



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MAKUENI**

**ELC CASE NO. 449 OF 2017**

**(FORMERLY MACHAKOS ELC CASE No. 191 OF 2016)**

**CHRISTOPHER NDOLO MBUTA.....1<sup>ST</sup> PLAINTIFF**

**ANNAH NDOLO MBUTA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**JACKSON MUTUA KAVILA.....1<sup>ST</sup> DEFENDANT**

**REUBEN MBUTA.....2<sup>ND</sup> DEFENDANT**

**ESTHER WANZA MBUTA (Administrator of the estate of ALICE NDUNGE.....3<sup>RD</sup> DEFENDANT**

**LAND ADJUDICATION AND SETTLEMENT OFFICE MAKUENI COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR MAKUENI.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. The application for determination is dated 22<sup>nd</sup> November 2017 and was filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants under certificate of urgency. It is brought under Order 40 Rules 2 (2) & 7 of the Civil Procedure Rules 2010, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the Law. It seeks;

a) *Spent*

b) **THAT** this Honorable Court's restraining orders/orders of injunction dated 29/09/2017 be stayed pending hearing and determination of this application.

c) **THAT** this Honourable Court's restraining orders/orders of injunction dated 29/09/2017 be discharged.

d) **THAT** in the alternative to prayer (c) above this Honorable Court's orders of injunction dated 29/09/2017 be varied to allow the 1<sup>st</sup> defendant/applicant who is in occupation and use of the suit properties and has so been for over twenty (20) years to remain in such occupation and use pending hearing and determination of the suit and counterclaim herein herein.

e) **THAT** an order of injunction do issue restraining the plaintiffs, their agents, servants and/or contractors and each and every one of them from entering and/or trespassing onto the 1<sup>st</sup> defendant/applicant's land parcel No.s 912, 1160, 1902 and 2916 situated in Mang'elete settlement scheme and breaking fences thereon, grazing, ploughing, cultivating, building structures thereon or in any other way interfering with the said suit properties until the suit and counterclaim are heard and determined.

f) **THAT** cost of this application be paid by the plaintiffs/respondents.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Jackson Mutua Kavila sworn on 22<sup>nd</sup>

November 2017.

3. The principal grounds are that;

- a) The 1<sup>st</sup> defendant/applicant is the registered owner of the suit properties and has been in exclusive occupation for over twenty years.
- b) The issue of ownership of the suit properties by the 1<sup>st</sup> defendant/applicant was determined on 3/03/2016 by the Machakos High Court in Succession Cause No. 167 of 1996 (estate of Mbuta Ndolo) where one Ezra David Ndolo unsuccessfully urged the Court to make a finding that the suit properties are part of the aforesaid estate.
- c) Injuncting the 1<sup>st</sup> defendant/applicant from occupation and use of the suit properties amounts to evicting him there from before hearing and determination of the suit herein as he is already in occupation and use thereof and has so been for over twenty years.
- d) The plaintiffs/respondents are not in occupation or use of the suit properties.

4. The application was supported by the 2<sup>nd</sup> defendant/applicant through his affidavit dated 20/02/2018 in which he explained how the alterations in the land adjudication records came about.

5. The 3<sup>rd</sup> defendant/applicant filed an affidavit dated 06/03/2018 in support of the application. She deposed that the 1<sup>st</sup> defendant/applicant bought the suit properties from her late mother and the 2<sup>nd</sup> defendant.

6. The application was opposed through grounds of opposition dated 01/12/2017, a replying affidavit sworn on 19/12/2017 and a further affidavit sworn on 17/05/2018 by the 1<sup>st</sup> plaintiff/respondent on his behalf and that of the 2<sup>nd</sup> plaintiff/respondent. The gist of the opposition is that the application is *res judicata* as the averments therein were canvassed in the 1<sup>st</sup> defendant's/applicant's replying affidavit sworn on 24/11/2016 and subsequently considered by Angote, J in his ruling delivered on 29/09/2017.

7. The instant application was canvassed by way of written submissions. The 4<sup>th</sup> and 5<sup>th</sup> defendants/applicants neither responded to the application nor filed submissions.

Having considered the application, the supporting affidavit, the grounds of opposition, the replying affidavit as well as the submissions filed, it is my considered view that the following issues arise for determination;

- a) Whether the orders of injunction dated 29/09/2017 should be varied/discharged.
- b) Whether an injunction should be issued against the plaintiffs.

**Whether the orders of injunction dated 29/09/2017 should be varied/discharged.**

8. Order 40 Rule 7 of the Civil Procedure Rules, 2010 provides that any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied by such order. It is settled law that an interlocutory injunction will be set aside or discharged if it has been obtained by means of misrepresentation or concealment of the material facts.

9. In view of the fact that injunctive orders are preceded by thorough evaluation and application of the principles enunciated in the case of **Giella –vs- Cassman Brown. Co. Ltd (1973)EA 358**, a party seeking variation and/or discharge of such orders bears the burden of proving that the beneficiary thereof concealed/misrepresented some material facts which would have influenced the decision of the court.

10. The plaintiffs/respondents rely on **Ragui –vs- Barclays Bank of Kenya (2002) 1 KLR** where Ringera, J ( as he then was) stated that; *“it is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged”*.

11. They also relied on **Nairobi, Commercial & Admiralty Division HCCC No. 828 of 2010; Harrish Chandra Bhovanbhai Jobanputra and Anor –vs- Paramount Universal Bank Ltd & 3 others** where F.Gikonyo, J stated that;

*“I think the discretion under Order 40 rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing an injunction, the Court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the Court would not have issued an injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in the first instance would have affected his judgment on whether or not to give the injunction, then the Court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it's no longer necessary to have the injunction”*

12. I have looked at the supporting affidavit of the 1<sup>st</sup> defendant/applicant and it is quite evident that the information therein was before the Court during the hearing of the application for injunction filed by the plaintiffs/respondents . Further, it does not indicate which information, if any, was concealed and/or misrepresented to the Court.

13. The affidavit filed by the 2<sup>nd</sup> defendant/applicant explains how the amendment of the land adjudication records came about and avers that

the plaintiffs/respondents were part and parcel of the process. He stated that the amendment was done to ensure equitable distribution of the estate of Mbuta Ndolo among his three houses. The plaintiffs/respondents have countered this by stating that the land adjudication officer had neither the capacity nor the jurisdiction to distribute the estate of the deceased as it is a preserve of the succession Court.

14. Further, the 2<sup>nd</sup> defendant/applicant has deposed that he was unwell at the time the plaintiffs'/respondents' application was canvassed and as such, he was not in a position to avail the aforesaid information about amendment. It would have been prudent for him to attach some hospital records in support.

15. This suit is about whether the registration of the suit properties in the 1<sup>st</sup> defendant's/applicant's name was proper. It is therefore my considered view that the issue of amendment requires interrogation through trial. The legality of such amendment is not something that can be determined by just reading the explanation given by the 2<sup>nd</sup> defendant/applicant in his affidavit. In my view, this does not suffice as information which was concealed from the Court. In any case, the plaintiffs/respondents have denied knowledge of any such dealings by the land adjudication officer. For something to be concealed or misrepresented, it must be established that it was within the knowledge of the person so concealing. Further, in light of the fact that the amendment needs to be interrogated, the information could not have impacted the Court's decision.

16. The upshot of the foregoing is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicants have not discharged their burden of demonstrating why the injunctive orders should be discharged or varied.

**Whether an injunction should be issued against the plaintiffs.**

17. The 1<sup>st</sup> defendant/applicant's prayer for injunction presupposes that he is the owner of the suit parcels yet the issue of ownership is hotly contested. In light of the injunction order already in place, it cannot be said that the 1<sup>st</sup> defendant/applicant has also established a prima facie case with probability of success.

18. It is my considered view that the balance of convenience does not tilt in favour of granting the orders sought.

**CONCLUSION**

In my view, the application lacks merit and should be dismissed with costs to the Plaintiffs/Respondents.

**SIGNED, DATED and DELIVERED at MAKUENI this 6<sup>TH</sup> day of DECEMBER, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

Mrs. Kinyanjui for the Plaintiff/Respondent

Ms Watta holding brief for Mrs. Nzei for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants/Applicants

Mr.Kwemboi Court Assistant

**MBOGO C.G, JUDGE**

**6/12/2018**