELC No. 544 of 2016. That on the basis of the orders extracted in ELC NO. 21 of 2017, Njeru proceeded to damage crops on the portion that he had sold to Chesinya. He added that unless the court clarifies whether ELC No. 544 of 2016 is the lead file and that orders were made in the lead file, there is likely to be bloodshed owing to emotive nature of land.

6. When the matter come up for inter parte hearing of the issues raised in the Certificate of Urgency, counsel for Njeru submitted that Njeru's interpretation of the order of 5th December 2017 is that no party is at liberty to use the land and that allowing one party to use the land will result in conflict.

7. I have considered the issues raised in the Certificate of Urgency, the supporting affidavit and submissions of counsel. I am concerned that parties herein, both of whom have the benefit of representation by counsel seem to hold the view that the court ought to superintend them and that failure to do so will result in conflict and bloodshed. From the onset, it must be made very clear that the duty to obey the law and uphold the rule of the law is cast upon everybody. Litigants cannot claim that the court must guide them on every little detail. Among the things the court has been asked to clarify is that ELC No. 544 of 2016 is the lead file and that the orders of 5th December 2017 were made in the lead file. The record herein shows that on 21st March 2017, in the presence of counsel for Chesinya and counsel for Njeru, a consent was recorded pursuant to which ELC No. 544 of 2016 and ELC No. 21 of 2017 were consolidated and ELC No. 544 of 2016 was chosen as the lead file.

8. Once two or more causes are consolidated, the title of the consolidated cause changes accordingly. Indeed, the title of the ruling delivered on 5th December 2017 appropriately captures the consolidation in its heading. In view of the consolidation, the heading of the extracted order in respect of the ruling made on 5th December 2017 ought to have been the same as the title of the said ruling. It was wrong for the parties to submit drafts under the heading of the separate suits. Similarly, the deputy registrar ought not to have signed orders under the separate headings. Nevertheless, the orders as extracted cannot be source of any confusion since they are specific and apply to Chesinya and Njeru with equal force.

9. Being alive to the possibility of confusion if I referred to the parties as plaintiff or defendant, I deliberately referred to them by their names in my aforesaid ruling.

10. Citing theories of possible conflict, parties have invited the court to clarify on who as between them should have possession and use of the suit property. Alternatively, that none should use the suit property pending hearing and determination of the suit. Owing to dearth of evidence, I was reluctant to delve into this aspect in my earlier ruling. I thought that it was sufficient to restrain subdivision, sale, transfer, lease or any disposition in respect of the suit property. From the material placed before the court, it seems that Chesinya has been having possession and use of the portion that was sold to him. Indeed, Njeru did not file any replying affidavit to contest the contents of Chesinya's affidavit which was filed on 14th June 2018 and wherein Chesinya among other matters complained that following the ruling of 5th December 2017, Njeru invaded his portion and damaged crops.

11. In view of the foregoing, I now give the following directions:

- a) The orders made in the ruling delivered on 5th December 2017 remain in force. However, those orders and future orders herein as long as the consolidation remains as was ordered on 21st March 2017, must be extracted using the heading used in the ruling delivered on 5th December 2017.
- b) Elisha Chebii Chesinya to retain possession and use of the 15 acres of plot No. 33 Olongai Scheme pending hearing and determination of the suit but subject to the orders made in the ruling delivered on 5th December 2017.
- c) Parties to urgently set down the suit for hearing.
- d) Costs in the cause.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Okiro holding brief for Mr Makori for the plaintiff in ELC No 544 of 2016

Ms Gikonyo holding brief for Mr Ngure for the defendant in ELC No 544of 2016

Court Assistants: Gichaba & Lotkomo