



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 10 OF 2015

PAUL KIPROP CHESIRE & 72 OTHERS (All Being Member Of

Kokwenbei Community Based Organization).....PLAINTIFFS

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

LOMOLO (1962) LIMITED.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiffs claiming an ancestral right over the suit property and having filed a reference to the National Land Commission for historical injustice; there having been previous suits decided against the plaintiffs and plaintiffs restrained by a permanent injunction; whether in light of the order of permanent injunction against the plaintiffs, the plaintiffs can succeed in this application for injunction; grant of injunction will be akin to a stay of judgment of the previous suits; application dismissed)

1. The application before me is that dated 10 June 2015 filed by the plaintiffs. It is an application for injunction brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010. The application as drawn seeks orders to have the 2nd defendant, Lomolo Limited, restrained from evicting the plaintiffs or in any way interfere with their possession and use of the land parcel L.R No. 10939, pending the hearing and determination of the application. But I believe that what the applicants want is to have the 2nd defendant restrained, pending the hearing of the suit and I will deem the application as one seeking such orders. The application is opposed by the 2nd defendant.

2. Before I go into the application, I think it is necessary that I set out a little background on this suit.

3. This suit was commenced by way of plaint filed on 19 January 2015. The plaintiffs have described themselves as members of Kokwen-Bei Community Based Organization. It is their pleading that since time immemorial, their forefathers have been in occupation of the land parcel L.R No. 10939 (the suit property) and that the said land is their ancestral land. During the colonial period, it is pleaded that white settlers took over the plaintiffs' land and converted it into their own use and constructed temporary villages where the plaintiffs' community was housed. Around the year 1964, the 2nd defendant obtained title to the land and has been using the land as a sisal farm ; it is pleaded that he has been using the plaintiffs as a source of cheap labour.

4. It is the plaintiffs' case that their removal from their ancestral land and grant of title to the 2nd defendant is a historical injustice that has denied them the use of their land and reduced them to squatters. It is pleaded that it is the duty of the National Land Commission, the 1st defendant, to investigate the plaintiffs' claims and correct the historical injustice. It is further pleaded that the plaintiffs are in occupation of the suit property and reside on it with their children and animals and that they know no other home. It is averred that the plaintiffs now live in deplorable conditions of poverty while the 2nd defendant exploits them as a source of cheap labour in their own ancestral land.

5. In the suit, the plaintiffs want the following orders:-

I. An order directing the 1st defendant to initiate investigations into the suit property and find whether or not historical land injustice was occasioned to the plaintiffs as the land belongs to them as their ancestral land.

II. The registration of the suit property to the 2nd defendant be revoked and the same do revert back to the plaintiffs as communal land owned by them.

III. A permanent injunction be issued against the 2nd defendant by itself, servant and/or agents restraining them from evicting the plaintiffs from the suit property.

(iv) Costs of the suit plus interest.

6. The supporting affidavit to the application for injunction is sworn by Paul Kiprop Chesire. He has deposed that the Kokwenbei Community Based Organization is made up of descendants of the historical owners of the suit property. He has more or less repeated the averments in the plaint that they have been in possession of the land and that they have filed a complaint with the National Land Commission and that the Commission has started its own investigations. It is further deposed that as these proceedings have pended, the 2nd defendant has been demolishing their houses, burning their land, digging trenches and filling them with water and killing their livestock in an effort to evict them from the land. It is therefore his view that as the court deals with the matter, the 2nd defendant should be restrained from interfering with their possession of the land.

7. So far, only the 2nd defendant has entered appearance. The 2nd defendant also filed defence and has opposed the application for injunction through the replying affidavit of Harris Horn Junieur, a director of the 2nd defendant. The position of the 2nd defendant is that the case of the plaintiffs is defeated by the Limitation of Actions Act, which gives a period of 12 years for a claim over land. The 2nd defendant has also averred that the suit property does not exist as it has been subdivided into three other titles. It is averred that the 2nd defendant acquired the land for valuable consideration after purchasing it from the original owner and that its relationship with the plaintiffs has been one of employer/employee. It is stated that if the plaintiffs have a complaint on their remuneration, they can lodge a claim at the Industrial and Labour Relations Court.

8. It is also stated that this suit is res judicata. The 2nd defendant has pointed at two previous suits, that is the suit *Nakuru High Court Case No 152 of 2006 (OS)* and *Nakuru High Court Case No. 98 of 2013 (OS)*. There is also a third suit, *Nakuru ELC Judicial Review No. 3 of 2015*, where the 2nd defendant has sued the National Land Commission (NLC) seeking inter alia, orders to have the NLC prohibited from investigating its title on a reference made by the plaintiffs. In the judicial review suit, the plaintiffs applied to be enjoined as interested party and filed an application for injunction which was rejected. It is the view of the 2nd defendant that the applicants are lazy opportunists who seek to acquire land through fraud and racial profiling. It is deposed that the applicants have on several occasions invaded the land of the 2nd defendant armed with poisoned arrows and attacked its employees. It is the position of the 2nd defendant that the plaintiffs have no right over the suit property and have therefore not established any prima facie case.

9. I have considered the material filed alongside the arguments of Mr. Maina for the plaintiffs and Mr. Githui for the 2nd defendant and I take the following view of the matter.

10. This is an application for injunction and I stand guided by the principles laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***. In the said suit, it was held that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case and also demonstrate that he stands to suffer irreparable loss if the injunction is not allowed. If in doubt, the court will decide the application on a balance of convenience.

11. The case of the plaintiffs is based on a complaint of historical injustice. They are of the view that their claim for historical injustice needs to be investigated by the NLC and in the meantime, they should be allowed to stay on the suit property. That is why they want the injunction. It however appears to me that the question whether the applicants are entitled to remain on the land was settled in the two suits mentioned by the 2nd defendant.

12. The suit *Nakuru HCCC No. 152 of 2006* was a claim for adverse possession over the suit property. That suit was against the 2nd defendant and a company known as Deans Estate Limited. Deans Estates Limited had purchased a portion of the land parcel L.R No. 10939 which is the suit property herein. There was a parallel suit, *Nakuru HCCC No. 36 of 2007*, filed by Deans Estates, wherein the said company sought a declaration that the plaintiffs were trespassers and further sought a permanent injunction against them. The two suits were consolidated and in a judgment delivered on 24 January 2014, the court (Ouko J, as he then was) dismissed the case of the plaintiffs and declared that they are trespassers on the suit property. A permanent injunction was issued to restrain them from the suit land.

13. In the other suit, Nakuru HCCC No. 98 of 2013, the plaintiffs filed another suit, against the 2nd defendant, seeking orders that they be declared owners of the suit land by way of adverse possession. In a judgment delivered on 10 December 2014, Waithaka L J, held that the suit was *res judicata* as the matters had already been determined in the previous judgment of Ouko J. The case was dismissed with costs.

14. It will be seen that it has already been held before, that the plaintiffs have no right to be in the suit property and a permanent injunction issued against them from being on the suit land. It follows that they have no business being on the suit property for they were ordered to stay away from it. That being the case, if I allow their application for injunction, I will basically be staying the orders issued by Ouko J. I am afraid that I have no jurisdiction to do so.

15. If the plaintiffs were aggrieved by the previous two judgments, then their avenue was to appeal. Although this suit is framed differently, and is a suit inter alia seeking the intervention of the NLC to investigate the plaintiffs' alleged historical injustices, it cannot be escaped that the plaintiffs have already been restrained from the suit property. Given that position, I am afraid that I cannot allow their application for injunction, for as I have stated earlier, that will be going against a valid judgment delivered by my predecessors.

16. I therefore see no merit in this application and it is hereby dismissed with costs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th January, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Ikua for plaintiffs/applicants

Ms. Alwala for 2nd defendant /respondent

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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