



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 86 OF 2015

OLARE OROK CONSERVANCY LTD.....PLAINTIFF

VERSUS

DOMINIC RAKWA.....DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff asserting that it holds a lease over the suit land; defendant raising issues on the veracity of the lease; lease entered into by the wife of the registered proprietor who later died; no evidence that at the time of execution of the lease, the registered proprietor had authorized the signing of the said lease; doubt on the case of the plaintiff; application decided on a balance of convenience and status quo ordered to be maintained pending hearing of the suit)

1. This suit was commenced by way of plaint filed on 24th March 2015. Together with the plaint, the plaintiff filed an application for injunction which application is the subject of this ruling. The application is opposed and I think it is necessary to set out the respective cases of the parties.
2. The plaintiff's case as pleaded and as elaborated in the supporting affidavit sworn by David Rakwa, a director of the plaintiff company, is that they are the registered lessees of the property Cis-Mara/Koiyaki-Dagurugureti/849 (the suit land) having leased it for a term of 12 years and 10 months from 15 August 2012, from the registered owners of the suit property who are named as Metian Ole Rakwa and Moompi Enole Rakwa. It is stated that the defendant, who is a stranger to the plaintiff, and who has no proprietary interest in the suit land, has trespassed and entered the suit land, and developed permanent structures on the property without the plaintiff's knowledge, or approval, and in blatant disregard to the plaintiff's rights over the suit property.
3. It is further stated that the developments are next to the Olare Orok Airstrip, and this has interfered with the land and taking off of planes from the airstrip, which has made the plaintiff's business of operating a private conservancy to suffer as persons have now shunned using the airstrip. In the suit, the plaintiff wants a permanent injunction to restrain the defendant from the suit property; a mandatory injunction to compel the defendant to vacate the property and remove his structures; an order for vacant possession and/or eviction; mesne profits for the illegal possession and costs.
4. In this application for injunction, the plaintiff has asked for the following substantive orders which are prayers 3 and 4 of the application:-

(i) *That this Honourable Court be pleased to grant an order of injunction restraining the*

defendant whether by himself, agents, servants or otherwise howsoever from trespassing onto, developing or in any manner interfering with the suit property.

(ii) That this Honourable Court be pleased to grant an order of mandatory injunction compelling the defendant whether by himself, agents, servants or otherwise howsoever to vacate and remove all the structures and buildings constructed on the suit property.

5. The defendant has opposed the application through a replying affidavit sworn by himself. He has stated that the suit property is registered in the name of their late father, Metian Rakwa as sole proprietor, and the assertion by the plaintiff, that the land is registered in the joint names of Metian Rakwa and Moompi Enole Rakwa is incorrect. He has annexed copies of the Certificate of Death relating to Metian Rakwa and title deed to the property. The Certificate of Death shows that Metian died on 15th February 2013. The defendant has deposed that he is aware that his late father leased the property to the plaintiff in the year 2006, for a period of 6 years and the lease had an option of renewal upon its expiry in the year 2012.

6. Before expiry of the lease, his father called for a family meeting, whose agenda was whether or not to grant an extension of the lease. It is averred that the meeting resolved that the lease will not be extended and pursuant thereto, the defendant's father authorized the family to proceed and subdivide the suit land into equal portions amongst his 8 sons. The subdivision was to take place upon expiry of the lease in the year 2012. He has stated that the lease demonstrated by the plaintiff is between the plaintiff and Moompi Enole Rakwa, who is said to be the defendant's stepmother and the 5th wife of the defendant's father.

7. It is the defendant's position that Moompi has no proprietary interest in the suit land. It is further averred that Moompi did not have any legal authority to sign the lease on behalf of the late Metian and it is his position that there is no valid lease over the suit land. It is his view that the same is fraudulent and ought to be cancelled and that possession of the suit land ought to be enjoyed by all beneficiaries of the late Metian.

8. The plaintiff filed a further affidavit sworn again by David Rakwa. He has stated that in August 2012, the late Metian and his wife Moompi, expressed willingness to renew the lease and that the lease was renewed and registered on 9th November 2012. It is averred that the land registrar Narok, acted in the presence of all parties, including the late Metian and his wife, Moompi. He has stated that it was mutually agreed between the late Metian and Moompi, that the lease be executed by Moompi, and it is argued that a valid lease may be executed by the proprietor or someone else acting on his behalf. It is said that the plaintiff has been enjoying exclusive possession since then, and it is only after the death of Metian, that the defendant started trespassing into the property. It is averred that the defendant has no capacity to question the lease in issue and that he is a selfish son, trying to grab the property of his late father.

9. I have considered the documents filed by the parties and the written submissions of Mr. Muchemi for the plaintiff and Mr. Morintat for the defendant.

10. The application before me is one seeking both interlocutory and mandatory injunctions. The principles applicable in an application for an interlocutory injunction were laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***. An applicant needs to demonstrate a prima facie case and show that he stands to suffer irreparable loss if the injunction is not granted. If in doubt, the court will decide the application on a balance of convenience. The standard is higher for mandatory injunctions.

11. The basis of the plaintiff's case is the lease executed on 15th August 2012 and registered on 9th November 2012. I have looked at the lease which is executed by Moompi Enole Rakwa as lessor. In executing the lease, Moompi declared that she is the registered proprietor of the property and nowhere in the lease have I seen that she executed the same on the instructions of Metian, who appears to me to have been the registered proprietor of the property, when the lease was executed and registered. Moreover, there is no document annexed by the plaintiff to show the Metian had authorized Moompi to enter into a lease over the suit property on his behalf.

12. The veracity of the lease is therefore in serious doubt. Being in doubt, I opt to decide this application

on a balance of convenience. The balance of convenience in my opinion, lies in having the current status quo in the property maintained. I would also encourage the parties to file a succession cause in respect of the estate of Metian, so that the issue of who is entitled to the suit property is resolved.

13. My final order on this application is that the status quo currently prevailing be maintained. The costs of this application will be costs in the cause.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th January, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:-

Ms. Alwala holding brief for Mr Mwalo instructed by M/s Kiplenge & Kurgat Advocates for defendant/respondent

No appearance on part of Oyomba & Company Advocates for plaintiff/applicant.

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU