



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 32 OF 2015

(Formerly Eldoret ELC No. 347 of 2014)

ROSEBELLA JEPTOO MUREI & ANOTHER..... PLAINTIFFS

VERSUS

DORCAS CHEMWETICH SURTAN & 7 OTHERS..... DEFENDANTS

R U L I N G

1. This case was filed before Eldoret Environment and Land court. The Plaintiffs contemporaneously filed an application for injunction against the defendants seeking to restrain themselves, their agents, employees or servants from wasting, leasing out, disposing or otherwise alienating LR NO. 6482 (IR NO 129498) otherwise known as Kibulgeny Farm. The applicants' Counsel appeared before the Judge at Eldoret and asked that the application be certified urgent and a temporary injunction be given ex-parte pending hearing of the application inter partes.

2. The Judge certified the application urgent but did not give any interim injunction. The Judge instead made an order of inhibition which order was to last until the hearing and determination of the application. The application was set down for inter- partes hearing on 26/11/2014. For some reason which cannot be discerned from the record, the application was never placed before the court on 26/11/2014. The matter was listed before the Judge on 5/12/2014. The applicants advocate asked that the matter be fastracked. The Counsel for the 5th, 6th and 7th defendant/Respondents indicated to court that he wished to raise a preliminary objection. The matter was adjourned to 3/2/2015.

3. When the application came up for hearing on 3/2/2015, the Judge gave the parties time within which to file statements and fixed the case for hearing on 27/4/2015 with a mention on 4/3/2015. During the mention on 4/3/2015 Counsel for the 5th, 6th and 7th defendants asked for transfer of this case to Kitale. The Judge then disqualified himself and ordered the case transferred to Kitale to be mentioned on 11/3/2015.

4. When the matter was placed before me for mention, Mr Magut for plaintiffs indicated that the parties were before me for purposes of taking a hearing date. He applied that he be allowed to withdraw the suit against the 1st, 2nd, 3rd, 4th and 8th defendants and that he be allowed to amend the plaint. The 3rd and 8th defendants who were present did not object to the withdrawal of the suit against them. Mr Ngigi for the 5th, 6th and 7th defendants indicated to the court that he wished to be heard on the application dated 19/11/2014 which was filed by the plaintiff/Applicants. Mr Ngigi further contended that Mr Magut's application to withdraw the suit against the 1st, 2nd, 3rd, 4th and 8th defendants was unprocedural in that a written notice to that effect ought to be given.

5. Mr Magut in response argued that Order 25 Rule 1 of the Civil Procedure Rules is not coached in

mandatory terms and that therefore the court can allow the withdrawal. On the issue of the application which is pending, Mr Magut argued that there are orders of the court which have been made and that they are in force and that if Mr Ngigi is aggrieved, he should ask for a review of the same. Mr Magut also urged the court to allow him to amend the plaint.

6. I have given due consideration to the issues raised herein by counsel for the plaintiffs and counsel for the 5th, 6th and 7th defendants. The first issue for determination is whether Mr Ngigi should be heard on the application dated 19/11/2014. The second issue for determination is whether the plaintiffs should be allowed to withdraw their case against the 1st, 2nd, 3rd, 4th and 8th defendants. The last issue for determination is whether the oral application by Mr Magut to amend the plaint should be allowed.

7. On whether Mr Ngigi is entitled to be heard on the application dated 19/11/2014, I find that Mr Ngigi is entitled to be heard on the application of 19/11/2014. There were no orders touching on the application which were granted except the application being certified urgent. No interim injunction was granted as prayed. What the Judge did was to issue an order of inhibition pending hearing and determination of the application. The Judge gave the order of inhibition suo moto. He never gave any interim orders and if any were subsequently extended, the same were non-existent. The Judge appears to have decided to have the case fasttracked as requested by the plaintiffs advocate. That is why on 3/2/2015 when the application came up for hearing he gave directions, on filing of documents and fixed the matter for hearing. The record does not show whether this was done after consultation of the counsel on record or not but I do not find anything wrong in a matter being fasttracked by doing away with interlocutory applications and going for the main hearing. However be that as it may, I find that Mr Ngigi is entitled to be heard on the application unless he renounces his right to do so. There are no orders touching on the application and the order of inhibition granted by the Judge on 19/11/2014 was to await the outcome of the said application.

8. On whether the plaintiffs should be allowed to withdraw the suit against the 1st, 2nd, 3rd, 4th and 8th defendants, I find that this prayer cannot be granted. Order 25 Rule 1 of the Civil Procedure Rules is very clear on ways in which a suit can be withdrawn where a suit has not been set down for hearing and the plaintiff wishes to withdraw the suit against all or any of the defendants. He is free to do so by giving notice which shall be served on all the parties. In the instant case this case is not due for hearing. The parties have not filed statements as directed by the court on 3/2/2014. The case is therefore not set for hearing even though a hearing date had been given. The proper way to discontinue the case against some defendants is to give a notice in writing which notice shall be served on all the parties herein. I therefore decline to allow the withdrawal of the suit against 1st, 2nd, 3rd, 4th and 8th defendants. Let the proper procedure be followed.

On the issue as to whether the plaintiff should be allowed to amend their plaint, I find that this prayer cannot be granted. Though the law allows for oral applications for amendment, the circumstances of this case do not warrant that an oral application be allowed. Mr Magut did not indicate which kind of amendments he wishes to bring. Let a formal application for amendment be made to that effect. I therefore decline to allow the oral application for amendment.

10. The applicant are at liberty to take a hearing date for the application dated 9/11/2014 or have the same held in Limbo until the amendments are done.

It is so ordered.

Dated, signed and delivered at Kitale on this 11th March, 2015.

E. OBAGA

JUDGE

11/03/2015

In the presence of Mr Magut for plaintiffs, Mr Ngigi for the 5th, 6th and 7th defendants, and the 3rd and 8th defendants who are in person. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

11/03/2015