



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 97 OF 2015

JOSEPH MUTHIANI KIVINDU1ST PLAINTIFF

WAYUA KIVINDU2ND PLAINTIFF

VERSUS

FREDRICK MWANIKI MUSAU1ST DEFENDANT

AUGUSTINE NZUKI MULI2ND DEFENDANT

BONIFACE MAKAU3RD DEFENDANT

REGISTRAR OF LANDS, MACHAKOS COUNTY

AND ATTORNEY GENERAL4TH DEFENDANT

KENYA UNION OF SAVINGS AND CREDIT

CO-OPERATIVES LIMITEDINTERESTED PARTY

RULING

1. This Ruling is in respect to the Application by the Plaintiffs dated 14th September, 2016. In the Application, the Plaintiffs are seeking for the following reliefs.

a. That Interim Conservatory Orders, and or status quo be issued in terms of interim injunction restraining Kenya Union of Savings and Credit Co-operatives Ltd (KUSCCO) and their agents, servants and or whomsoever from alienating, selling, sub-dividing, surveying or in whatsoever manner interfering with the suit property land Title No. 8914/43 (IR NO. 160391) pending the hearing and determination of this suit.

b. That Kenya Union of Savings and Credit Co-operatives Ltd (KUSCCO) be enjoined in the suit herein as the 4th Defendant, and the Plaintiffs be granted leave to amend the Plaint accordingly.

c. That the 1st Defendant – Fredrick Mwaniki Musau be committed to civil jail up to a period of six (6) months and be fined for a sum of Kshs. 27 million; and his properties be attached for contempt disobedience of the court orders herein issued on 23rd March, 2015 preserving the suit property land Title No. 8914/43 (IR.NO. 160391).

d. That Elly Oyugi and George Ototo, being officers of Kenya Union of Savings and Credit Co-operatives Ltd (KUSCCO) be summoned to court to show cause for their committal to civil jail for a period of six (6) months, and be fined for a sum of Kshs. 27 million, and or their properties be attached.

e. That the Conservatory, Prohibitory and injunction orders be issued to presence the suit priority land Title No. 8914/43 (IR.NO. 160391) pending the hearing and determination of the suit.

f. That such further orders and relief be issued as may be just and appropriate in the interest of justice.

g. That costs of the Application be provided for.

2. The Application is supported by the Affidavit of the 2nd Plaintiff who has deponed that she is an old widow pursuing over 13 acres of land that was acquired by her late husband in 1960's from the 1st Defendant's father.

3. The 2nd Plaintiff deponed that initially, the land was known as Ngelani Ranch Block Title No. 8914 plot 13A; that this court issued interim orders preserving the suit property; that the 1st Defendant was duly served with the order of 23rd March, 2015 on 25th March, 2015 and that in September, 2015, he realised that the title document for L.R. NO. 8914 had been issued in the name of the 1st Defendant.

4. According to the 2nd Plaintiff, on 2nd August, 2016, the 1st Defendant abused the course of justice by alienating and transferring the suit property to the Interested Party for Kshs. 27,000,000; that the said transfer was effected while the 1st Defendant was aware of the pending litigation and that the suit property should be preserved pending the hearing and determination of the suit.

5. The Interested Party, KUSSCO, filed a Notice of Preliminary Objection in which it averred that it has not been properly enjoined in the suit and that the Application dated 14th September, 2016 is incurably defective and an abuse of the court process.

6. In his Replying Affidavit, the Interested Party's Deputy Manager, Risk Management Services deponed that the Interested Party is not aware of the relation between a property known as Plot No. 13A under Block No. 8914, Ngelani Ranching Unity and L.R. No. 8914/43; that they conducted due diligence before buying the land and that the Interested Party holds a valid title to L.R. No. 8914/43.

7. According to the officer of the Interested Party, neither the Interested Party nor its officers were aware of the orders of the court prior to 16th September, 2016 and that the Interested Party is not privy to the origin of the dispute between the Plaintiffs and the Defendants.

8. In his response, the 1st Defendant deponed that the Plaintiffs do not have the legal capacity to file the current suit; that he was never served with the order of 24th March, 2015 and that he only learnt about this matter through a friend.

9. According to the 1st Defendant, Plot No. 13A is still intact; that Plot No. 43 is within L.R. No. 8914 and that indeed he sold L.R. No. 8914/43 on 21st October, 2015.

10. The 1st Plaintiff swore a Supplementary Affidavit in which he deponed that the 1st Defendant was served and was aware of the order of 23rd March, 2015; that the 1st Defendant entered appearance through his advocate on 8th April, 2015; and that the said orders were extended with the knowledge of the 1st Defendant's advocate. The 1st Plaintiff deponed that indeed, Plot No. 13A is one and the same as Plot No. 43; that initially, the original plot was number 13 before it was sub-divided into five (5) plots being

13A to 13E and that the 1st Defendant did not in his Defence deny the existence of the said plots.

11. The Plaintiff's advocate submitted that the act of the 1st Defendant to sell the land to the Interested Party is an act of contempt; that the 1st Defendant had knowledge of the orders of the court and that the joinder of the Interested Party is paramount having purchased the suit property during the pendency of the suit.

12. The 1st Defendant's counsel submitted that Plot No. 13A is not the same as Plot No. 8914/43; that Plot No. 13A is still intact and that in any event the cause of action is time barred.

13. The Interested Parties' advocate deponed that the Plaintiff cannot seek for an order of committal of his client to jail before joining them in the suit; that there is no prayer for the cancellation of his client's title and that the doctrine of tracing cannot be used in the instant case.

14. This suit was commenced by way of a Complaint dated 23rd March, 2015. In the Complaint, the Plaintiffs averred that the 1st Defendant's father, Musau Mwaniki, sold to the 1st Plaintiff's father, Pius Kivindu Kingoo, his share at Ngelani Ranching Unity in Athi River in 1966.

15. According to the Complaint, the 1st Defendant's father was amongst four other (4) partners who had been allocated Plot No. 13 within the ranch, which was sub-divided into Plots No. 13A to 13E.

16. The Plaintiffs averred in the Complaint that as at the time of the death of the 1st Plaintiff's father, he was in possession of the suit property; that the process of sub-division of the Ranch commenced in the year 2009 and that the 1st Defendant connived with the officials of the Ranch to have the share of the 1st Plaintiff's father transferred to the 1st Defendant.

17. The Plaintiffs went further to describe the suit property in the Complaint as follows:-

“14. That the subject property about 13 Acres valued over Kshs. 7 million is in the process of registration and has been delineated for purposes of identification in a sub-division plan and described as Plot No. 13A under Block No. 8914 – Ngelani Ranching Unity, Athi River. The title processing is underway at lands office.”

18. It is therefore obvious that the Plaintiffs were aware that there was an ongoing process to have a title issued in respect to Plot No. 13A. Indeed, the Plaintiffs simultaneously with the filing of the Complaint sought for an injunction to prevent any dealings in the suit property.

19. The order of *status quo* was first granted ex-parte on 23rd March, 2015 before the same was extended by Kariuki J. in the presence of the 1st Defendant's advocates on 8th April, 2015. The parties' advocates were directed by the court to file and exchange submissions and highlight the same on 28th May, 2015. However, the Application was not heard on 28th May, 2015 as scheduled.

20. The Plaintiffs have deponed that in September, 2015, they realized that titles in Ngelani Scheme had been processed and when they went to check on the status of Plot No. 13A, they discovered that after the survey, the number had changed to L.R. No. 8914/43 and a Certificate of Title issued to the 1st Defendant.

21. The Plaintiffs then immediately informed their advocate about the change of the portion number and the fact that a title document had been issued to the 1st Defendant. On those instructions, the Plaintiff's advocate filed an Application dated 10th November, 2015 in which he sought to amend the Complaint to show that the initial suit property was also known as L.R. No.8913/43. The Application, together with the draft amended Complaint was duly served on the 1st Defendant's counsel on 16th November, 2015.

22. Unbeknown to the Plaintiffs, the 1st Defendant had entered into an agreement of sale with the Interested Party in respect to L.R. No. 8914/43 on 21st October, 2015 for the sell of the land for Kshs. 27,000,000. The Transfer document between the 1st Defendant and the Interested Party was signed on 15th April, 2016 and registered on 2nd August, 2016. By the time the Transfer document was being signed, the Plaintiffs had served the 1st Defendant's advocate with the Application to amend the Plaint to reflect the new number.

23. Although the 1st Defendant has deponed that L.R.No. 8914/43 is distinct from portion number "13A under Block No. 8914 – Ngelani Ranching Unity, Athi River" as pleaded in the Plaint, he did not place any evidence before the court to show that the two plots are different.

24. On the other hand, the Plaintiffs have exhibited "the proposed sub-division plan for L.R. No. 8914" which was prepared by Real Plans Consultants in February, 2011, the duly authenticated Survey Plan No. 385/92 for L.R.No. 8914/6-68 and 164-166 which was approved by the Director of Survey on 2nd May, 2013 and the Deed Plan for L.R. No. 8914/43.

25. When the proposed sub-division plan, the Survey plan and the Deed plan are superimposed on each other, they leave no doubt in my mind that Plot No. 13A is the same as L.R. No. 8914/43 in terms of the size, the location, the neighbouring plots and the roads of access.

26. The 1st Defendant's argument that he owns another plot known as 13A within L.R. No. 8914 is a red-herring considering that he has not pointed out the plot on Survey plan No. 385/92.

27. Having found that the two plots are one and the same, and in view of the fact that the Interested Party purchased the plot *pendete lite*, I find and hold that the court can only determine the matter effectively and effectually by joining the Interested Party in this suit.

28. I say so because the outcome of the dispute between the Plaintiffs and the Defendants will affect the interests of the Interested Party considering that currently, the land is registered in its name.

29. The next issue that I am supposed to deal with is whether the Plaintiffs are entitled to an order of injunction.

30. The Plaintiff's case is that the suit property was owned by the late Kivindu King'oo, the father and husband of the 1st and 2nd Plaintiffs respectively.

31. According to the Plaintiffs, the late King'oo purchased the share in respect to the suit property from the 1st Defendant's father, and took possession of the land.

32. There have been correspondences dating back to 1992 in which the 1st Defendant's late father sought to evict the late King'oo from the suit property.

33. All along, the late King'oo resisted the attempts to have him leave the land, insisting that he has been a member of the Ngelani Ranching Unity since 1964.

34. Obviously, the issue of whether the 1st Defendant's father ever sold his shares in the Ranch can only be dealt with at trial. In the meantime, an order conserving the suit property to obviate any further dealings in the land should issue.

35. I say so because there is evidence showing that the Plaintiffs' patriarch occupied the suit property before his demise, and the issue of who actually owns the land can only be dealt with after *viva voce* evidence has been tendered.

36. The last issue that I am supposed to deal with is whether the 1st Defendant and the officials of the

Interested Party are in contempt of the orders of this court. It is not in dispute that on 23rd March, 2015, an ex-parte order was issued by the court for the maintenance of *status quo* obtaining as of 23rd May, 2015 in respect to the suit property.

37. An Affidavit of Service sworn on 2nd April, 2015 shows that the 1st Defendant was served with the order of 23rd March, 2015 on 25th March, 2015 at the Machakos Agriculture Head Office, Machakos town, where the 1st Defendant works.

38. The 1st Defendant has not denied that he works at the said institution. The 1st Defendant has also not denied that he was at his place of work on 25th May, 2015 when it is alleged that he was served.

39. The 1st Defendant did not challenge the deposition of the process-server that he was indeed served with the said order by way of cross-examination or otherwise.

40. In the circumstances, I find the assertion by the 1st Defendant that he was not served with the order of 23rd March, 2015 and that he was only informed about the pending suit by a friend to be untrue. Having been served with the said order and the Summons to Enter Appearance, the 1st Defendant's advocate entered appearance on 8th April, 2015 and filed a Defence on behalf of the 1st, 2nd and 3rd Defendants on 24th April, 2015.

41. On 8th April, 2015, the record shows that the parties were directed to exchange written submissions in respect to the Notice of Motion dated 23rd March, 2015. In the presence of the Defendant's counsel, the court directed that "*status quo should be maintained*" and gave a date for highlighting of submissions.

42. The maintenance of *status quo* was not limited to any particular date, meaning that none of the parties was to deal with the suit property until the Application of 23rd March, 2015 was heard and determined.

43. In the case of ***Shimmers Plaza Ltd vs. National Bank of Kenya Ltd (2015) eKLR***, the Court of Appeal defined *status quo* as follows:

"All it meant was that everything was to remain as it was as at the time that order was given."

44. The evidence before the court shows that while the order for the maintenance of the *status quo* was still in force, the 1st Defendant entered into an Agreement of Sale of the suit property on 21st October, 2015.

45. Even after being served with an Application for leave to amend the Plaintiff to reflect the new number that had been allocated to the suit property, the 1st Defendant went ahead to sign the Transfer document in respect of the suit property on 15th April, 2016.

46. Having been served with the order of 23rd March, 2015, and his advocate having been aware of the orders of *status quo* on 8th April, 2015, the 1st Defendant's act of selling the suit property to the Interested Party was in contempt of the orders of the court of 23rd March, 2015 and 8th April, 2015.

47. As was held in the case of ***Commercial Bank of Africa Limited vs. Isaac Kamau Ndirangu (1992) eKLR***, it is only by acting swiftly and firmly when an order of the court is flouted that the dignity and authority of the court can be held.

48. It has been stated for the umpteenth time that it is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the courts (***See Commercial Bank of African Limited vs. Isaac Kamu Ndirangu, supra***). In that regard, having found the 1st Defendant to be in contempt of the orders of the court, I shall,

which I am obliged to do, proceed to punish him after I have heard him in mitigation.

49. I am supposed to also determine if Elly Oyugis and George Ototo, being officers of the Interested Party are also in contempt of the orders of 23rd March, 2015 and 8th April, 2015.

50. The record shows that the Interested Party was not a party to the suit when the two orders were made. There is also no evidence to show that the officials of the Interested Party were served or were aware of the said orders before the Agreement of Sale of 21st October, 2015 was signed.

51. In the circumstances, the said officials cannot be said to have been in contempt of the orders of the court.

52. For those reasons, this court makes the following orders:

a) That Interim Conservatory Orders, and or status quo be issued in terms of interim injunction restraining Kenya Union of Savings and Credit Co-operatives Ltd (KUSCCO) or its agents, servants and or whomsoever from alienating, selling, sub-dividing, surveying or in whatsoever manner interfering with the suit property land Title No. 8914/43 (IR NO. 160391) pending the hearing and determination of this suit.

b) That Kenya Union of Savings and Credit Co-operatives Ltd (KUSCCO) be enjoined in the suit herein as the 4th Defendant, and the Plaintiffs be and are hereby granted leave to amend the Plaint accordingly.

c) The 1st Defendant be and is hereby found to have been in contempt of the orders of this court of 23rd March, 2015 and 8th April, 2015.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE