



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 165 OF 2014

NGENDA LOCATION RANCHING COMPANY LTD.....PLAINTIFF

VERSUS

JOHN NDUNG’U GITAKA & 24 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be applied; suit by plaintiff a land buying company seeking eviction of the defendants; Counterclaim by some of the defendants/applicants claiming land by way of adverse possession and filing application for injunction; among the grounds being that survey fees sought by plaintiff company to distribute land to defendants and other members is too high; no correlation between this and a claim for adverse possession; applicants seemingly being in possession by dint of their membership hence prima facie with permission which cannot sustain claim for adverse possession; application dismissed with costs)

1.This suit was commenced by way of plaint filed on 11th June 2014 filed through the law firm of M/s Rodi Orege & Company Advocates. The plaintiff is a limited liability company whereas the defendants are described as adults of sound mind. In the plaint, the plaintiff has pleaded that it is the registered owner of several land parcels being the land parcels number 11764 (original No. 9397/1, 9398/2 and 4767) measuring approximately 398 acres; land parcel number 9264 (original numbers 8943/5 and 469/12) measuring approximately 251.24 acres ; and land parcel No. 6290 measuring approximately 5.8 acres.

2. The said parcels of land are said to be developed through the planting of coffee and macadamia trees, and a factory dug borehole fitted with an electrical water pump for irrigation. It is averred that on or about 30th May 2014, the defendants without any colour of right, invaded the plaintiff's said parcels of land and inter alia started constructing illegal structures , damaged the coffee and macadamia trees, destroyed the factory, furniture and buildings; damaged the irrigation pipes and pumps and caused wastage to the land.

3. It is said that since 6th June 2014, the defendants started cultivating and subdividing the property amongst themselves and invited unsuspecting persons to buy the property through announcements made in Inooro FM radio. In the suit, the plaintiff asked for the following orders :-

(a) *Vacant possession and orders of eviction from the suit properties.*

- (b) *Permanent orders of injunction to restrain the defendants from the suit properties.*
- (c) *Costs of the suit.*
- (d) *Interest.*
- (e) *Any further relief deemed fit to grant.*

4. Together with the suit, the plaintiff filed an application for injunction but which appears to have been abandoned along the way.

5. The 1st, 2nd, 3rd and 25th defendants entered appearance through the law firm of M/s Kiplenge & Kurgat. They also filed a defence and counterclaim. They denied encroaching on the plaintiff's farm and averred that they have been in adverse occupation of the land since the year 2001. In their counterclaim, they averred that they are entitled to the land by way of adverse possession of the portions that they occupy. They have also asked for costs and any further relief deemed fit to grant. A reply to defence and defence to counterclaim was filed by the plaintiff in which the plaintiff refuted their claim to the suit properties.

6. Through an application dated 15 April 2015, and filed on the same date, the 1st, 2nd, 3rd and 25th defendants (whom I will hereinafter refer to as the applicants), have asked for two principal orders being :-

- (i) *A perpetual injunction restraining the plaintiff/respondent from issuing all Survey Receipts from the 15th of April 2015 until the determination of the main suit.*
- (ii) *A restraining injunction against the plaintiff/respondent , its agents or servants from further selling, transferring, charging or in any way alienating the suit property pending the determination of the main suit.*

7. The application is based on the following grounds :-

- (a) *That the plaintiff company entered into a sale agreement with Stima Investment Co-operative Society without the resolution by all members of the company.*
- (b) *That the plaintiff company has already alienated, distributed, sub-divided and transferred the suit land L.R No. 11764 and L.R No. 6290 despite a pending suit at the High Court of Kenya in the Environment and Land Court No. 165 of 2014 (which appears to me to be this suit) in which the main suit is being heard.*
- (c) *That the suit land is Agricultural land and the plaintiff company does not have the necessary consent from the Land Control Board to transfer, sell, alienate or distribute the suit land.*
- (d) *That the plaintiff company through its Board of Directors fixed the prices of the Survey Fee which is high without the resolution by all the members of the Company.*

8. The supporting affidavit is sworn by John Ndungu Gitaka, the 1st defendant. He has averred that the applicants are shareholders of the plaintiff company and that they entered into the suit land in their capacity as shareholders. He has averred that despite this case being pending, the plaintiff company through its Board of Directors has set a very high survey fee without the resolution of members. A survey receipt of Kshs. 30,000/= is annexed. It is also stated that the plaintiff company has alienated, subdivided, transferred, and distributed the suit properties L.R No. 11764 and L.R No. 6290 despite this pending case. Some photographs said to show the subdivisions are annexed. It is further deposed that the consent of the Land Control Board was not sought despite the land being agricultural land. The applicants state that they stand to suffer irreparably if the plaintiff company executes its intentions.

9. The application is opposed by the plaintiff and the company has filed a replying affidavit sworn by Felister Njeri Cheror, who is one of its directors. She has inter alia deposed that Mr. Gitaka, who has sworn the supporting affidavit, purchased shares from one of the original shareholders of the company in the year 2013, and that no shareholder could rightfully enter and occupy the suit properties before subdivision and balloting of individual plots. She has admitted that the company sold the property L.R No. 9264 but has denied that this was done without a meeting or resolution of members. She has annexed various meetings and resolutions to support her point.

10. She has also denied that the survey fee has been set very high as alleged or without authority. She has deposed that the company has subdivided, transferred and distributed the land parcels No. 11764 and 6290 and that each individual shareholder that has paid the survey fees and balloted has already taken possession of their individual plots. It is averred that the 1st defendant has failed and/or refused to pay the survey fee. She has further deposed that the company went through all processes for subdivision, transfer and distribution of the properties. It is her view that the plaintiffs have not established a prima facie case and that the application needs to be dismissed.

11. I allowed both parties to file supplementary affidavits. In their supplementary affidavit, the applicants have averred that Felista is not a director of the company. They pointed out that the Articles of Association of the Company only has provision for 10 directors yet Felista is listed as the 11th director. They inter alia have averred that Felista has no authority to swear affidavits on behalf of the company.

12. The respondent on the other hand deposed inter that she is indeed a director of the company and that the objective of the company was to finally subdivide land among shareholders. She has added that all legal processes have been complied with.

13. Before the hearing of the application, the other defendants filed affidavits stating that they are not opposed to the plaintiff's suit. The main suit by the plaintiff is therefore only opposed by the four applicants.

14. I have considered the application alongside the submissions of counsel. The application before me appears to be one for injunction and I stand guided by the principles laid down in the case of **Giella vs Cassman Brown (1973) EA 358** where it was stated that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success and also show that he stands to suffer irreparable loss if the injunction is not granted. If in doubt, the court will decide the application on a balance of convenience.

15. It follows that an application for injunction is hinged on a party demonstrating a prima facie case. This of course can only be discerned from the pleadings of the party and the evidence tabled in support of the application for injunction. The case of the applicants as pleaded in their defence and counterclaim is that they are entitled to portions of the suit properties by dint of adverse possession.

16. It is however apparent to me that the applicants are actually shareholders of the plaintiff company in possession by virtue of their membership in the company. They are therefore part and parcel of the company and if they were in possession, it seems to me, at least at this stage of the proceedings and without any prejudice to a contrary finding after hearing the case, that they have been in possession with the permission of the plaintiff company, which casts doubt as to the strength of the applicants' case in claiming the land through the doctrine of adverse possession.

17. It in fact seems to me that the quarrel that the applicants have is the manner in which the company is distributing its assets, whether to shareholders or to other parties through sale. If this is their contention, which as I have said appears to me to be the case, I do not see how pleadings claiming land by way of adverse possession helps their cause.

18. I do not see how then can contend that the survey fees that they have been asked to pay so that they can get their distribution, which they are entitled to by dint of their membership, tallies with a claim for adverse possession, which is the case pleaded by the applicants.

19. The plaintiff is actually ready and willing to give them land, and all they are required to do is pay survey fees. If they feel that the survey fee is high, how is that connected to a suit for adverse possession ? In brief I am not convinced that the plaintiff has established a prima facie case and not being in doubt, I need not consider the balance of convenience.

20. I have considered the issue raised about the directorship of Felister, but in light of the fact that I am not persuaded that the applicants have established a prima facie case, I see no need to address it.

21 In brief, I find no merit in this application and the same is hereby dismissed with costs.

22. It is hereby 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 Biko holding brief for Mr Morintat for 1st, 2nd and 25th defendants/applicants.

Mr Orege present for plaintiff /respondent

CA: Janet

MUNYAO SILA

JUDGE

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