



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 197 OF 2014

KIMUNGENY ARAP RUTO & 87 OTHERS.....PLAINTIFFS

VERSUS

LUCY MUMBUA MULILI & 16 OTHERS.....DEFENDANTS

RULING

(Suit by several persons claiming entitlement to land; verifying affidavit stating that authority has been given and a signed letter of authority annexed; defendants demonstrating that some of the plaintiffs are deceased and could not have signed the authority; suit clearly accompanied by a false verifying affidavit and false authority; suit dismissed with costs)

1. The application before me is that dated 3rd July 2014 filed by the plaintiffs. It is an application for injunction that was filed together with the suit. Through this application, the plaintiffs want the defendants restrained from using or dealing with the land parcel L.R No. 9381 in Nyahururu (the suit property), pending the hearing and determination of this suit. The application is opposed and I think it is necessary that I give a background to this suit before tackling the application.

2. This suit was commenced by way of plaint. In their plaint, the plaintiffs have pleaded that they are the registered/allotted owners of the suit property and that the defendants have illegally and without the consent of the plaintiffs entered into the same claiming that it belongs to them. In the suit, they want a declaration that they are the allotted owners of the suit property and an order of permanent injunction to restrain the defendants from it.

3. In their grounds in support of the application for injunction, the plaintiffs have averred that they have been on the suit land for over 50 years and they are therefore entitled to the land by way of adverse possession. The supporting affidavit is sworn by Alfred Ndiritu Kingori who is the 2nd plaintiff. He has annexed some documents dating back to the year 1965. These documents seem to suggest that there was a group of squatters, identified as Maina Squatters, who were to be settled in what the plaintiffs state is the suit property.

4. The plaintiffs state that they are the squatters that were to be settled on this land and that they have been in occupation for over 50 years. It is alleged that, the defendants now claim that the land belongs to them and it is said that they have appeared with a map showing that the land has been subdivided into plots belonging to them.

5. Mr Ndiritu has deposed that they are now being harassed and being charged in court for trespass. It is for that reason that the plaintiffs now want the injunction sought.

6. The State Law Office entered appearance on behalf of the 1st, 2nd, 6th, 7th, 9th and 10th defendants who are apparently public officers. A defence and 2 replying affidavits sworn by the 2nd and 7th defendants were filed together with a preliminary objection.

7. In the replying affidavit sworn by the 2nd defendant, the Chief of Maina Location, it is averred that the Maina Squatters were all settled between 2009- 2012 after a vetting process. It is stated that all members were allocated a plot at Maina Squatters Settlement Scheme. He has pointed out at discrepancies in the plaint such as the 12th plaintiff who is named as plaintiff and defendant. He has also doubted the authenticity of the authority given to Mr. Ndiritu, as some of the persons, said to have given authority and who are named as plaintiffs, are dead.

8. He annexed Certificates of Death to demonstrate this alongside some letters from the families of those who he states are deceased. He has averred that the suit is engineered by one Joram Njau Gicheha a son of Simon Gicheha Njeru who is among the beneficiaries of the Settlement Scheme. It is said that Joram was given a portion by his father which he later sold and thereafter started interfering with a plot owned by one Samuel Kibara Gathogo.

9. This led to Joram being charged in court for trespass. It is his view that these proceedings are an attempt to derail the criminal case.

10. The 7th defendant is Chief of Mutitu location where the Maina Settlement Scheme is situated. In his replying affidavit, he has given a history of the Maina Squatters. He has stated that they were initially 82 in number who were allowed into the land by a white settler. Later they were joined by 58 others. To resolve their settlement the two groups formed a joint committee which worked together with the Director of Land Adjudication. After vetting, they were issued with allotment letters to their plots. It is also stated that the correct land parcel in issue is the land parcel L.R No. 11725 and not the suit property L.R No. 9381. It is averred that the 2nd plaintiff was never a beneficiary and so too some of the named plaintiffs.

11. In the preliminary objection, it is argued inter alia that the suit as drawn offends the provisions of Section 3 of the Public Authorities Limitations Act; offends Section 12 as read with Sections 13A and 16 of the Government Proceedings Act; and that no consent to sue has been obtained by some of the plaintiffs.

12. The other defendants are represented by the law firm of M/s Tumuti & Company Advocates but I have not seen any replying affidavit or Grounds of Opposition with regard to the application for injunction.

13. I directed that the Preliminary Objection be heard alongside the application for injunction. I also directed counsels to file written submissions. All counsels filed submissions including Mr. Tumuti. I have considered these submissions.

14. I will start with the preliminary objection and I choose to be specific to the complaint that the suit has not been filed with the authority of the named plaintiffs. It is argued that some of the plaintiffs are deceased and it cannot be that they have signed any document authorizing the filing of this suit. In his submissions, Mr. Wachira Nguyo for the State, inter alia pointed out that plaintiff No. 46 is deceased and she could not have consented to sue her son, who is named as 2nd defendant.

15. I have seen in the Replying Affidavit of Joseph Muraya Waithaka, the Certificates of Death of Micah Mukira Gatheka, the 43rd plaintiff which shows that he died on 26th May 2004; Joseph Njoroge Gathua, the 69th plaintiff, which shows that he died on 29th May 2000; and Joyce Nyambura Mwangi, the 54th plaintiff which shows that she died on 10th July 1999. I have also seen a Burial Permit in respect of Wanjira Njogu Mutua named as the 52nd plaintiff which shows that she died on 21st June 2011.

16. There is a letter written by one Fredrick Kariuki Gathura stating that Grace Nyambura Gathura is deceased. There are also letters by some plaintiffs who state that they have not sanctioned this suit and have not signed any authority.

17. These are written by Samwel Kibaara Gathogo (the named 12th plaintiff), David Ngata Githinji (the named 62nd plaintiff) and Kihara Meshak Warutere (the named 71st plaintiff).

18. The Verifying Affidavit in this matter has been sworn by Alfred Ndiritu Kingori who has stated that he has the authority of all the other plaintiffs. He annexed an authority which purports to have been signed by all the named plaintiffs. Mr. Ndiritu did not file any affidavit to refute the claim that some of these persons are deceased and could not therefore have granted him the authority to institute this suit.

19. Order 4 Rule 2 requires a plaint to be accompanied by a Verifying Affidavit. In Rule 3, where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

20. In our case, it is clear that the purported written authority is fraudulent. It could not have been signed by persons who died long before the suit was instituted.

21. It follows that the suit herein is accompanied by a fraudulent verifying affidavit and a fraudulent authority. This court cannot condone such fraud. The case herein is clearly an abuse of the process of court and the only treatment it deserves is to be dismissed with costs. The costs will be shouldered by Alfred Ndiritu Kingori who is the person who swore that he had obtained the authority of all other parties when in fact he could not have.

22. With the dismissal of the suit, the application for injunction automatically falls by the wayside.

23. Following the above, I really do not see the need of going into the other issues raised in the preliminary objection.

24. This suit is hereby dismissed with costs.

25. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th January, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr Geoffrey Otieno holding brief for M/s Mongeri and Company Advocates for plaintiffs/applicants

Mr Wachira Nguyo present for 1st, 2nd, 6th, 7th, 9th and 10th defendants.

M/s Tumuti & Company Advocate: Absent

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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