



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 54 OF 2014 (O.S)

ANTONY MURIITHI NJERU.....PLAINTIFF

VERSUS

NJERU M'THAIYA.....1ST DEFENDANT

JOSEPH MWANIKI NJERU.....2ND DEFENDANT

RULING

On 10th July 2014, the plaintiff, then acting in person filed this suit seeking judgment against the defendants in the following terms:-

- 1. All entries onto parcel of land No. KYENI/KIGUMO/6771 be declared null and void and be revoked forthwith.***
- 2. Compensation for the plaintiff's immense developments of the said parcel.***
- 3. Costs and interests of this suit.***
- 4. Any further relief which this Honourable Court may deem fit and just to grant in the circumstances.***

The suit was based on pleadings that at all material times, the 1st defendant who is the grandfather to the plaintiff was the absolute registered owner of land parcel No. KYENI/KIGUMO/223 which he has since sub-divided into portions measuring 0.3, 1.28 and 0.46 Hectares without the plaintiff's knowledge. One such portion being land parcel No. KYENI/KIGUMO/7335 (herein the suit land) has been registered in the names of the 2nd defendant. It is the plaintiff's case that the registration of the suit land in the 2nd defendant's names was done fraudulently particulars of which have been pleaded in paragraph 7 of the plaint.

The two defendants also acting in person, filed separate defences in which then not only denied the plaintiff's averments but further questioned his locus standi to sue them as he is not the owner of land parcel No. KYENI/KIGUMO/6771 nor the resultant sub-divisions including the suit land which the 2nd defendant pleaded that he had purchased procedurally from the 1st defendant. They further pleaded that this suit is sub-judice as there exists **RUNYENJES COURT CIVIL SUIT No. 41 of 2014** touching on the same subject matter in which the 2nd defendant has sued the plaintiff seeking his eviction from the suit land.

Simultaneously with the plaint, the plaintiff filed a Notice of Motion which is the subject of this ruling,

seeking that a prohibition order be issued prohibiting any selling, transfer and all dealings pertaining to land parcel No. KYENI/KIGUMO/7335 and land parcel No. KYENI/KIGUMO/7336. In his supporting affidavit, the plaintiff has deponed that prior to sub-dividing the land parcel No. KYENI/KIGUMO/6771, the 1st defendant had shown him and his family a portion thereof as their land after which the plaintiff constructed a permanent dwelling house and therefore if the 1st defendant is not restrained, he will sell the resultant sub-divisions thus rendering the plaintiff destitute.

The 2nd defendant filed a replying affidavit to that application which in which he deponed, inter alia, that the same has been overtaken by events since the suit land has already been transferred to him by the 1st defendant and a copy of the title deed was annexed thereto. That prior to the transfer of the suit land to him, the plaintiff who is only a grandson to the 1st defendant was living on his mother's land parcel No. KYENI/KIGUMO/6845 before moving to the suit land without the 2nd defendant's consent. That the plaintiff cannot lay a claim to the 1st defendant's land during his life time and further, that there is **RUNYENJES COURT CIVIL SUIT No. 41 of 2014** in which he has sued the plaintiff seeking his eviction from the suit land and therefore the issues herein can be canvassed in that case.

The firm of **MUTHONI NDEKE Advocates** subsequently came on record for the plaintiff while that of **MAINA KAGIO Advocates** came on record for the defendants.

It was agreed with counsel that the said application which is the subject of this ruling be canvassed by way of written submissions which have now been filed.

As indicated above, the plaintiff was previously acting in person when he filed both the suit and this application. The Notice of Motion is therefore what the Courts usually refer to as "**home-made**". It is not elegantly drawn neither does it cite the legal provision on which it is founded. Nonetheless, those defects are curable by dint of **Article 159 of the Constitution** as well as **Order 51 Rule 10 of the Civil Procedure Rules**. It is however a good practice for an advocate taking over a case where pleadings have been drawn by a lay person to consider amending them so that the real issues can be identified for interrogation.

The plaintiff seeks a prohibitory order. Such orders are issued pursuant to **Section 68 (1) of the Land Registration Act** which reads as follows:-

"The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge".

An order of inhibition is similar to a temporary injunction in that it seeks to preserve the property in dispute pending the trial or further orders of the Court. In considering such an application, the Court will take into account the following:

- 1. Whether the applicant has good grounds for the grant of such an order.**
- 2. Whether the property in dispute is at risk of being alienated or transferred to the detriment of the applicant.**
- 3. Whether the failure to grant the order may render the suit nugatory.**
- 4. What prejudice, if any, will be caused to the other party.**
- 5. The conduct of the parties.**

Taking all that into account, it is clear to me that the plaintiff has no good grounds to warrant the issuance of prohibitory orders with respect to either the suit land or even the other parcel No. KYENI/KIGUMO/7336 which he also seeks to prohibit. To begin with, his locus is highly in doubt. He has not told us what interest he has either in the original land parcel No. KYENI/KIGUMO/223 which, by his own admission, was the property of the 1st defendant, nor the resultant sub-divisions including the

suit land which is now registered in the names of the 2nd defendant. In his plaint, it is not even remotely suggested that the 1st defendant held the original land parcel No. KYENI/KIGUMO/223 in trust for him or his family or that he has any interest therein protected by the law on adverse possession. Indeed the plaintiff has not pleaded what interest known in law he has either in the original land parcel No. KYENI/KIGUMO/223 or land parcel No. KYENI/KIGUMO/7336 or the suit land. A prohibitory order cannot be issued in vacuum. It must only be issued to protect an interest that is recognized in law bearing in mind that the registration of a party as owner of land vests in that person all the rights and privileges belonging thereto subject only to any overriding interests protected under **Section 28 of the Land Registration Act** or obligations to which the party is subject as a trustee. None of those have been alluded to by the plaintiff in this case. The plaintiff has pleaded fraud in the manner in which the 2nd defendant was registered as the proprietor of the suit land but in the absence of disclosing what interest, if any, he has in that land, he cannot be entitled to the order of inhibition sought. The only party who may raise a complaint of fraud as against the 2nd defendant is the 1st defendant who was the registered owner of the suit land. At the most, the plaintiff could only have been a licensee of the 1st defendant and he cannot now claim a greater interest than that of the registered proprietors of any of the parcels whose rights are protected by **Sections 24 and 25 of the Land Registration Act**. It is also clear to me that the only legitimate claim the plaintiff can litigate over is land parcel No. KYENI/KIGUMO/6845 given to his mother by the 1st defendant. There is really no basis upon which this Court can issue a prohibitory order with respect to the suit land or land parcel No. KYENI/KIGUMO/7336 or indeed any of the resultant subdivisions of the original land parcel No. KYENI/KIGUMO/223.

Secondly, a prohibitory order is an equitable relief and therefore, a party approaching the Court must do so with clean hands. That includes making a frank and full disclosure particularly of any previous or pending litigation over the same subject matter. It has been deposed by the 2nd defendant, and this has not been rebutted by the plaintiff, that there is a case pending at the **RUNYENJES PRINCIPAL MAGISTRATE'S COURT** being Civil Case No. 41 of 2014 where the 2nd defendant has sought orders for the eviction of the plaintiff from the suit land. Yet in paragraph 8 of his plaint, the plaintiff has pleaded as follows:-

“That there is no other suit pending between the plaintiff and the defendants in any Court of law concerning the same subject matter and nor have there been any previous proceedings relating to the same”

By failing to disclose the existence of the case at the **RUNYENJES COURT** in which orders are sought for his eviction, the plaintiff has not come to Court with clean hands and is therefore un-worthy of the equitable remedy of prohibition taking into account that the case at the **RUNYENJES COURT** has a bearing on this case. This case is therefore a clear abuse of the process of this Court.

The up-shot of the above is that the plaintiff's Notice of Motion filed herein on 10th July 2014 is devoid of merit. It is dismissed with costs to both defendants.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017

Ruling dated, delivered and signed in open Court this 1st day of February 2017

Mr. Kagio for Defendant/Respondent present

Ms Muthoni Ndeke for Plaintiff/Applicant absent

1st Defendant present in person.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017