



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 48 OF 2017

JULIUS KINYUA NYAGA.....PLAINTIFF

VERSUS

NJUKI MBURURI

NYAGA NDAGARARI (As Officials of Mbandi Group Ranch)....DEFENDANTS

SILAS K. NYAGA

RULING

1. By a notice of motion dated 3rd March 2017, the Plaintiff sought the following reliefs against the Defendants;

a. A declaration that the Plaintiff is a bonafide member of Mbandi Group Ranch and as such entitled to a share of the suit property under the Land (Group Representatives) Act 1968.

b. An order for the mandatory sub-division of the suit property and inclusion of the Plaintiff in the list of allottees as per his respective share therein.

c. Costs of this suit with interest thereon.

2. It was pleaded in the plaint that the Plaintiff was a member of Mbandi Group Ranch which was the registered proprietor of *Title No. Mbeti/Gachoka/582* (hereinafter known as the ‘suit property’) and that as such a member, he was entitled to a share of the suit property. It was further pleaded that the Defendants were attempting to subdivide and sell the suit property without involving all the members and in particular, the Plaintiff.

3. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 3rd March 2017 seeking an interlocutory injunction restraining the Defendants from sub-dividing, dealing with or disposing of the suit property pending the hearing and determination of the suit. The said application was supported by the affidavit of the Plaintiff sworn on 3rd March 2017 to which he annexed documents of registration of Mbandi Group, a letter of protest to the Land Registrar Mbeere, a memorandum of undertaking between the Mbandi Group and a third party, and minutes of the “Mbandi Clan Group” meeting held on 20th February 2016.

4. The Defendants filed a replying affidavit sworn by Nyaga Ndagarari on 19th April 2017 in which the Plaintiff’s claim was disputed. It was stated that the Plaintiff had no claim whatsoever to the suit property since he had already benefitted from another parcel known as *Title No. Mbeti/Gachoka/468*. It was

further stated that the Plaintiff was listed as a beneficiary of the suit property in the minutes of 20th February 2016 purely by error and that when the error was discovered, it was corrected. The Defendants also stated that they intended to sub-divide the suit property for distribution to its members and not for the purpose of selling it.

5. The Plaintiff filed a further affidavit sworn on 21st June 2017 in response to the Defendants' replying affidavit in which he denied that there was any error in the minutes of the Group Ranch of 20th February 2016 to justify his removal from the list of beneficiaries. He asserted that any decision or resolution for his removal was null and void. He admitted receiving a share from the proceeds of sale of Title No. Mbeti/Gachoka/468 but insisted that he was entitled to a share of the suit property as well since he was a *bonafide* member of the Mbandi Group Ranch.

6. The court has considered the Plaintiff's said application and affidavits in support thereof, the Defendant's replying affidavit and the submissions of the advocates for the parties. The main question for determination is whether or not the Plaintiff has made out a *prima facie* case with a probability of success at the trial as set out in the case of ***Giella Vs Cassman Brown & Co. Ltd [1973] EA 358***.

7. The court is reasonably satisfied that on the basis of the material on record, the Plaintiff has made out a *prima facie* case with a probability of success at the trial. The registration documents and the minutes of Mbandi Group Ranch indicate that one Kinyua Nyaga is a member. He appears to have participated in some meetings and deliberations of the Group. I am aware that the parties herein are not agreed on whether the said 'Kinyua Nyaga' referred to in the Group documents is the Plaintiff Julius Kinyua Nyaga or his step brother Lenox Kinyua Nyaga. In my view, that is an issue which can only be conclusively determined at the trial. In the meantime, the property in dispute ought to be preserved. The court finds that the Plaintiff has satisfied the first principle for the grant of an injunction.

8. The 2nd principle relates to the adequacy or otherwise of monetary damages. An order of injunction will not normally be issued unless the Plaintiff might otherwise suffer irreparable harm or damage which cannot be adequately compensated by an award of monetary damages. The Plaintiff has stated that he may suffer "loss of existing and future business interests more so on account of the property's unique location and convenience". The Plaintiff appears to be concerned with the location of the suit property and the business opportunities it may attract. The defendants did not offer any contrary evidence on this aspect.

9. The court is inclined to accept the Plaintiff's averments on the interest he has in the suit property by virtue of its location. The court therefore holds that such loss of opportunity may not be easily compensated by monetary damages. The 2nd principle has in the circumstances been satisfied. That being my opinion, there would be no need to consider the 3rd principle on balance of convenience.

10. The upshot of the foregoing is that the Plaintiff's notice of motion dated 3rd March 2017 is hereby allowed in terms of prayer No (c) thereof. Costs of the application shall be in the cause.

11. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **2nd** day of **NOVEMBER, 2017**

In the presence of Mr Nzioki for the Plaintiff and Mr. Eddie Njiru for the Defendants.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

02.11.17