



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 237 OF 2016

FRANCIS NJUGUNA AND 19 OTHERS.....PLAINTIFFS

VERSUS

JOYCE NYAMBURA MURIGIDEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiffs being registered proprietors of various parcels of land after subdivision of a parent title; defendant interfering with the same claiming that she is registered as proprietor of the parent title; there being evidence that the defendant had litigated over the parent title and lost an injunction application; not allowing application will be giving the defendant what she lost in the earlier suits; application for injunction allowed with costs).

1. This suit was commenced by way of a plaint that was filed on 30 June 2016. The plaintiffs have pleaded that they are the owners of the land parcels Nakuru Municipality Block 17/653 to 679 which land parcels were excised from the land parcel Nakuru Municipality Block 17/631. They aver that they purchased the land from the previous registered proprietor, one Francis Gachanja, on diverse dates in the years 2006- 2015. The plaintiffs have sued the defendant on the complaint that the defendant has entered into the suit properties on the allegations that she is entitled to ownership of them. They have pleaded that the defendant has had several cases in court pitting herself against Francis Gachanja for the ownership of the parent title, land parcel Nakuru Municipality Block 17/631, and that she lost all the suits. It is the view of the plaintiffs that the defendant has no right over the suit properties. In the suit, the plaintiffs have asked for a declaration that they are the lawful proprietors of the suit properties; an order of permanent injunction against the defendant; and an order directing the Land Registrar, not to enter any registration in favour of the defendant over the suit properties.

2. Together with the suit, the plaintiffs filed an application for injunction seeking to have the defendant restrained from the suit properties, pending hearing and determination of this suit. It is that application which is the subject of this ruling.

3. The defendant has opposed the motion through a replying affidavit sworn on 31 August 2016. She has also filed a defence and counterclaim to the main suit. It is her case that the land parcel Nakuru Municipality Block 17/631 originally belonged to her late father, one Kariuki Munyua Kihika alias Jese Kariuki, who died on 5 July 1998. She has stated that her father used to live on this land together with his late father, one Munyua, who was an employee of a colonial settler by the name of Hughes. It is said that the land was formally one measuring between 10 and 14 acres but part of it was taken by the Municipal Council, leaving the current area measuring approximately 1.6 Ha. It is averred that the defendant's late father pursued documentation from the authorities and she has attached several correspondences

exchanged with the Ministry of Lands. She has stated that the land was then allocated to her late father and she annexed a letter of allotment. In the year 2005, she obtained letters of administration for the estate of her late father. As she pursued for documents, Francis Gachanja started constructing on the property. She then filed the case Nakuru HCCC No. 258 of 2005 against the said Francis Gachanja. While this case was still pending, Francis Gachanja filed the case Nakuru CMCC No. 1188 of 2006 against her. She has averred that this case is still pending determination. She has deposed that despite these cases, Francis Gachanja still went ahead to file the case Misc. Civil Application No. 52 of 2007 against the Attorney General and two others but did not include her in the case. She has stated that Francis Gachanja obtained ex-parte orders of which she was never served. She has also alluded to another case, being Judicial Review Case No. 34 of 2011, filed by one Chege Mwangi, but where she was not sued. She suspects fraud in the manner in which Francis Gachanja obtained title to the land and she has reported the same to the CID. It is her view that the land properly belongs to her late father. After the demise of her father, a Lease Certificate was issued to her, a copy of which she has attached. She has contended that only three parcels of the suit properties have Green Cards, being the land parcels Nakuru Municipality Block 17/654, 655 and 656. She has also denied that the plaintiffs have developed the suit properties. She has argued that the title of Francis Gachanja was illegally obtained and he could pass no title to anybody else.

4. In her counterclaim, the defendant wants a declaration that the registration of the properties Nakuru Municipality/Block 17/ 653-679 was fraudulent and null and void; a declaration that she is the lawful owner of these properties excised from Nakuru Municipality/Block 17/631; an eviction order against the plaintiffs and a permanent injunction against them.

5. The plaintiffs filed a Reply to Defence and Defence to Counterclaim to challenge the defendant's suit against them. They also filed a supplementary affidavit sworn by Joseph Njoroge Ndathe. It is contended that the defendant is seeking to rely on an irregular and fraudulent process to claim entitlement to the suit properties. He has deposed that the defendant seeks to rely on a letter of allotment issued on 30 March 2000 yet her father died on 5 July 1998. He has argued that there was no acceptance on the part of the alleged allottee so as to vest any interest in the estate of Jese Kariuki and that in any event, the same could not be accepted as the allottee was deceased. He has asserted that no contract could be made with a dead man. He has stated that the pretended acceptance by the executors of the estate of the deceased created no contract. He has also pointed out that any lease should have been issued in the name of Jese Kariuki and has argued that the certificate of lease held by the defendant is void.

6. I have considered the above depositions alongside the submissions of Mr. Gatonye for the applicants and Ms. Kipruto for the respondent.

7. This is an application for injunction and the principles upon which such an application is decided were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. One needs to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss if the injunction is not allowed. If in doubt, the court will decide the application on a balance of convenience.

8. I have looked at the material supplied by the applicants. I have seen that the applicants have title deeds to the suit properties. The suit properties emanate from a subdivision of the land parcel Nakuru Municipality/ Block 17/631. I have also seen a ruling made on 16 June 2006, by Koome J (as she then was) in the suit Nakuru HCCC No. 258 of 2005. That was a suit filed by the respondent herein against Francis Gachanja Mwangi wherein she claimed that the said Francis Gachanja Mwangi had fraudulently obtained title to the land parcel Nakuru Municipality/Block 17/631. The respondent herein (as plaintiff in that suit) filed an application for injunction. Koome J, did not believe that the respondent had demonstrated a prima facie case and proceeded to dismiss the application. In the suit, Nakuru CMCC Misc. Application No 52 of 2007, Francis Gachanja Mwangi had sued the Attorney General, the Commissioner of Lands and the Nakuru District Land Registrar, to have removed a restriction that had been placed in the said title. That application was allowed in a ruling made on 22 June 2007. I guess the combination of the above rulings is what paved way for Francis Gachanja Mwangi to deal with the property Nakuru Municipality/Block 17/631 and proceed to subdivide the same into the suit properties herein.

9. There is also Nakuru High Court, Judicial Review Case No. 34 of 2011 wherein one Chege Mwangi, had sued the Commissioner of Lands seeking orders of prohibition, to have the Commissioner prohibited from issuing a title to the land parcel Nakuru Municipality Block 17/631 to any other person other than himself as the ex-parte applicant. The motion was allowed by Emukule J and orders of prohibition issued on 19 December 2011. I do note that the respondent has displayed a title to the land parcel Nakuru Municipality Block 17/631 which appears to have been issued on 25 September 2015. I am unable to comprehend how this title was issued, given that there was already made an order of prohibition, as I have demonstrated above, coupled with the fact that the land parcel Nakuru Municipality Block 17/631 had ceased to exist as it had been subdivided to produce the suit properties. I also observe that in the case Nakuru HCCC No. 258 of 2005, the respondent had inter alia sought orders that she should be declared the lawful owner of the land parcel Nakuru Municipality Block 17/631. I have no evidence that this suit was pursued by the plaintiff and there is no decree giving this land to the respondent. It appears that the respondent made a decision to circumvent court process and obtain title to the disputed land despite being aware that Francis Gachanja had a previous title. That to me appears to be an abuse of process. The respondent ought to have awaited a decree in her favour before proceeding to procure title in her name. She in fact does not seem to have been keen to conclude the case after dismissal of her application for injunction. She ought to have taken positive steps to have the case heard and finalized. In her affidavit, she tried to explain that the court file went missing. I do not buy that excuse, for if indeed the court file went missing, there was avenue to reconstruct and proceed with the matter.

10. I also observe that some of the applicants have already developed houses in some of the suit properties. It is apparent that they have already taken possession. This suit was of course prompted by the action of the respondent in attempting to interfere with their possession. On assessment of the material tendered herein, I am convinced that the plaintiffs have demonstrated a prima facie case with a probability of success. Indeed, if I am to deny them an injunction, I will be handing over to the respondent, what the court declined to give her in the case Nakuru HCCC No. 258 of 2005.

11. For the above reasons, I do allow this application for injunction. I issue orders restraining the defendant/respondent from the land parcels Nakuru Municipality/Block 17/ 653 to 679 (both inclusive) until this suit is heard and determined.

12. The applicants shall also have costs of this application.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of:

Ms. Gitau holding brief for Mr. Gatonye for the plaintiffs/applicants.

Ms. Kipruto for the defendant/respondent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU