



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 212 of 2012

JOSEPH ROTICH KIPKONESPLAINTIFF

VERSUS

JACKSON KIMATIAN KUMARE.....1ST DEFENDANT

TAPKIGEN LESHAD.....2ND DEFENDANT

RONO LESWAGEI.....3RD DEFENDANT

MAMA WIRIMA4TH DEFENDANT

MAMA SABERA.....5TH DEFENDANT

OBICHO.....6TH DEFENDANT

OBIERO7TH DEFENDANT

MAMA NAOMI8TH DEFENDANT

PAUL.....9TH DEFENDANT

KIPTOBON10TH DEFENDANT

MAMA WINDIIRI11TH DEFENDANT

JOHN TOWET.....12TH DEFENDANT

RULING

By a plaint dated 4th April, 2012, the plaintiff, Joseph Rotich Kipkones, instituted this suit against the defendants, seeking among other orders, a permanent injunction restraining the defendants either acting by themselves, their agents or servants jointly or severally howsoever from leasing selling, entering, occupying or in any way dealing with all that land comprised in L.R NO. NAKURU/NESSUIT/1961 (hereinafter called the suit property).

Simultaneously with the plaint, the applicant filed the notice of motion dated 4th April 2013 seeking the following orders:-

1. That the application be certified as urgent and be heard on priority basis;
2. That pending the inter-parties hearing of the application, the Court be pleased to issue an interim injunction restraining the defendants either by themselves, agents and or servants jointly and or severally howsoever from leasing, selling, entering, cultivating, occupying or in any way dealing with the suit property;
3. That pending the inter-parties hearing of the suit, the Court be pleased to issue a temporary injunction restraining the defendants either by themselves, agents and or servants jointly and or severally howsoever from leasing, selling, entering, cultivating, occupying or in any way dealing with the suit property.
4. Costs of the application.

Upon being certified that the application was urgent, the Court granted an interim order in terms of prayer 2 above. It is that interim order that the applicant wants confirmed pending the hearing and determination of the suit .

The application is supported by the affidavit of the 1st applicant and is premised on the grounds that the applicant is the registered owner of the suit property; that the respondents have illegally entered, occupied and are in the process of cultivating the suit property and that unless the respondents are restrained he will suffer irreparable loss and damage.

In reply to the application, the 1st respondent has sworn an affidavit in which he has deposed that the application is unmerited, misconceived, inept and an abuse of the process of the court; that he is the bona fide proprietor of the suit property and that the applicant acquired title documents to the suit property fraudulently. He has also deposed that the application is *res sub judice* Nairobi High Court miscellaneous application No.635 of 1997; that contrary to the applicant's contention the dispute in respect of the suit property started in 1996 and that the respondents have never been in occupation of the suit property.

The 1st respondent's contention is supported by the affidavit of Francis Rono Leswaka sworn on 25th July 2012.

The respondents have also filed a notice of preliminary objection together with grounds of opposition dated 24th April, 2012 in which they contend that the application is bad in law, incompetent and totally unsuitable; that the suit property is subject of a restriction entered by the Government of Kenya in respect of the Mau forest Complex; and that the application and the suit is *res sub judice* Nairobi High Court Miscellaneous application No. 635 of 1997

I have read and considered the pleadings filed by the respective parties, the affidavit evidence adduced in support thereof and the submissions by counsels for the respective parties.

The application herein being for a temporary injunction, the burden is on the applicant to satisfy the conditions set down in ***Giella V Cassman Brown & Co Ltd. (EA 358***, namely that he had a *prima facie* case with a probability of success, that unless an injunction is granted, he might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

The applicant's case is that being the registered owner of the suit property, his interest in the suit property is indefeasible. His aforementioned contention is based on Section 27,28 and 32 of the Registered land Act, Chapter 300 laws of Kenya (repealed). The **sections proves:-**

“(27) Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute

ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b).....

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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, but subject-**

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as effect the same and are declared by section 30 not to require noting on the register ,

Provided that nothing in this section shall be taken to relieve a proprietor from any duty obligation to which he is subject as a trustee. (emphasis is mine).

32. The Registrar shall, if requested by a proprietor of land or lease where no title deed or certificate of lease had been issued, issue to in a title deed or certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.

Provided that-

(i) Only one title deed or certificates shall be issued in respect of each parcel

of land or lease;

(ii)”

This contention by the applicant is contested by the respondents who have averred that the applicant's title was fraudulently obtained and that its ownership is subject of their unregistered interest thereto (as persons in possession or occupation of the suit property). The respondents have also challenged the suit and application herein on the ground that it is *res sub judice* Nairobi miscellaneous Civil application No. 635 of 1997.

As the contention that this suit is *res sub judice* Nairobi miscellaneous civil application No.635 of 1997, if proved will render it unnecessary , at this juncture, to proceed with the suit or application, it behoves this court to consider it first. **See Channan Agricultural Contractors V. Mumias Agricultural Transport limited** Civil Appeal No. 81 of 1991 where the court of Appeal held:-

“Section 6 of the Civil procedure Act does not empower a judge to strike out but only allows for stay”

The respondents' contention that the issues raised in the current suit and application are similar to those in Nairobi High Court Miscellaneous Civil application No. 635 of 1997 is vehemently opposed by the applicant who argues that the issues raised in Nairobi High Court Miscellaneous Civil application No.635 of 1997 and the parties thereto are different from those in the instant suit and application. The applicant, therefore, maintains that the suit herein in not *res sub judice* Nairobi high Court miscellaneous Civil application No 635 of 1997.

Section 6 of the Civil procedure Act, under which the above contention is premised provides:-

“No court shall proceed with the trial or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.”

From the foregoing provisions of the law the suit herein can only be *res sub judice* if: -

- (i) the matter in issue is also directly and substantially in issue in the Nairobi High Court misc. Civil application No.635 of 1997; or if
- (ii) the parties in the other suit (Nairobi high Court misc. civil application No.635 of 1997) are the same as the parties in the current suit or are the same parties under whom the parties in the current suit or any of them claim.

I have taken liberty to ascertain the issue(s) in Nairobi High Court Misc. civil application No.635 of 1997 and the issue(s) in the current suit. I have also taken liberty to ascertain the parties in the suit herein.

Whereas the issue in the instant suit is the applicant’s rights over the suit property, the issue in Nairobi High Court Misc. Civil application No. 635 of 1997 is the rights of the Ogiek Community to occupy certain portions of the Mau complex. Even though, there is evidence to the effect that the suit property is part of the suit land in Nairobi High Court Misc. civil application No.635 of 1997, there is no evidence that the issue of the applicant’s ownership is one of the issues under consideration in the said suit.

I also note that the parties in the said suit are not similar to the parties in this suit. For these reasons, I find and hold that the suit herein is not *res sub judice* Nairobi High Court Misc. Civil application No.635 of 1997.

Coming back to the applicant’s application for injunction, it is common ground that the applicant is the registered owner of the suit property. As such, he is *prima facie* the indefeasible owner of the suit property, together with all privileges and appurtenances thereto. However, I hasten to point out that unless there is evidence to the contrary the applicant’s rights in the suit property are by dint those of the provisions of section 30 of the Registered land Act (which governed the suit property when registration was effected) subject to overriding interest that may affect the property even though not noted in the register.

Such overriding interests are expressed under Section 30 (supra) to include the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed. See section 30 (g) of the Registered Land Act.

Whereas the applicant is *prima facie* the owner of the suit property, there is evidence that he has been involved in a long protracted dispute with the respondents and that the respondents are in occupation of the suit property. The applicant, through paragraphs 14,15,16 and 17 of the affidavit he swore on 4th April., 2012 has admitted that the respondents are in occupation of the suit property.

When considering whether or not to grant a temporary injunction the Court is not supposed to make any definitive finding on issues of law and fact from the affidavit evidence. I find as a fact that the applicant’s ownership of the suit property is subject to the respondents rights as persons in occupation.

Whereas the applicant is seeking an injunction to restrain the respondents from leasing, selling, entering, cultivating, occupying or in any way dealing with the suit property; it is clear from the affidavit evidence that by the time he came to court the respondents were already in possession of the suit property . See **Yego V Tuiya & another 91986) KLR 726** where the Court of Appeal held:-

“the order of the judge requiring the appellant to deliver up vacant possession of the land exceeded the terms of the respondents’ application, and under the civil procedure Rules order XXXIX Rule 1, this was not a proper thing to do.”

Also see **Esso (K) Ltd V. Mark Makwata Okiya** Civil Appeal No. 69 of 1991 where the court of Appeal held:-

“ the purpose of Injunctions is to maintain status quo. Injunctions are not to be granted if the event meant to be restrained has taken place; and courts should not grant orders not prayed for.”

Although this court initially granted an interim order in favour of the applicant, it is no bound to follow its decision where facts emerge in a different light. See **Uhuru Highway Development Ltd V. Central Bank of Kenya** Civil Appeal No.140 of 1995 the Court of Appeal held;

“ views expressed by a court at an interlocutory stage are not binding on the trial court as facts may emerge in a different light, or views may change or the court may not follow its own decision when found to be wrong. Concluded views can only be expressed on facts not in dispute, facts which stand out as clear as day light.”

From the affidavit evidence presented in this application it is clear that by the time the applicant went to court the suit property had been the subject of a protracted dispute between the applicant and the respondents; that none of the tribunals and /or administrative officers arbitrating over the dispute made a definite finding regarding the respondents possession/ occupation of the suit property and that the respondents were still in occupation of the suit property.

Having found that the respondents were in occupation when the applicant went to Court and there being no evidence to prove that they were not in occupation when the property was registered in

the name of the applicant, I decline to grant the order sought.

The upshot of the foregoing is that the preliminary objection dated 24th April 2012, fails and the plaintiff’s application dated 14/4/2012 is dismissed with costs.

Dated, Signed and delivered this 24th day of May 2013

**L N WAITHAKA
JUDGE**

PRESENT

Mr Mbugua for plaintiff/Applicant

Mr Bosire for 1st and 2nd Defendants

Mr Samich for 3rd - 13th Defendants