



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.135 OF 2018

CHEPTANUI SOY.....PLAINTIFF

VERSUS

MICAHEL SAYAYA.....1ST DEFENDANT

JOHN SAYAYA.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; applicant stating that suit land was allotted to her by the Government as a Settlement Scheme; 2nd respondent stating that the same land had been allocated to his deceased wife much earlier; both parties demonstrating some documents of allotment; difficult at this stage of the proceedings to determine who is entitled to the land; application decided on a balance of convenience; balance of convenience tilting towards maintaining status quo; status quo being that the respondents are in possession; such status to be maintained until the case is heard) .

1. This ruling is in respect of an application for injunction that was filed by the plaintiff contemporaneously with the plaint. The plaintiff's case is that in the year 2013, she acquired the land parcel Plot No. 1895 measuring 2.0 Ha in Nessuit Location through a Government Settlement Scheme. She averred that in May 2017, she visited the said land only to find that the 1st respondent has cultivated it, and on making inquiries, the 1st respondent claimed that the said land was leased to him by the 2nd respondent. It is her case that the occupation of the suit land by the 1st respondent is illegal. In her suit, she has sought orders of a declaration that she is the rightful owner of the suit land, a mandatory injunction compelling the 1st respondent and his servants/agents to vacate the suit land; and costs of the suit.

2. In this application for injunction, the applicant has sought orders to restrain the respondents from trespassing onto, cultivating, fencing off or in any other way interfering with the applicant's peaceful occupation of the suit land, pending the hearing and determination of this case. To her supporting affidavit, the applicant annexed a letter from the Ministry of Lands to demonstrate her ownership of the land. She also claimed that the respondents have threatened her, an issue that she reported to the police. She has asserted that the respondents have no rightful claim over her land.

3. The 2nd respondent filed a replying affidavit to oppose the motion. In his affidavit, he has deposed inter alia that the suit land was allocated to one Jane Cherotich Sayaya (deceased) in the year 1995 and he has annexed a copy of an allocation card said to be for the said deceased. He has stated that the deceased was his wife and is mother to the 1st respondent. He has averred that after issuing the allocation cards, the Government instructed a surveyor to subdivide and allocate the land but this process was stopped through an order made in High Court Miscellaneous Civil Application No. 635 of 1997. He has annexed a copy of the said order. He has contested the letter annexed by the applicant and has contended that the same did not originate from the Lands Office as the Government has placed a caveat on all land within the Mau Forest Complex and that in any event the order issued in the Case No. 635 of 1997 is yet to be lifted.

4. I invited counsel for both applicant and respondents to file submissions in respect of the application but only counsel for the applicant proceeded to file submissions. There was also no appearance on the part of counsel for the respondents during the hearing of the application. In his submissions, counsel for the applicant submitted inter alia that the plaintiff has a prima facie case as she has produced an allotment letter. On the claim that there was a caveat by the Government, counsel submitted that this was temporarily lifted in the year 2013 in the wake of the 2013 elections and several people including the applicant were settled in the area. He pointed out that the allotment card annexed by the 2nd respondent is for a plot No. 02180 measuring 5 acres and not Plot No. 1895 measuring 2.0 Ha. Counsel also cited various authorities in support of the application. I have considered all these in arriving at my decision.

5. What is before me is an application for injunction and I stand guided by the holding in the case of *Giella vs Cassman Brown (1973) EA 358*. In the said case, it was held that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success; show that he stands to suffer irreparable harm unless the injunction is granted; and where the court is in doubt, it will

decide the application on a balance of convenience.

6. I do note that in this case, both the applicant and the respondents claim ownership of the same land. The applicant has averred that the suit land was allocated to her in the year 2003, whereas the respondents have contended that they are on the suit land by virtue of an allotment made to the late wife of the 2nd respondent. I have seen the letter dated 26 February 2013 annexed by the applicant which the applicant states is an allotment letter. The same is from the District Land Adjudication and Settlement Office and is addressed to the District Land Registrar, Nakuru. It refers to the Plot No. 1895 Nessuit Settlement Scheme and states :-

*“As per records held in this office the owner of the above parcel of land measuring 2.0 Ha is Leah Cheptanui Soy ID No. *****(provided). He/She has cleared with Department of Settlement. You may process his/her title deed.”*

7. Now, the above letter, to me, does not appear to be an allotment letter. If indeed the land was one under a Settlement Scheme, you would expect the allottee to have a formal allotment letter, a charge for the land, payment for clearing of the dues to the Government, and then a Discharge of Charge. These documents are not annexed by the applicant. In fact, it cannot be said that the annexed letter dated 26 February 2013, is an allotment letter. That is a letter claimed to be from the Settlement Office to the District Land Registrar. I am missing critical documents which would back up this letter, and at this stage of the proceedings, based on the material before me, I am unable to conclude that the applicant is the rightful and lawful allottee of the suit land. The applicant has also not explained where she has been since the year 2013, to the year 2017, when she claims to have gone to the land and found the respondents.

8. On the other hand, the respondents have annexed a card which states that it is one for “Allocation of Land”. The card is addressed to Jane Cherotich Sayaya (deceased) and it states that she has been allocated the plot No. 02180 at Nessuit. It is not easy for me, at this stage of the proceedings, to also state whether this is an allotment to the deceased for the suit property or whether it is for other land, for it is not unusual to find the numbers in the allotment letters differing from the actual registration numbers of the plots. Thus, it may very well be that this card is for the suit property.

9. Given that both parties have demonstrated some sort of ownership documents for the said land, and none has availed documents that can be said to be conclusive in terms of having actual title to the land, I am in a situation of doubt, and it is best that this application be decided on a balance of convenience. The balance of convenience tilts in favour of the respondents who are in possession of the suit property and not to the applicant, who has never stepped into the suit land.

10. My orders on this application therefore, are that the current status quo be maintained until the case is heard and finalized. The status quo is that it is the respondents who are in possession of the suit land. They may retain possession and utilize the land for cultivation but they ought not to erect any additional structures until this suit is heard and determined. In addition, no party should sell, charge, lease, or in any other way enter into dealings over the disputed land until this case is finalized.

11. On costs, the same shall be in the cause.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Odundo for the applicant.

Mr. Bosire for the respondents.

Court Assistants: Nelima Janepher

Carlton Toroitich

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU