



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.327 OF 2014

GEORGE KIGEN1ST PLAINTIFF

HARON CHEPKAT KIMUGE.....2ND PLAINTIFF

SALOMON CHIRCHIR.....3RD PLAINTIFF

JONATHAN BENEI.....4TH PLAINTIFF

WILLIAM KIPROTICH TOROTICH.....5TH PLAINTIFF

KIKWAI BARMOSOT.....6TH PLAINTIFF

VERSUS

KIPNGOK CHIRCHIR.....1ST DEFENDANT

JOSEPH CHELELGO.....2ND DEFENDANT

KIPTALLAM CHIRCHIR.....3RD DEFENDANT

RULING

(Application seeking to enforce court order on alleged violation of it; parties having agreed to status quo; allegation that respondents have erected fences in violation of the order of status quo; on the material presented, difficult to determine whether the fences were erected before or after the order of status quo; respondents given benefit of doubt; application disallowed).

1. The application before me is that dated 12 July 2016 filed by the plaintiff. It seeks orders to have the OCS Menengai Police Station provide security to the plaintiffs so that they can execute the orders of 15 March 2016, which required the removal of fences erected in the parcels of land known as LR No. 482/5, 482/6 and 6547 (Curtis Estate). The motion is grounded on the reasons that on 13 July 2015, this court issued orders directing that status quo be maintained; that subsequently and in disobedience of the said orders, the respondents proceeded to erect the fences; that thereafter an application for contempt was filed; that the application was compromised by an agreement that the fences erected after 15 July 2015 be removed within 30 days; and that despite these orders the 1st and 3rd defendants/respondents have refused to remove the said fences.

2. The application is supported by the affidavit of George Kigen Cheboiywo, the 1st plaintiff, who has more or less averred on what I have set out above.

3. The respondents, have replied to the application by filing a replying affidavit. They have deposed inter alia that the land was surveyed and by 20 November 2014, the surveyor had completed his work; that this is the status quo which subsisted as at 11 May 2015 when the consent that parties remain where they are located was recorded; that at the time this suit was filed, the fences in issue had already been erected.

4. The parties in this matter are members of Koymtich Farm Limited, a land buying company. The dispute really is over the manner in which some land that was purchased in the year 1996 was distributed to the members. At the time the dispute was filed in the year 2014, some members had already settled in some portions of the farm that was purchased. Some had in fact erected fences. I at some point referred the dispute for mediation but the parties could not agree. On 15 March 2015, the parties recorded a consent to withdraw all pending applications and also recorded a consent that any fences erected after 13 July 2015 be removed within 30 days, and status quo be maintained.

5. On 13 July 2016, when the case came up for mention, Mr. Waiganjo for the plaintiffs lamented that only the 2nd defendant has complied with the order to remove fences. He soon thereafter filed this application.

6. It is against that backdrop that this application came to be. It will be observed that whereas the plaintiffs assert that the fences were put up after the consent of 13 July 2015, the respondents insist that the fences were put up much earlier.

7. I regret my inability to reconcile the two conflicting positions. To find that there has been a violation, I require to be convinced to a level that is slightly above the balance of probabilities. In other words, I am unable to tell, solely based on the material that is before me, whether or not the fences in issue were erected before the consent order for status quo or that they were erected thereafter. It is on that basis that I will give benefit of doubt to the respondents. I am therefore unable to grant the orders sought in the application. I have little option, given the above, but to decline the orders sought in this application. I however make no orders as to costs.

8. That said, I need to make clear that there should be no adjustments on the ground in so far as occupation is concerned until this case is heard and determined. In other words, the status quo must be maintained. I will not hesitate to be firm in enforcement of this order if there is any violation. The parties are hereby warned that I will not be lenient on any person who is found to be interfering with the status quo. Parties need to remain in the portions that they are currently occupying until this suit is heard and determined.

9. It is so directed.

Dated, signed and delivered in open court at Nakuru this 31ST day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Ms. Muchiri holding brief for Mr. Waiganjo for the plaintiff/applicants.

N/A on part of M/s Olonyi & Co. for defendants/respondents.

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU