



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 514 OF 2013

MOSES CLEMENT MUHIA NJOROGE.....1ST PLAINTIFF
JACINTA NYAMBURA MBURU.....2ND PLAINTIFF
JAMES NDUNGU KINYANJUI.....3RD PLAINTIFF

VERSUS

JANE WAITHERA LESALOI.....1ST DEFENDANT
JOSEPH GATHAGU KAGIKA.....2ND DEFENDANT
ANDRIAN MURIITHI.....3RD DEFENDANT
JOHN GITAU KIOI.....4TH DEFENDANT
THE DISTRICT LANDS SURVEYOR, KAJIADO.....5TH DEFENDANT
DISTRICT LANDS REGISTRAR, KAJIADO.....6TH DEFENDANT

RULING

In an application dated 8/5/2014, the Plaintiffs prayed for orders that:

1. *Spent*
2. *Spent*
3. *The 2nd, 3rd and 4th Defendants do remove the Plaintiff's land parcels numbers NGONG/NGONG/50356, NGONG/NGONG/59355 and NGONG /NGONG/59372 all from Original Title No. NGONG/NGONG/48197 any structures, buildings, houses of permanent or temporary nature, shelter or any other development built or otherwise brought by the 2nd, 3rd and 4th Defendants thereon either before or after the issuance of the interim injunction orders given on 14/3/2014 and issued on 18/3/2014 with immediate effect.*
4. *The Plaintiffs be allowed to forcefully evict, remove and/or eject the 2nd, 3rd and 4th Defendants*

and to demolish and remove any structures, buildings, houses of a permanent or temporary nature, shelter or any other development on the Plaintiff's land parcel numbers NGONG /NGONG/50356, NGONG/NGONG/59355 and NGONG/NGONG/59372 all from Original Title No. NGONG /NGONG/48197 erected, built, or otherwise brought onto the Plaintiff's land by the Defendants, either jointly or severally.

- 5. Such forceful eviction, removal and/or ejection of the 2nd, 3rd and 4th Defendants and the forceful demolition and removal of structures, buildings, houses of a permanent or temporary nature, shelter or any other developments on the Plaintiff's land parcel numbers NGON /NGONG/50356, NGONG/NGONG/59355 and NGONG/NGONG/59372 all from Original Title No. NGONG/NGONG/48197 be carried out by a court bailiff of the Plaintiff's choice and the OCS, Ngong Police Station to provide security and assist in such ejection, removal and demolition of any structures erected by the 2nd, 3rd and 4th Defendants.**
- 6. The Court Orders given on 14th March and issued on 18th March 2014 do remain in force and do operate in tandem with the orders herein.**
- 7. The costs of the application be borne by the 2nd, 3rd and 4th Defendants in any event.**

The application is based on the grounds outlined in the application and supported by an affidavit sworn by the 1st Plaintiff with the authority of his co-Plaintiffs. The deponent gave a history leading to the orders given by the court on 14/3/2014. The said orders were pursuant to their application dated 30/4/2013 which was first heard *ex-parte* and interim orders granted. The application was served upon the Defendants who filed responses thereto and the application was thereafter heard *inter-partes*. It is deposed that the orders granted on 14/3/2014 was served upon all the 2nd, 3rd and 4th Defendants on 27/3/2014. The 1st Plaintiff deposes that on visiting their plots on 8/4/2014, they noticed unauthorized developments on their parcels carried out by the 2nd, 3rd and 4th Defendants. He deposes that they made considerable effort to evict the said Defendants out of the property but that they are still adamant that they will not give vacant possession nor demolish structures. It is the 1st Plaintiff's deposition that despite knowledge of the orders of this court the Defendants have continued to disobey the same.

In Reply to the Notice of Motion, the 3rd Defendant with the authority of the 4th Defendant swore a Replying Affidavit on 23/5/2014 wherein he deposed that they have lodged an appeal against the ruling dated 14/3/2014. They denied personal service of the court order together with the penal notice as alleged by the Plaintiffs. The deponent stated that the developments on the parcels of land in dispute were put in place when the District Surveyor concluded the survey work on 11/4/2013 in terms of the decree issued by the Lower Court which is before the court made orders on 30/4/2013. It is deposed that the surveyor who undertook the survey work of the Plaintiff's portion did not physically undertake the work on the ground and lay beacons. Therefore, the 3rd Defendant deposed that in the absence of a physical survey and physical placement of beacons, it will be impractical to comply with the orders of the court.

The application was canvassed by way of written submissions. J.M. Njengo & Co. Advocates for the Plaintiffs filed submissions dated 23/6/2014 wherein counsel urged the court to grant the orders sought in the application submitting that it is clear that the Defendants have knowingly breached the terms of the court order. In respect of Prayer No. 3, counsel submitted that the same had been prompted by the need for clarity in the earlier order given by the court on 14/3/2014 and also because the Police are not ready to demolish the unauthorized developments without a specific court order in that respect. Similarly, counsel submitted that the other orders in the application herein have been sought for clarity purposes in effecting the orders granted on 14/3/2014. As regards costs of the application, counsel submitted that the same be borne by the 2nd, 3rd and 4th Defendants in view of their disobedience of the court orders resulting to the filing of this application.

Siagi & Co. Advocates for the 3rd and 4th Defendants filed submissions dated 7/10/2014. On the issue of personal service, counsel submitted that the said Defendants were unaware of the ruling date but that the

order extracted therefrom was served upon the Advocates. Further that the Affidavit of Service did not attach the **court order** together with the penal notice. Therefore, that service is disputed. It was also submitted that the application was brought under Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules which makes provision for review, whereas the application in itself did not meet the threshold for review, and therefore the application must fail. Counsel submitted that the jurisdiction of the court had not properly be invoked and thus that the application ought to fail.

It was submitted for the Defendants that the orders sought in the application, if granted, would amount to the final disposal of the suit at an interlocutory stage which would occasion the Defendants grave injustice yet the veracity of the affidavit evidence was yet to be tested on trial. Counsel submitted that the Court ought to be mindful of the authenticity of the titles in the Plaintiff's possession was in doubt since the process leading to the issuance of the said titles is suspect. Counsel urged the court to order the matter to proceed to full trial.

The Plaintiffs filed an application dated 30/4/2013 simultaneously with the Plaint and sought several injunctive orders against the Defendants. The matter was heard *inter-partes* when this court on 14/3/2014 allowed the said application in its entirety. Essentially, the Defendants were restrained from interfering in any way with the suit properties. The Defendants were also directed to move out of the suit properties. Shy of one month later, the Plaintiffs allege that the 2nd, 3rd and 4th Defendants are defying the court order by undertaking developments thereon. The Defendants on their part deny the allegations and depose that the developments on the ground were there before the Court made its order. Further, it is their position that there was no physical survey and placement of beacons on the ground as a result of which, it is impractical to comply with the court orders.

On perusal of the court file, I do note that this is a convoluted matter, the dispute having been heard in other arbitral tribunals. The Plaintiffs ask of this court to issue orders that the structures constructed on the suit properties be demolished with the assistance of the police. It is these structures that the 3rd and 4th Defendants claim were constructed way before the orders were made. This matter being highly contentious, it is safe for this court to maintain status quo and direct the matter to proceed to hearing where all parties will be afforded an opportunity to give evidence and the veracity of their evidence tested on cross-examination. This was the finding of the Court of Appeal **Ougo Vs Otieno & another Civil Appeal No. 3 of 1987 (1987) eKLR** where they held that the general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided on trial.

In the circumstances, I decline to allow the application but do hereby make the following orders:

1. ***There shall be no further developments undertaken or demolitions of any structures on the suit properties. Further, no party shall dispose off or in any way alienate the suit properties pending the hearing and determination of the suit.***
2. ***The parties to comply with Order 11 of the Civil Procedure Rules and the Plaintiffs do take steps to set the suit down for hearing without delay.***
3. ***The costs of the application shall be in the cause.***

Dated, Signed and Delivered this 20th day of March 2015

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the 1st Defendant

.....For the 2nd Defendant

.....For the 3rd and 4th Defendants

.....For the 5th and 6th Defendants

..... Court Clerk