



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CASE NO. 675 OF 2014

(Formerly Nyeri HCCC No. 113 of 2003)

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

**IN THE MATTER OF SECTIONS 37 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP
22**

AND

IN THE MATTER OF LAND PARCEL NOS. TETU/MUTHUANI/1434 AND 1435

SIMON MUCHEMI MUKABI PLAINTIFF/RESPONDENT

VERSUS

REUBEN IGWANYA KIRUTHU alias

IGWANYA KIRUTHU.....1ST DEFENDANT/RESPONDENT

DEDAN NDIRAGU.....2ND DEFENDANT/RESPONDENT

SIMON GACHUHI KIRUTHU alias

SOLOMON GICHUHI KIRUTHU.....3RD DEFENDANT/RESPONDENT

LUCY WANGECHI NDIRAGU substituted by

SIMON MUCHEMI MUKABI.....4TH DEFENDANT/RESPONDENT

PETER MUCHEMI NDIRAGU.....5TH DEFENDANT/RESPONDENT

SAMUEL MUTHUI NDIRANGU.....6TH DEFENDANT/RESPONDENT

MAHIGA PRODUCE TRADING CO. LIMITED.....7TH DEFENDANT /APPLICANT

RULING

Background

1. On **4th October, 2014** Mahiga Produce Trading Company Limited (hereinafter referred to as the applicant) filed the notice of motion dated 30th September, 2014 seeking to restrain the 1st and 2nd defendants (hereinafter referred to as the respondents), their servants and/or agents from encroaching onto, cutting down trees , cultivating, destroying the fence or in any other way interfering with the parcel of land known as **Title No.Tetu/Muthuaini/1434** (herein after referred to as the suit property) pending the hearing of the application *inter partes* and further pending the hearing and determination of the main suit. The applicant also seeks directions to the effect that the orders, if issued, be enforced by the OCS Nyeri Police Station.
2. The application is premised on the grounds that the applicant is the registered owner of the suit property. It is contended that the applicant bought the suit property from the 5th and 6th respondents on 10th February, 2012 took vacant possession and control of the property immediately and developed it by erecting a barbed wire fence around it.
3. It is the applicant's case that despite the 1st and the 2nd respondents being aware of its interest in the suit property, they encroached the same and committed acts of waste thereon to wit, destroyed the fence, felled the trees therein, made a path through the suit property and began cultivating thereon.
4. Contending that the respondents will not suffer any prejudice if the orders sought are granted and that the balance of convenience tilts in its favour, the applicant prays for restitution of its rights of possession and control of the suit property pending the hearing and determination of the application and the suit.
5. In the affidavit sworn in support of the application by Samuel Wambugu Ndiragu, the grounds on the face of the application are reiterated. The following documents are annexed to the supporting affidavit:-
 - a) A copy of the sale agreement executed between the applicant and the 5th and the 6th respondents marked **SWN 1**;
 - b) Certificate of search in respect of the suit property marked **SWN 2**;
 - c) Photographs showing the status of the suit property marked **SWN-3**.
6. Maintaining that the respondents have persisted on encroaching onto the suit property, the applicant reiterates that unless the orders sought are granted, it will suffer great prejudice.
7. In reply and opposition to the application, the respondents through the replying affidavit filed on 14th November, 2014 have deposed that the sale agreement executed between the applicant and the 5th and 6th respondents is illegal. The alleged illegal dealings over the suit property are said to have been confirmed by the court in High Court Succession Cause 467 of 2009. The ruling in the Succession Cause is annexed to the affidavit and marked **RK1**.
8. The respondents have denied having ejected the applicant from the suit property and instead deposed that at no time did the applicant take possession and control of the suit property.
9. It is the respondents case, that they have been in occupation and use of the suit property and that they had no reason to cut trees thereon.
10. Concerning the report allegedly made to the police concerning their alleged illegal dealings on the suit property, they have denied having knowledge of that report and contended that if there was such a report the police would have acted on it.
11. Terming the application a scheme meant to change the existing status quo, and to enable the applicant take possession of the suit property and to defeat the outcome of the succession proceedings, the

respondents urge the court to dismiss the application with costs to them.

12. When the application came up for hearing, counsel for the applicant **Mr. Kimunya**, reiterated that the respondents have encroached onto the suit property. He referred to the affidavit sworn by the 5th respondent dated 13th May, 2015 and submitted that the 1st and the 2nd respondents were evicted pursuant to a court order and that the 5th and 6th respondents were in occupation/possession of the suit property when they sold it to the applicant.

13. Based on the averments contained in the replying affidavit sworn by the 1st respondent, counsel for the 1st and 2nd respondent **Mr. Kiminda**, stated that the 1st, 2nd and 3rd respondents are in occupation of the suit property. Contrary to the allegation by the 5th respondent that the respondents were evicted from the suit property, he contended that the respondents had never been dispossessed of the suit property.

14. With regard to the sale agreement executed between the applicant and the 5th and 6th respondents, Mr. Kiminda submitted that the agreement was found to be an illegality as it was done without a grant. He reiterated that the respondents are not carrying out acts of waste. He urged that the application be dismissed and the obtaining status quo to be maintained.

15. In a rejoinder, Mr. Kimunya submitted that the 1st to the 3rd respondents are not the ones who brought the current suit and that the title held by the applicant is not challenged by the said respondents.

16. He pointed out that the suit property is still in the name of his clients after a decree was issued in Nyeri HCCC No.176 of 1987. According to him, what is in issue is whether vacant possession had been given to the 5th and 6th respondents when the applicant bought the suit property.

Analysis and determination

17. The genesis of the dispute herein can be traced to a case instituted by Lucy Wangechi Ndirangu (deceased) against the 1st, 2nd and the 3rd respondents herein to wit, Nyeri High Court No.176 of 1987. In that case the deceased sought judgment against the 1st to 3rd defendants herein for:-

- a) That the defendants (now respondents) hold land parcel Tetu/Muthuaini/555 upon themselves, the plaintiff and one Marieta Njeri in equal shares;
- b) An order requiring the defendants to transfer the portions;
- c) Order directing the defendants to execute all necessary documents to cause sub-division of Land parcel Tetu/Muthuaini/555 into three equal portions, in the name of the plaintiff, Marieta Njeri Mukabi and the defendants and separate titles to be issued to them;
- d) That if the defendant's fail to comply with the order in (c) above the executive officer of the court to execute the documents on behalf of the defendants.
- e) Costs of the suit
- f) Any other order the court may deem fit to grant.

18. By consent of the parties, the suit was referred to arbitration. The arbitrators found in favour of the plaintiff and Judgment was accordingly entered in favour of the plaintiff in accordance with the award of the arbitrators.

19. Following entry of the judgment above, the suit property was sub-divided giving rise to *inter alia* the parcel of land that is the subject of the current suit.

20. From the record before me, I gather that the respondents made various attempts to get the judgment entered in favour of the deceased reviewed or overturned in vain.

21. On 19th November, 2010 the 5th and 6th respondents herein were appointed the administrators of the estate of the deceased person herein (Lucy Wangechi Ndirangu).

22. On 14th October, 2011 the 5th and 6th respondents in their capacity as the administrators of the estate of the deceased and being the registered proprietors of the portion that devolved to them pursuant to judgment herein, sold the suit property to the applicant.

23. The Applicant obtained title to the suit property in 2012.

24. The record before me reveals that the defendant's in the original suit filed objection proceedings in Nyeri Succession Cause No. 467 of 2009 seeking the following orders:-

- a) Nullification or cancellation of the registration effected in favour of the 5th and 6th respondents;
- b) A prohibitory order to restrain any transactions affecting the suit property until the matter (read their application) is heard and determined;
- c) That the process of succession be resumed to finalize the matter.

24. Upon considering the representation made before him, **Wakiaga J.**, held:-

“I have looked at the pleadings herein and I note that application for confirmation of grant is still pending before this court. If that be the case how then did the respondents get registered as the proprietors of the suit land? To my mind any registration before confirmation of grant is therefore unlawful and in view of that I am of the view that the justice of the case demands that I allow the application herein in terms of prayer 2 and issue a prohibitory order restraining any transaction affecting the land known as Tetu/Muthuaini/1434 pending the determination of the applicant's intended protest to the grant or cancellation or nullification of the registration of respondent in respect of Tetu/Muthuaini/1434 with costs being in the cause.”

28. It is noteworthy that the decision of **Wakiaga J.**, did not nullify or cancel the existing registration in respect of the suit property and/or nullify the dealing that had already been entered into in respect of the suit property. What it did, was to order for maintenance of the existing status quo in respect of the suit property.

29. As pointed out herein above, the 5th and 6th respondents gained rights over the suit property as administrators of the estate of the deceased person herein. The rights of the deceased in turn was pursuant to an order of a court. Attempts by the respondents to challenge the order of the court pursuant to which the deceased and subsequently the 5th and 6th respondents got rights to the suit property were unsuccessful.

30 The court record shows that by a decree issued on 21st November, 2006 in Nyeri HCCC No. 176 of 1987, it was decreed that:-

- 1. The defendants/respondents be evicted from the plaintiff's parcel of land Tetu/Muthuaini/1434 by M/S Providence Auctioneers;**
- 2. The OCS Nyeri Police Station do provide security during eviction;**
- 3. The defendants/respondents do meet the costs of this application”.**

31. Whereas the respondents claim to be on the suit property, there being no evidence that the order for their eviction was lifted or not complied with, it is reasonable to say that they are wrongfully in occupation of the suit property.

32. Having found that the status quo to be maintained is the one ordered in Nyeri HCCC No. 176 of 1976, I agree with the applicant that the balance of convenience in this suit tilts in its favour as opposed to the respondents. Continued occupation of the respondent of the suit property is prima facie in contravention of the orders issued in Nyeri HCCC NO.176 OF 1987 (Supra).

33. The upshot of the foregoing is that the application herein has merit and is granted as prayed.

Dated, signed and delivered at Nyeri this 1st day of July, 2015.

L N Waithaka

JUDGE

In the presence of:

Mr. Kimunya for the 7th defendant/applicant

Mr. Njuguna for the plaintiff/respondent

N/A for the 1st & 2nd defendants

N/A for the 3rd – 6th respondents

Court assistant - Lydia