



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L 24 OF 2014

JEREMIAH CHERUGET.....PLAINTIFF

VS

NGOBITWO FARMERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT

(Application for injunction; principles to be applied; plaintiff asserting to have been a member of the defendant society and purchased shares equivalent to 4 acres; defendant stating that the shares were for the purchase of another land which did not materialize and that plaintiff is illegally occupying the suit land; evidence showing that plaintiff paid for shares and paid for survey fees; no evidence brought by defendant that plaintiff is in illegal possession or that his shares were refunded; defendant alleging a previous suit; no pleadings or any material adduced on the existence of any previous suit; prima facie case established; balance of convenience also in favour of plaintiff who has been in occupation; application allowed)

RULING

The application before me is one dated 27 January 2014 filed by the plaintiff. It is an application for injunction brought under the provisions of Order 40 Rule 2(1) of the Civil Procedure Rules, 2010. The plaintiff wants the defendant restrained from dealing with 4 acres of land within the land parcel described as Block 139 Plot No.203 until this suit is heard and determined. The grounds upon which the application is based are that the defendant has threatened to disposes the plaintiff and that the defendant has brought strangers to view the land and intends to sub-divide it. The application is supported by the affidavit of the plaintiff and is opposed by the defendant who filed a replying affidavit.

This suit was commenced by way of plaint. It is the case of the plaintiff that he has been a member of the defendant, which is a co-operative society, and that he holds shares equivalent to 4 acres of land. He has

averred that he paid for the shares in the year 2000 and took possession of the land and has been in possession to date. His land is comprised in Block No. 139 Plot No. 203. He has averred that on 23 January 2014, the management of the society, in collusion with strangers unknown to the plaintiff, entered the said land and purported to sub-divide it with intent to settle the strangers and dispossess the plaintiff. He visited the offices of the defendant and the Chairman informed him that since titles had not yet been issued, the defendant had a bigger say on who should be settled. In his suit, the plaintiff has asked for orders to restrain the defendant from interfering with his land and for an order compelling the defendant to issue title to the plaintiff. In his supporting affidavit, the plaintiff annexed various payment receipts indicating payment of registration as a member, payment of shares, and payment of survey fees.

The defendant's replying affidavit is sworn by one Daniel Tuitoek a director of the defendant. He has deponed that the defendant society was formed for purposes of purchasing land and has a membership of about 600 people. A list of about 50 members was annexed. It is averred that in the 1990s the society purchased the land parcels Soy/Soy Block 10 (Navillus)/7, 118, 137, 139, and 140 from the contribution of members. It is stated that the purchase of the Block No. 139 was finalized in the year 1999 and all members who had contributed towards its purchase were allocated their respective shares. It is stated that the 4 acres in dispute were allocated to three people, namely, Julius C. Kiberut, Symond Chemoiwo, and Constantine Koech. In the year 2000 a new register was opened for the purchase of a Block No. 146. It is averred that the plaintiff contributed towards the purchase of this Block but before the society could finalize its purchase, another buyer beat them to it, which forced the Society to refund the moneys back to the contributors. It is averred that in the year 2000, the Society called the plaintiff to collect his refund but the plaintiff has declined to collect the same. It is further averred that the plaintiff unlawfully and without any justification, went ahead and forcefully occupied the 4 acres in dispute leaving the genuine owners without a share. It is stated that there has been a previous dispute, which is either Eldoret HCCC No. 25 of 2006 or Eldoret HCCC No. 26 (for there are two paragraphs with different case numbers) where the plaintiff herein is the 5th plaintiff in the said suit. It is contended that this suit is subjudice.

Mr. Kipkenei for the plaintiff, pointed me to the receipts annexed to the plaintiff's supporting affidavit, and argued that the same demonstrate that the plaintiff paid for the land. He submitted that the land was surveyed and the plaintiff put into occupation. He submitted that no letter has been displayed by the respondent to show that they offered any refund to the plaintiff. He further submitted that his client has no knowledge of the case No. 25 of 2006. As to the list of members, he submitted that the same cannot be a complete list since it is stated that the society has about 600 members. He was further of the view that the balance of convenience tilts in favour of the applicant.

Mr. Onkoba for the respondent, inter alia argued that save for annexing some receipts, there is no evidence tendered that the suit land was allocated to the plaintiff.

I have considered the application, the material in support and in opposition to the application, and the

submissions of counsel. This being an application for injunction, I stand guided by the principles laid out in the case of *Giella vs Cassman Brown (1973) EA 358*. In considering an application for injunction, the court needs to be satisfied that the applicant has laid down a prima facie case with a probability of success and if in doubt, consider the balance of convenience. An injunction will also not normally be granted unless the applicant stands to suffer loss which cannot be compensated by an award of damages. It should also never be lost, that the essence of an application for injunction, is to enable the court pronounce how the subject matter of the case should be preserved, pending hearing and determination of the suit. It is not a final determination of the case.

In this suit, the plaintiff has averred that he bought shares in the defendant society and was allocated 4 acres of the disputed land. I have seen the various payment receipts annexed to his affidavit. There are at least three receipts for the year 2000 described as payment of shares. The plaintiff has averred that the payments were for 4 acres out of Block No. 139. The defendant on the other hand has averred that what the plaintiff intended to purchase was within the block No. 146 and not Block No. 139 where the disputed land falls. It was averred that the sale of Block No. 146 collapsed and that the plaintiff was invited to collect his refund.

Despite these assertions by the defendant, the defendant has not brought forth any material to support that position. No doubt, the defendant has custody of all documents related to the society including any documents on purchase of land, refund and allocations. No letter indicating that the plaintiff was offered a refund has been displayed by the defendant. All which is displayed is a list of about 50 or so members and I agree with Mr. Kipkenei, that this cannot be the list of all members, since the defendant stated that it has about 600 members. It has not been explained why the list displayed is selective.

Among the receipts annexed by the plaintiff, are receipts issued in the year 2006, which indicate that the same are payments for survey. Why would the defendant be accepting payment for survey from the plaintiff if at all the land that the plaintiff intended to purchase did not materialize. What then is the survey for? It can surely not be for non-existent land. The only conclusion one can reach, based on the material tendered, is that the defendant was accepting money for survey, so as to demarcate land to the plaintiff. I agree with Mr. Onkoba that the plaintiff has not tendered any document to show that he was allocated the land, but the defendant has not disputed the averment by the plaintiff that he has been on the suit land since the year 2000. It is claimed by the defendant that the plaintiff entered by force, but I doubt it. If at all he entered by force, one would have expected the defendant to have written to the plaintiff that he is on the land illegally and demanded that he should move out. A report to the police could also have been made. None has been demonstrated by the defendant.

The defendant alluded to a previous suit being in existence, but no plaint nor any pleadings in the alleged suit were displayed. It is incumbent upon any party wishing to demonstrate the existence of a previous suit, or indeed the existence of any document or matter, to display it, so that it can be compared with the

claims being made. I have absolutely no material before me touching on the case No. 25 of 2006 (or the suit No. 26 of 2006 as the case may be) and I cannot assume, in the absence of material, that this suit is related to the said case (s).

I think, from the material tendered before me, the plaintiff has demonstrated a prima facie case with a probability of success. I am not in doubt, but even if I was, I would still have held for the plaintiff, for the balance of convenience tilts in his favour, since he has been in occupation of the suit land from the year 2001.

For the above reasons, I allow the application for injunction, as prayed. The costs of the application shall be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF MARCH 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. R.K. Kipkeni present for the plaintiff

Mr. F.O. Mukabane of M/s Gicheru & Co present for defendant.