



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 92 OF 2017

(Formerly Machakos HCCC No. 180 of 2011)

DAVID PETERSON KIENGO.....1ST PLAINTIFF

NKIIRI VICTOR MICHUBU.....2ND PLAINTIFF

KENAKENA INVESTMENTS LTD.....3RD PLAINTIFF

VERSUS

KARIUKI THUO.....DEFENDANT

Consolidated with Machakos HCCC No. 220 of 2011

**THUO MARY NJERI, PAUL KIHORO AND JAMES KARIUKI
THUO**

Suing as the administrators of the estate of STEPHEN KIHOROTHUO.....PLAINTIFF

VERSUS

**FOUNTAIN SAVINGS AND CREDIT COOPERATIVE SOCIETY
LTD.....DEFENDANT**

RULING

What is before Court is Plaintiffs' application dated 28th January, 2015 brought pursuant to Section 1A, and 3A of the Civil Procedure Act, Section 70 of the Land Registration 2012, Section 130 of the Registered Lands Act (Repealed), Article 159 of the Constitution and all the other enabling provisions of the Law.

The application is based on the following grounds which in summary is that the 1st and 2nd Plaintiffs are the registered owners of properties known as KAJIADO/KITENGELA/32034, 32036, 32037, 32038, 32039, 32040, 32041, 32042, 32043, 32044, 32045, 32046, 32047, 32048, 32049, 32050, 32051, 32052, 32053, 32054, 32055, 32056, 32057, 32058, 32059, 32060, 32061, 32062, 2063, 32064, 32065, 32066 and 32067. The 3rd Plaintiff in which the 1st and 2nd Plaintiffs are members is the registered owner of the properties known as title numbers KAJIADO/KITENGELA/ 36516, 36517, 36518, 36519, 36520, 36521, 36522, 36523, 36524, 36525, 36526, 36527, 36528, 36529, 36530, 36531, 36532, 36533, 36534, 36535, 36536, 36537, 36538, 36539, 36540, 36541, 36542, 36543, 36544, 36545, 36546, 36547, 36548, 36549, 36550, 36551, 36552, 36553, 36554, 36555, 36556, 36557, 36558, 36559, 36560, 36561, 36562, 36563, 36564, 36565, 36566, 36567, 36568, 36569, 36570, 36571, 36572, 36573, 36574, 36575, 36576,

36577, 36578, 36579, 36580, 36581, 36582, 36583, 36584, 36585, 36586, 36587, 36588, 36589, 36590, 36591, 36592, 36593, 36594, 36595, 36596, 36597, 36599, 36600, 36601, 36602, 36603, 36604, 36605, 36606, 36607, 36608, 36609, 36610, 36611, 36612, 36613, 36614, 36615, 36616, 36617, 36618, 36619, 36620, 36621, 36622 and 36623 all situated in Kajiado County.

Further that the 1st and 2nd Plaintiffs purchased land parcel number KAJIADO/KITENGELA/2978 on 16th October, 2008 and around the same time the 3rd Plaintiff purchased KAJIADO/KITENGELA/2970, 2972 and 2974, which parcels were subdivided resulting in the suit properties above, with some of them already sold to third parties. That around 2011, the Defendant trespassed on the aforementioned parcels of land and fenced off huge chunks claiming ownership of the same. The Plaintiffs moved to court and obtained ex parte orders of injunction and the Defendants in HCCC 180 of 2011 also obtained an order of injunction against another party in HCCC 220 of 2011. Further that on account of the identical legal issues in these cross applications, the matters were consolidated by Justice J. Ngugi on 5th July, 2012 who delivered a detailed ruling where he confirmed the injunction in HCCC 180 of 2011 but dismissed application in HCCC 220 of 2011 in its entirety which among other reliefs sought an order of inhibition. This ruling vindicated the Plaintiffs' absolute ownership and enjoined the Defendant only and overturned the order that was existing before the application was determined after interpartes submissions. Further that the Defendant has filed an inhibition in some of the Plaintiffs' parcels of land and had refused, failed and/or neglected to lift it with the said inhibition being overtaken by events. The continued existence of the inhibition constitutes interference with the Plaintiffs' properties.

The application is supported by an affidavit of ANDREW NKIIRI the 2nd Plaintiff herein where he deposes that when the Defendant trespassed on the suit parcels of land mentioned above, they instructed their lawyers messrs Ole Kaikai & Company Advocates to move to court and seek an injunction against him, which he did vide HCCC No. 180 of 2011 and obtained ex parte orders on 25th July, 2011. He avers that he was informed by his lawyer that the Defendant vide HCCC 220 of 2011 obtained an injunction against FOUNTAIN SACCO over a parcel of land similarly claimed by him. He states that these two applications were consolidated, heard and determined and there is absolutely no ambiguity in the orders of the Court. He claims that after the ruling they discovered that the Defendant had lodged inhibitions on their parcels of land mentioned above and through their former advocates wrote to the Land Registrar seeking clarification. He reiterates that the inhibitions have no basis and should be cancelled as the court had consequently made orders regarding the dispute and the said inhibitions constitute an interference by the Defendant.

The application is opposed by the Defendant who filed a replying affidavit sworn by KARIUKI THUO where he deposes that the inhibition order complained of by the Plaintiffs was issued on 22nd August, 2011 and the same was by Consent. He avers that the ruling by Justice Ngugi on 27th July, 2012 allowed the Notice of Motion dated 27th July, 2011 in terms of prayer (C) thereof and did not remove the inhibition. He states that the application dated 28th January, 2015 is devoid of merit as it does not meet the threshold of interfering with a consent order. Further that the application is made in bad faith because if the inhibition is removed, the substratum of this case would be lost, as the Plaintiffs' would sell/transfer the suit lands to third parties. He claims that the Plaintiffs' filed this case in 2011 and up to now have not taken out Summons to Enter Appearance to enable the case take off. Further that they simply applied for an injunction and once they got it, they went home to relax. He reiterates that the said injunction lapsed on 26th July, 2013 by operation of law and he is guided by Order 40 rule 6 of the Civil Procedure Rules.

He affirms that it is in the interests of justice if the inhibition order remained in place to secure the interests of the Defendant and maintain the substratum of the case until it is finally heard and determined.

Both parties filed their written submission which I have considered.

Analysis and Determination

Upon perusal of the application together with the supporting & replying affidavits and submission herein, at this juncture the only issue for determination is whether the inhibition order entered against the aforementioned suit parcels of land should be removed pending the hearing and determination of the main

suit.

I note that on 5th July, 2012 Justice Joel Ngugi delivered a detailed ruling in the consolidated case where he confirmed the injunction in HCCC 180 of 2011 by restraining the Defendant either by himself, his agents, servants, and/or persons acting under him and/or for him from invading, trespassing, fencing, developing, alienating or in any other way howsoever interfering with the suit parcels of land pending the hearing and determination of the suit. However from the time the said injunctive orders were granted, the Plaintiffs' have not set the suit down for hearing and final determination. I further note from Judge Ngugi's ruling that it granted an injunction restraining the Defendant from the physical interference with the suit parcels but did not determine the issue of ownership.

I note that there was a consent order dated the 22nd August, 2011, recorded by Lady Justice Mugo where both parties agreed to a status quo and enter an inhibition order as against the suit parcels of land.

I note that the substratum of the suit herein concerns ownership of the suit lands as between the Plaintiffs and the Defendant. The Plaintiffs claim that the inhibition order entered herein has no basis and should be cancelled as the court had consequently made orders regarding the dispute and the said inhibitions constitute an interference by the Defendant. The Defendant on the other hand contends that if the inhibition is removed, the substratum of the suit would be lost.

Section 68 of the Land Registration Act provides that: '**(1)The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register (3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.**

Section 70 further provides that: The registration of an inhibition shall not be cancelled except in the following cases - (a) on the expiration of the time stated in the inhibition;(b) on proof to the satisfaction of the Registrar of the occurrence of an event stated in the inhibition; (c) on the land, lease or charge being sold by a charge, unless such sale is itself inhibited; or (d) by a consequent order of the court.'

I find that the provisions of Section 68 and 70 which are very explicit, were not put in place in vain but granted the court to protect parties claiming title to land, until an occurrence of an event. In the current scenario, in so far as there are already injunctive orders in place, there is a counterclaim which cannot be ignored nor wished away. As an independent arbiter, it is the duty of the Court to grant each party a chance to present their case before making a final determination.

In the consent order dated 22nd August, 2011, recorded by Lady Justice Mugo, item No. 2 therein was worded as follows: '***That an order of inhibition does issue inhibiting any dealings with parcels of land known as KAJIADO /KITENGELA /32032 - 32067, KAJIADO/KITENGELA/36585 - 36620 and KAJIADO/ KITENGELA / 36516 - 366551.***'

Further, In the case of Isaac Kamau Ndirangu vs Commercial Bank of Africa [2002] eKLR, it was held that. '**it is now settled law that a consent judgement can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake, or misrepresentation.** I note that neither of the parties has applied to set aside the consent order. Further, that in Justice Ngugi's ruling, he did not allude to nor set aside the consent order that had earlier been granted.

In the current circumstances and relying on the case above, I find that since the inhibition order was entered into by consent, the Plaintiffs should have applied to first set aside it aside. Further, I find that if the inhibition is removed, I concur with the Defendant that the substratum of the suit would be lost as the Plaintiffs would deal with the suit lands as they pleased. Since the Plaintiffs are already enjoying an order

of injunction, I do not see any prejudice they would suffer if the inhibition order remained in place until the suit is heard and determined.

Since both the Plaintiffs and the Defendant are staking claim over the suit lands, with the subject of the titles being in dispute, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought and uphold the said inhibition order pending the hearing and determination of this suit.

The upshot of the matter is that the Plaintiffs' application dated the 28th January, 2015 is not merited and hence disallowed.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 6th day of November, 2017.

CHRISTINE OCHIENG

JUDGE