



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 69 OF 2016

WACHIRA NJAGI.....1ST PLAINTIFF/APPLICANT

CAROLINE WAMARWA NJAGI.....2ND PLAINTIFF/APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD.....1ST DEFENDANT/RESPONDENT

STEPHEN NJAGI GICHOYA.....2ND DEFENDANT/RESPONDENT

MUCUE NJAGI.....3RD DEFENDANT/RESPONDENT

GRACE MABUTI NJAGI.....4TH DEFENDANT/RESPONDENT

NANCY WAMARWA NJAGI.....5TH DEFENDANT/RESPONDENT

RULING

The plaintiffs have by their amended Notice of Motion dated 27th May 2017 sought the following orders:

1. Spent.

2. Spent.

3. That a temporary injunction do issue restraining the defendants, their servants, agents, assignees or anybody claiming under them from interfering in whatsoever manner with the plaintiffs rice holding No. 3966A and 3966B until this suit is determined or further orders of this Honourable Court.

4. That the Court do restrain the Scheme Advisory Committee, Mwea Irrigation Settlement Scheme from sub-dividing rice holding No. 3966A and 3966B or transfer any portion thereof to the 2nd, 3rd, 4th and 5th defendants until further orders of this Court.

5. That the status quo be maintained to the effect that the 1st plaintiff is in possession and occupation of rice holding No. 3966A and the 2nd plaintiff is in occupation of 3966B.

The application is based on the grounds set out therein and is also supported by the affidavit of the 2nd plaintiff **CAROLINE WAMARWA NJAGI**.

The gravamen of the application is that rice holding No. 3966 has since 1976 been in the names of the 1st plaintiff **WACHIRA NJAGI** having been allocated to him by the 1st defendant. However in 2008, the 1st plaintiff started ailing and approached the 2nd plaintiff to help him in the management of the rice holding to the required standard. They therefore approached the 1st defendant who approved a transfer of two (2) acres of the rice holding to the 2nd plaintiff and the 1st plaintiff was therefore registered as tenant of rice holding No. 3966A, the 2nd plaintiff No. 3966B and one **ERIC MURIUKI NJOGU** No. 3966C – See annexures **CWN 1** and **CWN 2**. That they have been in occupation of their respective portions cultivating them according to the Rules and Regulations of the 1st defendant. However, the 2nd, 3rd, 4th and 5th defendants are threatening to evict them through the 1st defendant's Advisory Committee hence this application as they will suffer irreparable loss and damages if the injunction is not issued.

The 1st, 3rd, 4th and 5th defendants did not file any response to the application.

The 2nd defendant **STEPHEN NJAGI GICHOYA** filed a replying affidavit in which he deponed, inter alia, that in 1973, he was allotted the rice holding No. 3966 but in 1976 following an allegation that he had committed an offence, the 1st defendant requested him to choose a trustee while he handled the case facing him. So he chose his son the 1st plaintiff and the rice holding was allotted to him under the guardianship of 2nd defendant's sister **WAMATHU GICHOYA**. That guardianship was however revoked on 4th June 1980 when the 1st plaintiff became of age. That the 1st plaintiff therefore had no power to transfer or surrender any portion to the 2nd plaintiff whose occupation thereof is illegal. That he therefore filed a complaint to the Provincial Administration to recover his land so that he could distribute it to his sons and this application is premature and un-called for since it is the duty of the 1st defendant to arbitrate over matters relating to ownership of rice holdings.

In a supplementary affidavit dated 10th October 2016, the 1st plaintiff **WACHIRA NJAGI** averred, inter alia, that the rice holding No. 3966 was allotted to him solely by the 1st defendant and not in trust and in any case, it no longer exists having been further sub-divided and allotted to other parties. He also disowned the contents of an earlier affidavit purportedly sworn by him on 10th June 2016 and which is annexed to the 2nd defendant's replying affidavit allegedly revoking an affidavit of surrender dated 14th May 2008 adding that he was intoxicated when he swore it.

The application was canvassed by way of written submissions which have been filed by **MS THUNGU** advocate for the plaintiffs and **MR. MWAI** advocate for the 2nd, 3rd, 4th and 5th defendants.

I have considered the application, the rival affidavits and annexures thereto as well as the submission by counsel.

The remedy sought by the plaintiffs is to restrain the defendants from interfering with their rice holdings No. 3966A and 3966B and also to restrain the 1st defendant from sub-dividing or transferring the same pending trial. The principles that guide a Court considering such an application were set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** as follows:

- 1. The Applicant must establish a prima facie case with a probability of success.***
- 2. A temporary injunction will not normally be granted unless the Applicant shows that he will suffer irreparable injury that cannot be otherwise compensated by an award of damages;***
- 3. If in doubt, the Court will determine the application on the balance of convenience.***

In **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012**, the Court of Appeal had the following to say on what constitutes a prima facie case:

“The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed”

The Court then went on to add the following:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”

I will also be guided by **FILMS ROVER INTERNATIONAL VS CANNON FILM SALE LTD 1986 3 ALL E.R 772** by taking the route or course that appears to carry the lower risk of injustice should I turn out to have been “**wrong**”.

It is not in dispute that the plaintiffs are currently the licencees of rice holding No. 3966A and 3966B and have annexed the relevant receipts issued by the 1st defendant. The 1st defendant did not oppose this application and therefore the plaintiffs’ averments in that regard are not controverted. As licencees and tenants of the 1st defendant therefore, the plaintiffs are entitled to enjoy all the rights and privileges appurtenant to their licences. Of course a licensee who fails to comply with any conditions of his licence stands the risk of having it terminated as provided under **Regulation 8 of the Irrigation (National Irrigation Schemes) Regulations under the Irrigation Act**. No evidence has been placed before me to demonstrate that the plaintiffs are in breach of any of the regulations that govern their licences to the said rice holdings. What is alleged is that there is a threat to evict the plaintiffs from the said rice holdings. As at now, the 2nd, 3rd, 4th and 5th defendants do not hold any licence to the rice holdings No. 3966A and 3966B and any attempt to occupy them can only amount to a trespass. Any genuine claim that the 2nd, 3rd, 4th and 5th defendants have to the said rice holdings will surely have to await the trial of this case. On the above evidence, I am satisfied that the plaintiffs have established a prima facie case to warrant the orders sought.

On the issue of irreparable injury that cannot be compensated by an award of damages, it is clear that any attempt by the defendants to interfere with the rice holdings to which the plaintiffs have licences issued by the relevant authority which is the 1st defendant would, as I have stated above, amount to a trespass and as was held in **MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS K.L.R (E & L 1) 217**, is a clear violation of the law for which an injunction is merited.

Further, the plaintiffs allege that there is a threat to evict them from the rice holdings. Again this is not rebutted. Indeed the 2nd defendant in his replying affidavit has confirmed that in paragraph 10 where he has deponed as follows:

“That in response to paragraph 14, the averments are baseless as I initiated complaint to the Provincial Administration and the 1st defendant herein to repossesses (sic) my land so as to distribute the same to my siblings (annexed is a copy of complaint to the Scheme Manager marked SNG-2)”

In the case of **JAJ SUPER POWER CASH AND CARY LTD VS NAIROBI CITY COUNCIL & OTHERS C.A CIVIL APPEAL No. 111 of 2002**, the Court of Appeal addressed itself as follows:

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”

Finally, the purpose of a temporary injunction is to preserve the property in dispute pending the determination of the main suit. The plaintiffs are currently in occupation and possession of the rice holdings. They hold valid licences issued by the 1st defendant. A denial of the injunctive relief would have the effect of dispossessing them of the rice holdings before the trial given the admission by the 2nd defendant that he wishes to repossess the same. In the circumstances, the plaintiffs have satisfied this Court that they are deserving of the orders sought in the Notice of Motion dated 27th May 2017.

Ultimately therefore and upon considering all the evidence before me, I grant the orders sought in the Notice of Motion dated 27th May 2017. There shall be no order as to costs since the plaintiffs and 2nd defendant are family. The parties are directed to comply with the pre-trial directions so that this suit can be heard and determined within the next twelve (12) months.

Finally, this disputes involves rice holdings in Mwea within the geographical and pecuniary jurisdiction of **HON. P. KIAMA –SENIOR PRINCIPAL MAGISTRATE** at **WANGURU COURT**. It is hereby transferred to that Court for mention on 18th December 2017 for further orders.

It is so ordered.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Ruling delivered, dated and signed in open Court this 8th day of December 2017 at Kerugoya

Mr. Kagio for Ms Thungu for Plaintiffs present

Mr. Mwai for 2nd, 3rd, 4th and 5th Defendants absent

3rd Defendant present

Mr. Gichia Court clerk present

B.N. OLAO

JUDGE

8TH DECEMBER, 2017