



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO 32 OF 2015

HARRISON G. MWANDOE

HOTHAM M. MLONGOPLAINTIFFS/APPLICANTS

VERSUS

CHAIRMAN, SECRETARY, TREASURER – CHOKE RANCH

CHAIRMAN, SECRETARY, TREASURER – MIGENO RANCH

THE LAND REGISTRAR, WUNDANYI/MWATATE.....DEFENDANTS/RESPONDENTS

RULING

1. This is the Notice of Motion dated 25th February 2015. It is brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 40 Rule (2) of the Civil Procedure Rules and all enabling provisions of the Law.
2. It seeks orders;
 - a) Spent
 - b) That this Honourable Court be pleased to issue an order of injunction restraining the 1st and 2nd Defendants herein from further encroaching and/or interfering with the Plaintiff's family Land known as "Lusharunyi" situated in Mwatate location measuring 50,000 acres pending the hearing and determination of this matter inter partes.
 - c) That costs of the application be provided for.
3. The grounds are on the face of the application and are;
 - a) That the 1st and 2nd Defendants herein have illegally proceeded to encroach upon and/or interfere with the Plaintiff's family land herein which is now at a real risk of being wasted away or taken over completely.
 - b) It is in the interest of justice and fairness that the Plaintiff's application for injunction herein be allowed so as to prevent the Plaintiff's family from losing their ancestral land and from suffering irreparable loss and damage.
4. The application is supported by the affidavit of Harrison G. Mwandoe, the 1st Plaintiff/Applicant herein sworn on the 25/2/2015. He has also sworn a further affidavit on the 29/6/2015.
5. The application is opposed. There is a replying affidavit sworn by Donald Bong'osa Mcharo, Chairman of Taita Taveta Ranchers Association sworn on the 16/4/2015.
6. There is also a Notice of Preliminary objection raised by the 1st and 2nd Defendants dated 25/8/2015.
7. On the 7/11/2016, it was agreed by parties that the Notice of Motion dated 25/2/2015 and preliminary objection be canvassed together by

way of filing written submissions.

8. I have considered the pleadings, the application, response and annexures, submissions of counsel and the authorities cited.

In written submissions, counsels substantiated their clients respective positions stated in their respective affidavits.

The issues for determination are;

- i) Whether the preliminary objection is merited.
- ii) Whether the Plaintiffs/Applicants' case satisfies the conditions for grant of temporary injunctions.

9. The Notice of Preliminary objection dated 25/8/2015 states;

Take Notice that the 1st and 2nd Defendants will at the hearing hereof raise a preliminary objection to the Plaintiffs suit, and call upon the Honourable Court to strike out the same on the grounds that;

- a) The same is inherently incompetent, void and bad in law for being brought in a representative capacity without leave of the court, thus avoiding compliance with the mandatory requirements of Order 1 Rule 8 of the Civil Procedure Rules, 2010.
- b) The 1st and 2nd Defendants have no capacity to sue and be sued and further that no suit can be brought against officers of an organization in the names of the offices they hold.

10. In support of the preliminary objection the 1st and 2nd Defendants have submitted that as per paragraph 4 of the plaint dated 25th February, 2015, the Plaintiffs are claiming land known as "Lusharunyi" as their own together with undisclosed family members.

That the number of family members is not disclosed hence makes this suit a representative suit.

That therefore it was mandatory that their requirements of Order 1 Rule 8 of the Civil Procedure Rules be followed. They have relied on the authority of ***Sonko And Others –versus- Haluna And Another EALR (1970) 443.***

11. Further that the Plaintiffs have brought this suit on their own behalf and on behalf of their unnamed family members.

That since no permission of the court was given, this suit ought to be dismissed. It is their further submission that the 1st and 2nd Defendants are limited liability companies capable of being sued in their names and not through administrative offices.

That the suit is therefore a nullity and ought to be struck out with costs.

12. The Plaintiffs on their part submitted that the preliminary objection is misconceived. That the Plaintiffs obtained authority from family members in a family meeting held on 13/6/2008. That the 1st and 2nd Defendants are rightly sued. That the Plaintiffs' claim is historical and the court should not decide issues herein based on technicalities alone but let the matter go to full hearing.

13. With respect to the application dated 25/2/2015 the Defendant/Respondents submit that the Plaintiff's claim "Lusharunyi" measuring 50,000 acres does not exist. There is nothing to show that the Plaintiff's own the said land therefore the plaintiffs have failed to demonstrate that they have a prima facie case with chances of success. Further that they have failed to prove that they stand to suffer irreparably if these orders of injunction are not granted.

14. I have gone through the pleadings and the annexures. The Plaintiffs' claim appears to be historical. They have annexed several letters giving the history of this matter culminating in the filing of this suit. I have gone through Order 1 Rule 8 of the Civil Procedure Rules. It is not in doubt that the Plaintiffs are acting on their own behalf and on behalf of other family members. It is also not in doubt that leave of court was not sought before filing this suit.

From the history of the claim it is my humble view that this is a matter that ought to go to full hearing. Order 1 Rule 9 of the Civil Procedure Rules states that;

"No suit shall be defeated by reason of the mis joinder or non joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it".

15. It is my view that the failure by the Plaintiffs failure to seek leave of court before filing this suit is not fatal.

I find that the Plaintiffs ought to be given an opportunity to ventilate their claim.

16. On the second issue of the 1st and 2nd Defendants having been sued wrongly, I find that this can be cured by an amendment. It was held by Madan J A (as he then was) in the case of ***D.T.Dobie & Compny Ltd –verssus- Muchina (1982) KLR***, that,

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it”.

I find that this suit though it has many defects can be cured by an amendment. Article 159 (2) of the constitution 2010 provides for access to justice and speedy disposal of disputes.

I have taken into account the prevailing circumstances and decline to strike out the suit. I find that the preliminary objection lacks merit and the same is dismissed.

17. I have considered the Plaintiffs application dated 25/2/2015. The Plaintiffs’ claim family land known as “Lusharunyi” situated in Mwatate location measuring 50,000 acres.

There is no further description. The conditions for grant of temporary injunctions were laid down in the case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 358.*

Apart from the letters from the various state entities confirming that the Plaintiffs visited them, the description of the land is given as “Lusharunyi” situated approximately 2 kilometers from Choke Ranch and south of Mwatate Sisal Estate.

I find this to be too vague. The land is unsurveyed. I find that the Plaintiffs have failed to demonstrate that they have a prima facie case with a probability of success.

They have also failed to show what irreparable loss or injury they will suffer if these orders are not granted. In the event that their claim succeeds, they can be compensated by an award of damages.

Court orders ought not to be made in vain.

I find no merit in the application dated 25/2/2015 and the same is dismissed. The costs shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered at **Mombasa** on the **17th** day of **October 2017**.

L. KOMINGOI

JUDGE

17/10/2017