



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC CASE NO. 203 OF 2015
PETER NDIRANGU NYAMBURA 1ST PLAINTIFF
JOEL NDIRANGU NJOKI 2ND PLAINTIFF
-VERSUS-
PETER NDIRANGU MUTURI DEFENDANT

RULING

1. **On 22nd July, 2015** the plaintiffs (applicants), Peter Ndirangu Nyambura and Joel Ndirangu Njoki, filed the notice of motion of even date seeking to restrain the defendant (respondent), Peter Ndirangu Muturi, by himself, his servants, agents or otherwise howsoever from trespassing, entering, demolishing structures, tilling or in any other way interfering with their quiet possession of the parcel of land known as **Mutara/Mutara Block II/73** (hereinafter referred to as the suit property) pending the hearing and determination of the application and the suit.
2. The application is premised on the grounds that the applicants are the registered proprietors of the suit property; that no prejudice will occasion on the respondent if the orders sought are granted and that unless the orders are granted, the applicants stand to suffer irreparable damage.
3. The application is supported by the affidavit of the 2nd applicant, Joel Ndirangu Njoki, sworn on **22nd July, 2015**. In that affidavit, the 2nd applicant has deposed that on or about the year 1985, several members formed a land buying company called Othaya Mainga Chinga Exffaco Limited; that his grandfather, Daniel Ndirangu Wauthe (deceased) owned plot No. 11/73 which he transferred to them (the plaintiffs). The deponent explains that after the parcel of land was transferred to them, the documents of balloting were left with the land buying company, which misplaced it.
4. The deponent further explains that on or about 16th October, 2010 the members of the land buying company elected another management team, comprising, among other persons, the respondent.
5. It is the applicants' case that after the original list of members was prepared, they were indicated as the owners of the suit property. On the basis of that list, the applicants applied and obtained title to the suit property.
6. In support of the averments contained in the supporting affidavit, the following documents are annexed:-

- a) Membership card marked as **JNN-1**;
- b) Letter from the company's Board of Directors to the Land Registrar Nanyuki, confirming that they are the rightful beneficiaries of the suit property, marked **JNN-2**;
- c) Police Abstract issued on 11th July, 1995 confirming that the ballot card in respect of the suit property was lost, marked **JNN-3**;
- d) Letter from the Chief Mutara Location to the Land Registrar concerning the directors of the company at the material time, marked **JNN-4**;
- e) List of members of the company marked, **JNN-5**; and
- f) A copy of the Title Deed issued to them in respect of the suit property, marked **JNN-6**.

7. In reply and opposition to the application, the respondent filed the replying affidavit he swore on 10th August, 2015 in which he has, *inter alia*, deposed that he obtained title to the suit property on 7th September, 2011; that his title deed is valid and that he has been in possession of the suit property since 1971 and has effected massive developments thereon.

8. The respondent contends that the suit property was transferred to him by his mother, Jane Wanjiru Mugambi; that there have been attempts to tamper with the list of beneficiaries of the land allocated by the company and that the list he has annexed to his supporting affidavit and marked as **PNM-2** shows the authentic list of members of Uruku parcels of land, of which the suit property belongs.

9. Further that he never sold, transferred and/or parted with his possession of the suit property or had any dispute over his ownership or occupation of the suit property since 1971.

10. The respondent confesses that he is facing criminal charges in Nyahururu CMC Criminal case No. 1238 of 2015 over the suit property but contends that, legally, he is presumed innocent unless proven guilty.

11. Terming the registration of the suit property in favour of the applicants irregular, mistaken, fraudulent and illegal, the respondent contends that since the title issued to him had not been cancelled or revoked when the respondent's title was issued, the suit property was not available for registration in favour of the applicants.

12. The respondent further contends that the applicants' have not adduced any evidence to show that the suit property belonged to their grandfather or to show that they are the administrators of the estate of their said grandfather; that the directors of the company who issued the documents pursuant to which the plaintiffs were issued with their title deed are not properly on record and that this court has no territorial jurisdiction to hear and determine the suit and the application.

13. When the matter came up for hearing, counsel for the applicants, **Ms Muhoho**, relied on grounds on the face of the application and the affidavit sworn in support thereof.

14. Counsel for the respondent, Mr. Sigilai, made reference to the affidavit sworn in reply to the issues raised in the application and pointed out that the respondent denied all averments made against him and made a number of averments concerning his entitlement to the suit property which averments the applicants have not controverted.

15. Urging the court to deem the averments contained in the respondent's replying affidavit as admitted, Mr. Sigilai urged the court to dismiss the application on the grounds that his client has title to the suit property, has been in possession of the suit property and has effected development thereon. He submitted that the applicants have not explained how they acquired the suit property and reiterated the contention that this court lacks the territorial jurisdiction to hear and determine the suit.

16. In a rejoinder, Ms Muhoho, submitted that the issues raised by the respondent's counsel cannot be addressed at the interlocutory stage but at the main hearing. With regard to the contention that this court lacks jurisdiction to hear and determine the suit, Miss Muhoho, maintained that this court has jurisdiction to hear and determine the matter.

Analysis and determination

17. From the pleadings and the submissions made by counsels for the respective parties, the issues for the court's determination are:-

- 1) Whether this court has jurisdiction to hear and determine the application and the suit herein?
- 2) Whether the applicants have made up a case for being granted the orders sought?
- 3) What is the order as to costs?

18. On the issue as to whether this court has jurisdiction to hear and determine the dispute herein, being of the view that the decision in the case of **Lydia Achieng Abura v. Usonik Farm Purchase Cooperative Society Ltd (2014) eKLR** properly addresses the issue, in addressing that issue, I adopt that decision. In that case **Kaniaru J.** stated:-

“To buttress the argument on application of Section 12 and other jurisdictional concerns the plaintiff availed the decided case of Daniel Kimani Moseka vs. Japheth Arthur Mwangi Kiurire: HCC No.228/2011, Machakos. In the case an objection akin to the one raised herein was advanced by the defendant. The defendant wanted the case transferred to Nairobi from Machakos on the ground that the suit property was situated in Nairobi. The court dismissed the application on the basis that its jurisdiction was national, not local, and that Section 12 of Civil Procedure Act (Cap 21) applied only to subordinate Courts.

I am persuaded by the Court's reasoning in the availed case. I am also persuaded by the argument availed by the plaintiff. This Court is a superior court of record. It is clearly at par with the High Court. Its jurisdiction is national, not local. Section 12 of the Civil Procedure Act clearly applies to subordinate courts, whose jurisdiction is clearly not national and has local limits. The defendant's counsel is wrong to think that Section 12 of Civil Procedure applies to this Court. It applies to subordinate Courts and this is not one such Court. It is a superior Court of record....I expected the defendant also to tell the court of any inconvenience or disadvantage it would experience if the matter is heard here. None was forthcoming. I thought too that I would be told of any ulterior motive that plaintiff may have had in filing the case here or any undeserved advantage that would accrue to the plaintiff if the case is heard at Kisumu instead of Eldoret. There was nothing.

When all is considered, it is clear that the defendant's appreciation of the law is wrong. The law and other circumstances highlighted during hearing clearly favour the rejection of the objection. Without equivocating therefore, I hold the objection unmeritorious and dismiss it...” (Emphasis supplied).

19. With regard to the 2nd issue, for the applicants to be granted the orders sought they must satisfy the conditions set in the case of **Giella VS Cassman Brown & Co. Ltd 1973 E.A 358** which are:-

- 1) **They must show a *prima facie* case with a probability of success at the trial.**
- 2) **They must demonstrate that unless the orders sought are granted they might otherwise suffer irreparable injury which would otherwise not be adequately compensated by an award of damages.**
- 3) **If in doubt, the Court will determine the application on a balance of convenience.**

20. What is a *prima facie* case was defined by the Court of Appeal in the case of **Mrao VS First American Bank of Kenya Ltd Civil Appeal NO. 39 of 2002 (2003 e K.L.R)** in the following words:-

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

21. A temporary injunction being an equitable remedy, it will not be granted where it can be demonstrated that the applicant has not approached the Court with clean hands. Further, as was held in the case of **Films Rover International 1980 3 ALL. E.R 772**, the Court considering such an application should take the course that appears to carry the lower risk of injustice.

22. In applying the above principles to the instant case, upon review of the affidavit evidence adduced in this case, I find as a fact that both parties to this suit claim entitlement to the suit property. In fact both parties have title in respect of the suit property. The title held by the respondent was obtained before the title held by the applicants. Although the title held by the respondent is being challenged on the grounds that it was irregularly obtained, in the absence of any determination concerning that allegation, this court cannot rely on that allegation to find in favour of the applicants.

23. I also note that in his replying affidavit the respondent has raised many issues concerning his entitlement to the suit property which the applicants did not deem necessary to controvert. Such issues include the contention by the respondent that his title to the suit property is valid, he is in possession and has been in possession of the suit property since 1971; he has never parted with the possession of the suit property and that the applicants' registration as the proprietors of the suit property was irregular.

24. Although the applicants, *inter alia*, seek to restrain the respondent from interfering with their quiet possession of the suit property, I note that the applicants have not indicated whether they are in possession of the suit property. Being the claimants, the applicants were duty bound to adduce evidence capable of proving that they are the ones in possession and not the respondent. In the absence of the said evidence and given the fact that the respondent's allegation to the effect that he is and has been in possession of the suit property is not controverted, I find and hold that the applicants have not made up a case for being granted the orders sought.

25. The upshot of the foregoing is that the application dated 22nd July, 2015 has no merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nyeri this 4th day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Cheruiyot h/b for Ms Muthoni Muhoro

N/A for the defendant

Court assistant - Lydia