



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 122 OF 2016

REBECCA MWAKISHA (Suing on behalf of the Estate of

STEPHEN MWAKISHA – Deceased).....PLAINTIFF/APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF KWALE.....1ST DEFENDANT/RESPONDENT

JOSEPH CHALE MACHACHE.....2ND DEFENDANT/RESPONDENT

KENYA RAILWAYS CORPRATION.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff filed her suit dated 26th May 2016 and together with it a notice of motion application. The application is anchored under the provisions of section 1A, 1B & 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. She sought the following orders:

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. That this Court be pleased to issue an order of temporary injunction restraining the 3rd Defendant by itself, servants and/or agents from releasing any payments, being compensation to owners of land for the acquisition of Standard Gauge Railway line, to the 2nd Defendant/Respondent pending the hearing and determination of this suit and/or further orders of this Court.

2. The application is premised on the grounds listed on its face and on the supporting affidavit. In brief the applicant deposes that she is the legal administrator of the estate of Stephen Mwakisha – deceased who was allocated the suit land in 1976. She deposed that they have been in actual use and occupation of

the said ranch to date until recently when the 2nd Respondent got in and started illegally and unlawfully putting up structures claiming ownership. The applicant deposed further that the 3rd Respondent has started effecting compensation payment after acquiring the land. This is the reason she moved to Court to obtain the orders sought.

3. The application is opposed by the 2nd and 3rd defendants. The 2nd defendant denies through his replying affidavit that the applicant's husband was the owner of the suit land which is unsurveyed and instead deposes the land belongs to him. The 2nd Respondent deposed that the letters annexed cannot be authenticated for the reasons he has outlined in paragraph 4 of the affidavit. The 2nd Respondent deposed that he has been in occupation of the suit land since 1st June 1988 having acquired it through purchase.

4. The 3rd defendant also filed a replying affidavit sworn by its corporation secretary Ms Helen K. Mungania on 7th October 2016. She deposed that the land was acquired on its behalf by the National Land Commission that is mandated by law to do so. Thereafter on 6th January 2015 the 3rd Respondent was supplied with bank details of the 2nd Respondent as per copies annexed. That on receipt of these documents, the 3rd Respondent effected payment and as far as the 3rd Respondent is concerned, the matter is finalized. She deposed that the 3rd Respondent is wrongly sued as it was not in anyway involved in any malpractice. That the 3rd Respondent promptly paid compensation as per the advise of the National Land Commission therefore the claim herein has been overtaken by events.

5. The 3rd Respondent also raised a preliminary objection as regards the jurisdiction of this Court to hear this matter in line with the provisions of sections 112, 118 – 120 of the Land Act. That the original jurisdiction to hear claims of ownership and interest & compensation vests on the commission's inquiry.

6. The applicant and the 3rd Respondent tendered written submissions. The applicant submitted that this Court has jurisdiction to hear this matter under the provisions of article 162 (2) (b) of the Constitution and section 13 (2) of the Environment & Land Court Act. The applicant also submits that the National Land Commission Act Cap 50 does not bar this Court from hearing disputes such as this. Secondly that the issue raised is not a pure point of law as is envisaged in the renowned case of **Mukisa Biscuit Co Ltd vs West End Distributors Ltd (1969) E A 696**.

7. The 3rd Respondent on its part submitted on the provisions of the statutory framework i.e. Land Act sections 112, 118, 119 & 120. He also cited the case of **Mutanga Tea & Coffee Co Ltd vs Shikara Ltd and Municipal Council of Mombasa C. A No 84 of 2014** where the issue of following the right procedure and exhausting the dispute resolution mechanisms as provided by various legislations was articulated. That the High Court cannot usurp jurisdiction vested on the commission of inquiry in its exercise of its inherent jurisdiction. That in this instance, a dispute resolution mechanism has been well set out for any aggrieved party to seek remedial action. He therefore urged the Court to uphold the preliminary objection.

8. On the merits of the application, the 3rd Respondent relied on the principles to be considered for granting injunctions. That the applicant came to Court long after the payment was made out. The 3rd Respondent also submits that the remedy of damages would adequately compensate the applicant as a legitimate claimant and that the 3rd Respondent is endowed with enough resources. Therefore a mandatory injunction would not be the right action for the Court to grant at this stage. He relied on the decision of **Bharat Petroleum Corporation vs Harochand Sachdeva Air 2003** to support this submission. The 3rd Respondent urged the Court to dismiss the application.

9. I will start with the issue of jurisdiction of the Court raised by the 3rd Respondent. Under section 112 of the Land Act, it deals with inquiry as to compensation of land to be acquired. Section 118 deals with issue of final survey; s.119 deals with conditions for payment of compensation and section 120 on formal taking of possession. In the present suit, the plaintiff is seeking for an order ***“declaring her as the beneficial, legal and rightful owner of all that unsurveyed land measuring 1000 acres in TARU***

LOCATION, Fuleye Village, Samburu North.” The sections of the law cited by the 3rd Respondent relates to issues of compensation as regards to the land that is compulsorily acquired. While my understanding of the plaintiff’s dispute is that it is a dispute of a claim over land. Probably acquisition is only part of the dispute. This is brought out in paragraph 6 of her plaint where she pleads, **“The 1st defendant has un – procedurally conferred ownership of the plaintiff’s land to the 2nd defendant.”**

10. The plaintiff has not accused the National Land Commission of conferring ownership on the 2nd defendant. It is therefore my considered view that the preliminary objection is misplaced. This Court was established to resolve disputes as regards use, occupation & ownership of land. Consequently the dispute as contained in the plaint is therefore properly before the Court.

11. On the merits of the application, the orders sought are for injunctive relief therefore the principles set out in the case of **Giella vs Cassman Brown** comes into play. The applicant is required to demonstrate that she has a prima facie. In my view, she has attempted to do this by annexing the documents showing the land was given to her husband sometime in 1976. However the same land is being claimed by the 2nd defendant who is claiming purchasers’ rights allegedly from 1988. The 2nd defendant has even been paid the compensation by the 3rd Respondent as shown by annexure **“HM 3”** in the 3rd Respondent’s replying affidavit. This payment was made on 6th January 2015, more than one year before this suit was filed.

12. Would the orders sought serve any purpose in the circumstances of this case? The purpose of injunctive orders is set out under Order 40 rule 1 thus: **“that any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or**

That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of a decree that may be passed against the defendant in the suit” In this instant, the payment was already made. Therefore the orders sought in No 5 & 6 of the motion are being sought in vain as you cannot stop a horse which has already bolted from the stable. A temporary injunction cannot undo an event which has already taken place. In regard to prayers Nos. 3 & 4 as regards orders seeking to stop the 2nd Respondent from putting up structures on the suit property, no evidence was presented to show that such an activity is being undertaken by the 2nd defendant. What the Court gleans from the pleadings is that it is the 3rd Respondent that is engaged with the construction of the Standard Gauge Railway.

13. If this be true and as is explained by the 3rd Respondent that the same was done after the land was compulsory acquired; then for the orders to be granted the applicant ought to have laid a proper basis. None has been made. In any event the applicant has failed to submit on what loss she is likely to suffer which is irreparable if the orders are not granted. The 3rd Respondent has rightly submitted that the remedy of compensation in damages would suffice in the circumstances and that it has enough resources to pay such compensation. Therefore the balance of convenience tilts in favour of the 3rd Respondent continuing with its works on the suit land.

14. In regard to prayer 2 of the motion, the order cannot be granted as the Court can only make such a declaration on who owns the land after hearing both parties on merit. The same prayer is sought in the main suit and if granted at this stage, there will be nothing to proceed for trial. In light of the observations made in the paragraphs 12 & 13 above I find this application to be without merit and hereby dismiss it with an order that costs be in the cause.

Ruling dated & signed at Mombasa this 26th day of June 2017.

A. OMOLLO

JUDGE

Delivered at Mombasa this 29th day of June 2017 by

C. YANO

JUDGE