



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 168 OF 2016

ERNEST MURIUKI MUNGAI.....PLAINTIFF

VERSUS

GICHUGU CONSTITUENCY DEVELOPMENT FUND.....1ST DEFENDANT

COUNTY GOVERNMENT OF KIRINYAGA.....2ND DEFENDANT

RULING

On 21st October 2016, the plaintiff filed this suit seeking judgment against the defendants in the following terms:-

- 1. A declaration that the land parcel No. BARAGWE/RAIMU/2536 belongs to the plaintiff and an order of permanent injunction restraining the 1st and 2nd defendants from interfering with the plaintiff's quiet occupation of the land parcel No. BARAGWE/RAIMU/2536.***
- 2. Removal of the restriction placed by the 2nd defendant on the title to land parcel No. BARAGWE/RAIMU/2536.***
- 3. An order directed to the District Surveyor Kirinyaga County to point out the beacons for land parcel No. BARAGWE/RAIMU/2536 and the Office Commanding Station (OCS) to ensure compliance with the order.***
- 4. An order for eviction of the 1st defendant from land parcel No. BARAGWE/RAIMU/2536 and payment of mesne profit from the year 2012.***
- 5. Costs of the suit and interest.***

Simultaneously with that plaint, the plaintiff filed a Notice of Motion seeking orders in the following terms:

- 1. Spent.***
- 2. Spent.***
- 3. That this Honourable Court be pleased to issue an injunction restraining the 1st and 2nd defendants from carrying out any development and from interfering with the plaintiff's quiet possession of parcel No. BARAGWE/RAIMU/2536 pending the hearing and determination of this suit.***

4. That the OCS Kianyaga Police Station do ensure compliance with the orders issued by this Honourable Court.

5. That the costs of this application be provided for.

The application is premised on the grounds set out therein and supported by the plaintiff's affidavit. The gravamen of that application, which is the subject of this ruling, is that whereas the plaintiff is the registered proprietor of the land parcel No. BARAGWE/RAIMU/2536 (the suit land), the 1st defendant has without any reasonable cause prevented him from occupying it and has instead constructed a building thereon from which it is conducting its business. The 2nd defendant has caused a restriction to be placed on the suit land and if the injunction is not granted, the defendants will carry out more construction resulting in loss and damage to the plaintiff. Annexed to the application are the title deed to the suit land in the plaintiff's names, the certificate of search and a photograph of a building – see annexures **EMM 1** to **EMM 3**.

In opposing the application, the 1st defendant filed a replying affidavit sworn by **ROBERT NJAGI NJUGI** its Chairman who deponed, inter alia, that the 1st defendant is tasked with the responsibility of coming up with projects in consultation with stake holders from Gichugu Constituency and that it is in that regard that it identified a parcel of land No. BARAGWE/RAIMU/22 that had been set aside for a public project the same having been acquired by its predecessor **KIRINYAGA COUNTY COUNCIL** from one **NDEGE KITHIURU** pursuant to the *Land Acquisition Act*. That the said **NDEGE KITHIURU** had been compensated with another parcel of land at **MARURUMO ADJUDICATION SECTION** yet he fraudulently caused the land parcel No. BARAGWE/RAIMU/22 to be sub-divided creating the suit land after the Court of Appeal sitting in **NAIROBI CIVIL APPEAL CASE No. 280 of 2001** had ruled that he held land parcel No. BARAGWE/RAIMU/22 in trust for the **KIRINYAGA COUNTY COUNCIL** and therefore that land was not available for private use and the plaintiff did not therefore acquire the suit land legally and has no rights thereto. The 1st defendant therefore prayed that the ex-parte injunction granted on 24th October 2016 be discharged and the 1st defendant be allowed to proceed with the project.

The 1st defendant also filed a Preliminary Objection on the ground that this suit offends the provision of **Section 56 of the National Government Constituencies Development Fund Act 2015** and this Court lacks the jurisdiction to handle it as the 1st respondent is not a juridical body.

In a further affidavit however, the plaintiff deponed that when he purchased land parcel No. BARAGWE/RAIMU/2536, it did not have any encumbrances and therefore he is a bone fide purchaser. Further, that the County Council of Kirinyaga duly approved its sub-division.

The 2nd defendant similarly filed grounds of opposition to the application describing it as in-competent, bad in law and otherwise an abuse of the Court process which does not meet the threshold for the grant of injunction and ought to be dismissed.

Submissions have been filed by counsel for the plaintiff and the 1st defendant. Counsel for the 2nd defendant did not file any but associated himself with the submissions by the 1st defendant.

I have considered the application, the rival affidavits plus the annexures thereto and the submissions by counsel for the plaintiff and 1st defendant.

The first issue that I need to consider is whether the 1st defendant is properly sued in this matter. This is because, if it is not, as submitted by counsel, then this Court would lack the requisite jurisdiction to grant any interlocutory relief or indeed any final orders against it. Jurisdiction is everything and must be determined at the earliest opportunity even by the Court on its own motion. As **NYARANGI J.A** stated in **OWNERS OF THE MOTOR VEHICLE "LILLIAN S" VS CALTEX OIL (KENYA) LTD:**

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

There is no doubt that an issue of jurisdiction raises pure point of law which can therefore be properly raised as a Preliminary Objection as was defined in the case of ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS 1969 E.A 696.***

The 1st defendant is established under the ***NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND ACT of 2015*** and as deponed by its Chairman **ROBERT NJAGI NJUGI**, it is tasked with the responsibility of identifying and prioritizing development projects in consultation with the stakeholders from Gichugu. It is in that regard that it has prioritized the construction of a Bulking and Agricultural Market on the land parcel No. BARAGWE/RAIMU/22 which has been set aside for that purpose. Counsel submits that the 1st defendant is not properly sued because it is protected by ***Section 56 (3) of the NATIONAL GOVERNMENT CONSTITUENCIES FUND ACT.*** That submission is well founded. ***Section 56 (3)*** of that Act provides as follows:

“Disputes of a Civil nature shall be referred to the Board in the first instance and where necessary, an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to Court”.

The Board being referred to in the above provision is the ***NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND BOARD*** established under ***Section 14 of the NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND ACT 2015 (the Act).*** In urging this Court that it has the requisite jurisdiction notwithstanding the provisions of ***Section 56 (3) of the Act,*** counsel for the plaintiff submitted that this alone cannot oust this Court’s jurisdiction and cited the decision of ***MAJANJA J. in VICTOR SHIRIBWA UWANGA & OTHERS VS HAMISI CONSTITUENCY & OTHERS KISUMU HIGH COURT PETITION No. 20 of 2016*** where the Judge declined to uphold a Preliminary Objection similar to this one and instead referred a dispute relating to the violation of the rights of persons with disabilities to the Board established under ***Section 14 of the Act.*** That case can be distinguished from this one for two reasons. Firstly, the Board established under ***Section 14 of the Act*** was a party in that case. Secondly, and more significantly, the Court had struck out the other respondents leaving only the Board and the Judge therefore found it prudent, in order to ensure a resolution to the matter, to refer it to the Board. In this case now before me, the Board is not a party and the dispute also involves the **COUNTY GOVERNMENT OF KIRINYAGA** as the 2nd defendant. The orders being sought against the 2nd defendant with respect to the suit land can only be granted by this Court. Therefore, the route taken by the Court in the ***VICTOR SHIRIBWA MWANGA*** case (supra) may not be efficacious in the circumstances of this case. It is clear from ***Section 14 of the Act*** that only the Board can sue or be sued. The 1st defendant is therefore non-suited and the only prudent order to make is to strike it out of the proceedings.

I shall now consider the plaintiff’s Notice of Motion dated 21st October 2016 but only with respect to the 2nd defendant.

It is not in doubt that the suit land is currently registered in the names of the plaintiff who has availed the title deed thereto (annexture **EMM 1**). Such registration is, under ***Section 26 (1) of the Land Registration Act,*** conclusive evidence that the plaintiff is the absolute and indefeasible owner subject only to the encumbrances and other restrictions endorsed therein. The title can only be challenged on grounds that it was obtained fraudulently or through an illegal or un-procedural scheme. It has been suggested in the replying affidavit of **ROBERT NJAGI NJUGI** that the suit land was infact part of land parcel No. BARAGWE/RAIMU/22 which had been acquired by the then Kirinyaga County Council in 1973 from one **NDEGE KITHIURU** who fraudulently sub-divided it and sold the suit land to the plaintiff. Whether infact the plaintiff has any rights to the suit land will be a matter for the trial Court and at this stage, the Court cannot make any definitive findings on that issue and must stay clear of it. Suffice it to state that the production of the document of title with respect to the suit land is prima facie evidence that the plaintiff is the registered proprietor thereof and is entitled to all the rights appertaining

thereto including the right to eject trespassers.

The law in granting interlocutory injunctions was settled in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and that is the route that Courts have taken. The conditions for the grant of such injunctions are that:

- 1. The applicant must show a prima facie case with a probability of success at the trial.***
- 2. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages.***
- 3. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.***

In **MRAO LTD VS FIRST AMERICAN BANK OF KENYA & OTHERS (2003) K.L.R 125**, the Court of Appeal defined a prima facie case as follows:

“In civil cases, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial”.

Finally, as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILMS SALE LTD 1986 3 ALL E.R 772**, a fundamental principle to be considered is that the Court should take whichever cause appears to carry the lower risk of injustice if it should turn out to have been **“wrong”**.

Taking into account the above legal provisions and precedents, it is clear that prima facie, the plaintiff is the absolute and indefeasible owner of the suit land by virtue of the document of title issued in his names on 2nd October 2009. Until that registration is set aside on grounds of fraud or other procedural impropriety, the plaintiff is entitled to the protection of this Court. The plaintiff has, in my view, established a prima facie case as defined in the **MRAO** case (supra).

What about proof of irreparable injury that might not otherwise be adequately compensated by an award of damages? It is clear from the replying affidavit of **ROBERT NJAGI NJUGI** that the suit land was identified for purposes of constructing a Bulking and Agricultural Market. The term irreparable injury also termed irreparable harm is defined in **BLACK’S LAW DICTIONARY 9th Edition** as follows:

“The term irreparable injury, however, is not to be taken in its strict sense. The rule does not require that the threatened injury should be one not physically capable of being repaired. If the threatened injury would be substantial and serious – one not easily to be estimated, or repaired by money – and if the loss or inconvenience to the plaintiff if the injunction should be refused (his title proving good) would be much greater than any which can be suffered by the defendant through the granting of the injunction, although his title ultimately prevails, the case is one of such probable great or “irreparable” damage as will justify a preliminary injunction”.
Emphasis added

In **HALSBURYS LAWS OF ENGLAND 3RD EDITION VOL 21 Page 366**, irreparable injury is defined as follows:

“..... by the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired”
Emphasis added

Finally in **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS (2014)**, the Court of Appeal

expressed itself on the issue and said:

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature monetary compensation, of whatever amount, will never be adequate remedy” Emphasis added

Clearly if, as is deponed by **ROBERT NJAGI NJUGI** a market is constructed on the suit land and the plaintiff prevails at the trial, the loss that he will have suffered would be substantial bearing in mind what a market entails. That harm would no doubt be greater than what the 2nd defendant would suffer if the interlocutory injunction is not granted. I am therefore satisfied that the plaintiff has also established that he would suffer irreparable injury if the interlocutory injunction is not granted.

As I am not in doubt about the first two principles set out in the **GIELLA** case (supra), there would be no need to consider the third principle. However, even if I did, the balance of convenience would be in favour of granting the order of injunction sought.

Ultimately therefore and upon considering all the issues herein, I make the following orders:-

- 1. The 1st defendant is struck off from these proceedings.***
- 2. An order of temporary injunction is issued restraining the 2nd defendant by itself or those acting under it from carrying out any development or from interfering with the plaintiff’s quiet possession of the land parcel No. BARAGWE/RAIMU/2536 pending the hearing and determination of this suit.***
- 3. There is no need to issue any orders directed to the OCS Kianyaga at this stage as it is expected that Court orders are to be complied with but either party is at liberty to apply if need be.***
- 4. The parties to comply with the pre-trial directions and have this suit heard and determined within the next 12 months.***
- 5. The plaintiff to meet the 1st defendant’s costs.***
- 6. Costs of the application in the cause.***

B.N. OLAO

JUDGE

21ST APRIL, 2017

Ruling delivered, dated and signed in open Court this 21st day of April 2017

Ms Muthike for Plaintiff present

Ms Kiragu for Mr. Kibanya for 1st Defendant

Mr. Ngigi for 2nd Defendant absent.

B.N. OLAO

JUDGE

21ST APRIL, 2017