



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 499 of 2012

KIMAIYO CHEMOR & ANOTHER.....PLAINTIFF

VS

JOSEPH KIPKOECH CHEMOR.....DEFENDANT

RULING

*(Application for injunction; principles to consider in an application for injunction; suit land registered in the name of the defendant/respondent; plaintiff/applicant alleging that suit land was acquired by respondent through fraud; that suit land forms part of estate of their deceased father; no proof that suit land forms part of estate; no prima facie case established; application for injunction dismissed with costs.)*

The application before me is the Chamber Summons application dated 18 March 2009 filed by the plaintiff. It is brought under the provisions of Order XXXIX Rules 1, 3 and 9 of the Civil Procedure Rules and Sections 3, 3A and 63 (e) of the Civil Procedure Act, CAP 21 Laws of Kenya. At the outset, it will be noted that the application was filed before the Civil Procedure Rules were revised in 2010. It is an application for injunction which seeks to restrain the defendant from dealing with the land MOIBEN/MOIBEN BLOCK 9 (BARSOMBE)/319 pending the hearing and determination of this suit. The application is opposed.

This being an application for injunction, I will follow the principles laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. First, I need to be satisfied that the plaintiff has laid out a prima facie case with a probability of success; secondly, be alive to the principle that an injunction will not normally be granted if damages are an adequate remedy and finally, if in doubt, decide the matter on a balance of convenience.

To determine whether the plaintiffs have laid out a prima facie case with a probability of success, I inevitably need to make a preliminary assessment of the plaintiffs' suit. This assessment is made in light of the pleadings filed by the plaintiffs and from the evidence given in the supporting affidavit to their application for injunction. The defendant has filed a Defence and a Reply to the application. I will assess the plaintiffs' suit in light of the pleadings of the defendant. It is from an assessment of the totality of the pleadings of both plaintiffs and defendant that I will make a preliminary assessment as to whether the plaintiffs' suit is one that reaches the threshold of a prima facie case.

This suit was commenced by way of Plaintiff filed on the 19 March 2009. Alongside the plaintiff was filed this application for injunction. The two plaintiffs are brothers. The defendant is also their brother. It is the case of the plaintiffs that the suit land MOIBEN/MOIBEN BLOCK 9 (BARSOMBE) /319 forms part of the estate of their deceased father, one Chemor Chesigary Koibelel. Before filing this suit, the plaintiffs obtained letters of administration *ad litem* of the estate of the late Koibelel. It is pleaded and deposed that

Koibelel died intestate on 7/7/1990. It is further the case of the plaintiff that the defendant in 1998 fraudulently obtained title to the suit land. The plaintiffs have pleaded and deponed that the defendant had the suit land secretly transferred to himself and later charged the same to the Agriculture Finance Corporation. They have deponed that when they discovered that the defendant was registered as owner of the suit land, they held several family meetings and also reported the matter to the police station and District Officer of Soy Division. It is deponed that despite being called by the D.O to a meeting, the defendant declined to attend. In the plaint, the plaintiffs have sought prayers of a permanent injunction restraining the defendant from dealing with the suit land, an order of cancellation of the registration of the suit land in favour of the defendant and costs of the suit.

The defendant in his defence and Replying affidavit has denied that he fraudulently obtained title to the suit land. He has pleaded and deponed that he is the bona fide owner of the suit land. He has denied that the suit land forms part of the estate of Koibalel. He has pleaded and deponed that he was a member of Nyakiambi Company (presumably a land buying company) and held shares therein and that it was by virtue of being a member that the suit land was acquired by him. It is also his case that he had allowed the 1<sup>st</sup> plaintiff use of the land from 1998 till 2006 when he took over the land.

The application was canvassed before me on the 21<sup>st</sup> January 2012. Miss. Kiplimo, learned counsel for the applicants urged me to allow the application. She asserted that the suit land formed part of the estate of the deceased and referred me to minutes of meetings held by the family and which were annexed to the supporting affidavit. She averred that the plaintiffs as administrators ad litem of the estate of Koibalel are entitled to claim the suit land on behalf of the estate of the deceased. On the other hand, Mr. J.C.K. Cheptarus for the defendant urged me to dismiss the application for injunction. He asserted that the defendant is the bona fide owner of the suit land and that the suit land does not form part of the estate of the deceased. It was his view that the applicants have not laid out a prima facie case with a probability of success.

I have considered the application. I am of the view that the first thing that the plaintiffs ought to establish is that the suit land forms part of the estate of the deceased. It would appear that the suit land was initially under Nyakiambi Company, a land buying company. The plaintiffs have asserted that the shares in the said company were contributed to by the deceased and themselves. However, no evidence of such contribution was placed before me. There is also no evidence to show that the defendant held such shares on behalf of the deceased or in trust of the deceased. The suit land is registered in the name of the defendant and the plaintiffs have not placed before me any material to suggest that the suit land is part of the estate of the deceased. As registered owner, the defendant is entitled to enjoy the proprietary rights of ownership to the exclusion of all others. This is a right enshrined in Sections 25 and 26 of the Land Registration Act, Act No. 3 of 2012. Section 25, of the LRA provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. Such holding is only subject to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; or to the overriding interests noted in Section 28 of the LRA. Under Section 26 of the LRA, the Certificate of title is to be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject only to the encumbrances, easements, restrictions and conditions contained in the certificate. The title of the proprietor is not subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

At this preliminary stage, I am afraid that the plaintiffs have not placed before me sufficient material that would at face value intimate that the suit land is part of the estate of the deceased. Save for their empty depositions that the suit land was acquired fraudulently, there is no material tendereds to suggest that the defendant acquired the suit land by way of fraud, illegally, unprocedurally or through a corrupt scheme. I am not therefore convinced that the plaintiffs have set out a prima facie case with a probability of success. This is of course only a preliminary assessment of the plaintiff's case based on the quality and quantity of material placed before the court at this stage of the proceedings. The plaintiff may at the full hearing of

the main suit turn the tables.

The upshot of the foregoing is that I find no merit in the subject application. I hereby dismiss the same with costs to the defendant.

**DATED AND DELIVERED AT ELDORET THIS 29<sup>TH</sup> DAY OF JANUARY 2013.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

Ruling Delivered in the presence of:

Miss J.J Kiplimo for the plaintiffs/applicants.

Mr. J.C.K Cheptarus for the defendant/respondent.