



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO 176 OF 2015

CLEMENT OTIENO NYANG-----PLAINTIFF

VERSUS

SIMON NDUNGU KURIA-----1ST DEFENDANT

TOBIAS AOL OSANO-----2ND DEFENDANT

(Sued as trustees of Barina Squatters Self Help Group)

RULING

(An application for injunction to restrain trustees from disposing of trust properties; the trustees had been granted a certificate of incorporation; no prima facie case established; application dismissed)

1. The plaintiff filed this suit on 22nd June 2015. He describes himself as a member of Barina Squatters Self Help Group. The 1st and 2nd defendants are trustees of Barina Squatters Self Help Group. The plaintiff prays for judgement against the defendants jointly and severally for:-

1. An order of declaration that the 1st and 2nd defendants have breached the trust of Barina Squatters Self Help Group and their removal as trustees thereof.

2. An order spelling a time flame (sic) within which completion of distribution of land acquired by Barina Squatters Self Help Group registered in the trustees is given to members with title deed (sic) that being land parcels grant No. L.R. 17224 for L.R. No. 10332, Grant No. I.R. 19653 for L.R. No. 5700 and Grant No. I.R. 21595 for L.R. No. 11384.

3. Costs of the suit.

4. Any other relief this Honourable Court may deem fit to grant.

2. Subsequently on 16th December 2015, the plaintiff filed Notice of Motion dated 16th December 2015. The said application is the subject of this ruling. The prayers in the application are for orders:-

1. Spent
2. Spent
3. That the court do issue a temporary injunction restraining the defendants, their agents, servants or any other persons or agency from selling, transferring subdividing, leasing, allocating or carrying

out any activity on the said parcel of Barina Self Help Group registered trustees contrary to the interest of the applicant until the final determination of the suit filed herein.

4. That cost (sic) of this application be born (sic) by the respondents.
3. The application is supported by the supporting affidavit sworn by the plaintiff on 16th December 2015 and the supplementary affidavit sworn by the plaintiff on 20th September 2016.
4. The plaintiff deposed that the defendants are trustees of Barina Squatters Self Help Group and that pursuant to certificate of incorporation dated 6th August 2008, the defendants and two other persons were incorporated under the name of “BARINA SQUATTERS SELF HELP GROUP REGISTERED TRUSTEES” under the provisions of the Trustees (Perpetual Succession) Act Chapter 164 Laws of Kenya. Barina Squatters Self Help Group Registered Trustees is a body corporate with a common seal. The said corporate entity owns the three suit properties, namely L.R. No, 10332, LR .No. 5700 and L.R. No. 11384. The plaintiff states that the defendants have sold properties of the trust without the consent of members and without the consent of Grace Njeri Wachira and Jonah Kibet who according to the plaintiff are the other two trustees. The allegedly irregular sales were pursuant to various agreements dated 20th February 2014, 20th June 2014, 23rd November 2013, 25th May 2014 and 17th November 2015 among others. That the said sales were for the defendants’ personal gain. The plaintiff thus accused the defendants of wasting the assets of the trust instead of preserving them. On that basis, the plaintiff prays that an injunction be granted.
5. The defendants admit in their replying affidavit that they are two of the trustees of the trust alongside David Njunge Kanini and Selly Chepkorir Kipyegon. That Barina Squatters Self Help Group Registered Trustees is indeed a body corporate and that the trustees work alongside a management committee of about 17 members in the management of the affairs of the group. That the trust owns the three suit properties.

The defendants further depose that Barina Squatters Self Help Group has over 1,200 members and that the three suit properties which measure about 4,803 acres belong to the members of the group according to their shareholding. That the land has been surveyed and distributed to members who in turn have settled on and developed their plots. Some members have also sold their plots to other parties. That the plaintiff is a former committee member of the group and is disgruntled following his removal from the committee. That this suit is essentially about an alleged leadership dispute and not about title to use or occupation of the suit land. Consequently, this court lacks jurisdiction.

6. Parties opted to argue the application by way of written submissions. In that regard, the plaintiff filed his submissions on 1st November 2016 while the defendants filed their submissions on 6th April 2017.
7. In his submissions, the plaintiff generally summarized the contents of his affidavits. I have already set out the contents of the affidavits sworn by the plaintiff. I therefore do not find it necessary to reiterate them here. In short, the plaintiff submitted that the various alleged sales of the suit properties by the defendants were unauthorized and amount to wastage of the suit properties. Consequently, the plaintiff urged the court to allow the application and grant an injunction as sought.
8. In their submissions, the defendants argued that the application is defective and incompetent since the prayer for injunction does not cite any property and contradicts the prayers sought in the plaint.
9. Further, the defendants argued that the application and entire suit are incompetent since in essence the plaintiff has filed a representative suit but had failed to comply with the provisions of order 1 rule 8 of the civil procedure Rules, 2010 citing two authorities the defendants urged that such failure is fatal to the case.
10. The defendants also argued the since Barina Squatters Self Help Group Registered Trustees is a corporate entity, it ought to have been sued in its name as opposed to suing two trustees in their individual names. Finally, the defendants submitted that the plaintiff had failed to satisfy any of the conditions set in **Giella –Vs- Casman Brown**. That the plaintiff had failed to establish a prima facie case since his suit is defective for being a representative suit without leave having been granted, that the prayers in the plaint contradict those in the application, that the plaintiff

lacks *locus standi* since he has not demonstrated that any of his rights have been infringed and that the application does not specify the property in respect of which an injunction is sought.

Regarding the test as to whether damages would suffice, the defendants argued that the plaintiff had not alleged or proven any irreparable damage. In conclusion, the defendants urged the court to strike out the suit or to dismiss the application with costs.

11. I have considered the application, the affidavits in support, affidavits in response and the submissions by both the plaintiff and the defendants. I have distilled the issues for determination to be the following: Firstly whether the court has jurisdiction. Secondly whether the suit should be struck out. Lastly, whether the injunction sought should be granted.
12. Before embarking on determining the issues, it is important to restate the non-contested facts. There is no dispute that Barina Squatters Self Help Group Registered Trustees is a corporate entity. Indeed, the certificate of incorporation dated 6th August 2008 is clear on this. Barina Squatters Self Help Group Registered Trustees has four trustees and the defendants herein are two of the said trustees. Finally, there is also no dispute that Barina Squatters Self Help Group Registered Trustees is the registered proprietor of the three suit properties, namely L.R. No. 10332, LR .No. 5700 and L.R. No. 11384.
13. Now to the first issue for determination. Does this court have jurisdiction? The defendants have argued that the court lacks jurisdiction since the suit raises issues of leadership dispute. This court is established pursuant to article 162 (2) (b) of the Constitution of Kenya 2010 and is clothed with jurisdiction to hear and determine disputes relating to “*the environment and the use and occupation of, and title to, land*”. The provisions of the constitution are further augmented by the provisions of section 13 of the Environment and Land Court Act, 2011 which provides as follows:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

14. In his plaint the plaintiff has sought judgment against the defendants for among others an order spelling a time frame for completion of distribution of land parcels comprised in Grant No. I.R. 17224 for L.R. No. 10332, Grant No. I.R. 19653 for L.R. No. 5700 and Grant No. I.R. 21595 for L.R. No. 11384. Whether or not the suit will succeed is an issue to be determined in due course. Suffice it however to say that the plaintiff has brought to court a dispute relating to the said parcels of land. I therefore have no hesitation in finding, as I hereby do, that the court has jurisdiction.
15. The second issue for determination is whether the suit should be struck out. The defendants have urged the court to strike out the suit for being incompetent, bad in law and void *ab initio* for being a representative suit without first seeking and obtaining leave and giving notice as required by the provisions of Order 1 rule 8 of the Civil Procedure Rules, 2010. I have read the plaint filed herein. Nowhere in it does the plaintiff claim to file the suit on behalf of other persons. Similarly, the

- plaintiff does not claim to sue the defendants on behalf of any person. I therefore find that the suit is not a representative suit. Therefore no leave or notice was necessary.
16. The defendants have argued that the suit is fatally defective since the plaintiff ought to have sued Barina Squatters Self Help Group Registered Trustees as a corporate entity as opposed to suing the defendants individually.
17. The certificate of incorporation for Barina Squatters Self Help Group Registered Trustees was issued under the provisions of the Trustees (Perpetual Succession) Act Cap 164. Section 3 (3) of the Act provides:

“The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in the corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation”.

18. There is no doubt that Barina Squatters Self Help Group Registered Trustees being a body corporate ought to be sued in its corporate name. However, suing the individual trustees does not make the suit fatally defective and liable for striking out. It is up to the court that will hear the suit on its merits to decide whether or not there is any case against the defendants.
19. Striking out of pleadings is no small matter. I remind myself that striking out is a draconian remedy that should be resorted to in only the clearest of cases and only in situations where a suit cannot be sustained through amendment. As was stated by Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR**

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

20. At this stage, we cannot say that the plaintiff's case is so weak as to be beyond redemption and incurable by amendment. The plaintiff seems to be accusing the defendants of acting contrary to the interests of Barina Squatters Self Help Group Registered Trustees. He should be given a chance to have his day in court. I therefore find that the suit ought not be struck out in the circumstances. That disposes of the second issue.
21. The final issue is whether the injunction sought should be granted. The conditions for the granting of an interlocutory injunction were set out in **GIELLA VS. CASSMAN BROWN & CO., LTD. [1973] E.A. 358** at p. 360 as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”

22. The suit herein involves property whose registered proprietor is Barina Squatters Self Help Group Registered Trustees. I have read the trust deed annexed by the plaintiff. I note that according to clause 1 (a)(iii) of the Trust Deed, the three suit properties constitute Trust Property or assets of the trust. Consequently, anyone who seriously wishes to challenge the manner in which those

properties are being handled or disposed of must sue the registered proprietor of the properties. The defendants are not the registered proprietors of the suit properties. A suit against the trustees in their individual names is unlikely to succeed. I therefore find that the plaintiff has failed to establish a prima facie case with a probability of success.

23. In the end, I dismiss the application dated 16th December 2015. Costs to the defendants.

Dated, Signed and delivered in open court at Nakuru this 12th May, 2017.

D.O. OHUNGO

JUDGE

In the presence of:

Mr Morigori for the plaintiff/applicant

Mrs Gatu Magana for the defendants/respondents

Court Assistant: Gichaba