REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

E.L.C NO. 335 OF 2012

LOICE CHEMUTAI NGURULE.....1ST PLAINTIFF

JACOB AGUYA NGURULE.....2ND PLAINTIFF

-VERSUS-

WILFRED LESHWARI KIMUNG'EN.....1ST DEFENDANT

WILFRED ABUYE KIMUNG'EN.....2ND DEFENDANT

KENNETH ROTICH.....3RD DEFENDANT

RULING

1. The notice of motion dated 20th December, 2012 has been brought under Section 3 and 13 (6) (a) of the Environment and Land Court Act and Section 3A and 63 (e) of the Civil Procedure act. The Applicants are seeking, *inter alia,* the following orders-

1. That pending the hearing and determination of the plaintiffs' case as against the Defendants, the Honourable court be pleased to issue a temporary injunction restraining the Defendants/ Respondents together with their servants/ agents from entering, trespassing, invading, harassing, remaining, evicting, damaging property, felling down trees or interfering with the plaintiffs' quiet use, enjoyment, possession and occupation of the property known as Nakuru/ Mariashoni/980 (herein after referred to as the suit property) measuring approximately 5 acres.
2. that the costs of the application be dispensed.

2. The 1st Applicant herein alleges that she is the owner of the suit property measuring about 5 acres. She however does not have title documents to prove ownership as the Government has stayed or blocked issuance of title deeds of Mariashoni Scheme Farms until the process of demarcating the Mau-Forest Land is completed. Nevertheless she has been in possession and occupation together with the 2nd Applicant and the extended family since 1997 and has also planted several cypress trees and poles which are worth about 20 million shillings.

3. It is her contention that on 17th December 2012, the 1st and 2nd respondents who are her cousins, together with their servants invaded the suit premises and felled down the said trees and poles. They were acting pursuant to a tree felling permit that had been fraudulently issued to them using the name of the 1st Applicant. According to her, the respondents objection to her acquisition of the suit premises was because she is an unmarried woman and is not allowed to own land according to the Ogiek customs.

The dispute over ownership was also presented before the Chief and the other village elders of Mariashoni Location who agreed that the suit property belongs to her.

4. In opposition to the application, the 1st respondent deponed the Replying Affidavit filed on 9th January, 2013 on his own behalf and on behalf of the 2nd respondent. They contended that they were the owners of the suit property, having been allocated the same by the council of elders and have since settled and built houses therein. That the Applicants' 4 parcels of land comprising 20 acres was located on the other side of the baseline. They therefore denied that the Applicants had built on the said land or that they had planted trees therein and stated that the same had germinated naturally after the original trees were harvested by Timsales.

5. The 3rd respondent, the Assistant Chief of Kapcholola sub-location, Elburgon Division swore an affidavit on 9th January, 2013 in reply to the application. He said he had visited the suit property and established that the Applicants' premises is located on the other side of the base line from the disputed property. He alleged that the trees found thereon belonged to the Government and not to the applicants. He confirmed that there was a dispute over ownership of the suit property and for the sake of harmony, he had allowed both parties to harvest the trees in equal shares.

6. By the orders made on 12th February, 2013 the court directed its bailiff to visit the suit property and establish the number of logs felled, the same be sold and the proceeds be deposited in court. She was also required to establish the status on the ground in relation to occupation and developments carried out thereon. Pursuant to these orders, the court bailiff visited the suit property and prepared the report dated 12/05/2013. She established that there were three residential homesteads on the suit property which belonged to the 1st, 2nd applicants and the 2nd applicant's brother and that the respondents did not live near the suit parcel of land.

7. In their submissions filed on 16th July, 2013 the applicants submitted that they had established a prima facie case with a high probability of success at the trial. It was contended that even though the applicants had not attached any document to prove ownership, they had explained that the processing of title deeds had been stayed by the Government pending the demarcation of the Mau Forest. In addition, they had acquired prescriptive rights as owners in use and exclusive possession having occupied the suit land for a period of over 15 years. They relied on Section 7 of the Land Act, 2012 which provides that title to land may also be acquired through prescription and settlement schemes.

The definition of the term prescription as contained in the **Black's Law Dictionary Eighth Edition** is stated as ***" the acquisition of title to a thing (especially an intangible thing such as the use of real property) by open and continuous possession over a statutory period.....the acquisition of a territory though a continuous and undisputed exercise of sovereignty over it."***

8. On the issue of damages, it was the applicants' submission that money cannot be everything at all times and once a prima facie case has been established, the issue of damages need not arise. In support of this submission, reliance was placed in the case of **Lucy Njoki Waithaka vs. Industrial and Commercial Development Corporation Nairobi HCCC NO. 321 OF 2001 (UR)** where the court held thus;-

"as regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespass. That would not only be unjust but it would also be seen to be unjust.....money is not everything at all times and in all circumstances and don't you think

you can violate another citizen's rights only at the pain of damages."

9. Finally, the applicants' submitted that the balance of convenience tilts in their favour on the basis of their possession and occupation of the suit premises as opposed to the Defendants who have not evidenced any form of occupation of the same.

10. The 2nd and 3rd respondents on their part relied on the submissions filed on 25th June, 2013. According to them the applicants were not being truthful as it is not possible for a person to enter into another's parcel of land and start felling trees without their consent. That the Ogiek community is nomadic and they do not own land. The court was therefore urged to find that the applicants have no document to prove title over the suit property and the trees thereon, that the applicants' land is located away from the land where the trees are located and it is the respondents who have the right to the said trees as they have been occupying the land and it was allocated to them.
11. Attached to the submissions was an affidavit sworn by the 1st respondent in reply to the report of the Court bailiff. He agreed with the bailiff's report only on the issues of collection and sale of logs and deposit of proceeds in court. However, he denied that the applicants residences are located about 35 meters away from the forest and stated that the court bailiff did not measure the distance between the houses and where the trees were felled. He also denied the allegation that the 1st and 2nd respondents live 9 kilometers from the suit land.
12. I have considered the rival arguments by the parties herein. The conditions to be established for the grant of an interlocutory injunction are now well settled, that the Applicant has demonstrated a prima facie case with high chance of success, that if the orders sought are not granted, she stands to suffer irreparable damage and when in doubt, the balance of convenience tilt in favour of the Applicant.
13. In the present case, the Applicant has failed to demonstrate that she is the owner of the suit property as she has not produced any title documents. In addition the existence of the suit property is contested. According to the 3rd respondent, the members of the community were shown where to settle and titles were to be issued later. Hence the alleged plot known as Nakuru/Mariashoni/1980 is not in existence. He further alleged that the Applicant's property is situated far from the land which the parties herein laid claim therefore the boundaries and the location of the land to which the Applicant herein is entitled is not certain.
14. Nevertheless an injunction under Order 40 is intended to protect the property, the subject matter of a suit from damage, alienation or wastage. The impartial court bailiff who visited the suit property established that there were three residential houses on the suit land wherein the Applicants' reside. Although they have not demonstrated that they are the owners of the suit premises, they are however in possession thereof and would suffer damage if orders are not issued protecting them from eviction.

15. It is therefore in the interest of justice that the status quo of the suit property be maintained pending the hearing and determination of the suit in the following terms:-

(a) The plaintiff to remain in occupation of the suit property pending the hearing and determination of the suit

(b) There shall be no more felling of trees pending the hearing and determination of the suit

(c) Costs be in the cause

(d) parties to comply with Order 11 of the Civil Procedure Rules 2010 within 30 days and set down this

matter for hearing on a priority basis.

Dated and Signed at Nakuru this 9th day of October 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Kanyi for the plaintiff/applicant

Mr Wachira holding brief for Mr Ogeto for the Defendant/Applicant

CC: Stephen Mwangi

L N WAITHAKA

JUDGE