



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 896 of 2012

Formerly HCC 141 OF 2012

RITA JEPTOO KURUI & ANOTHER.....PLAINTIFF

VS

PHILIPH CHERUIYOT KIGEN.....DEFENDANT

RULING

The application before me is the Motion dated 28 June 2012 filed by the plaintiffs. It is an application brought under the provisions of Order 40 Rules 1,2 & 3 of the Civil Procedure Rules, Section 3A and 63 (e) of the Civil Procedure Act, and Section 68 (1) and (2) of the Land Registration Act, 2012. The application is seeking orders of injunction to restrain the defendant “from encroaching onto, entering, occupying, selling, disposing, transferring and/or in any way interfering with the plaintiffs use, occupation and possession of all that suit parcel of land L.R No. ELGEYO MARAKWET/KESSUP “B”/479 measuring 1.4 Ha or thereabouts pending the hearing and determination of this suit.” The application is opposed.

This being an application for injunction, I will stand guided by the principles laid out in the case of ***Giella vs Cassman Brown (1973) EA 358***. First, I need to be satisfied that the applicants have laid out a prima facie case with a probability of success, be alive to the principle that an injunction will not normally be granted if damages will be a sufficient remedy, and finally, if in doubt decide the application on a balance of convenience.

This suit was commenced by way of Originating Summons (O.S). In the OS the plaintiffs have sought for orders that they are entitled to all of the parcel of land LR No. ELGEYO MARAKWET/KESSUP “B”/479 by way of adverse possession against the defendant. They have also sought for an order to compel the defendant to surrender the original title deed for cancellation on account of fraud as they claim that the defendant improperly got the same registered in his name as against the plaintiffs. They have also sought a declaration that they are the rightful owners of the suit land by way of adverse possession and have asked for a vesting order to issue transferring the suit land to the plaintiffs in equal shares. It is their case that they have been in uninterrupted possession of the suit land; that the defendant in 1995 improperly and fraudulently had himself registered as the owner of the suit land; and that the plaintiffs have a customary trust and interest in the suit parcel of land.

The OS is supported by the affidavit of the first plaintiff. She has deponed that she is aged 70 years whereas the 2nd plaintiff is aged 76 years. The two plaintiffs are first cousins. The 1st plaintiff has deponed that the defendant fraudulently got himself registered as owner of the suit land in 1995 and has refuted that the suit land was properly transferred by their uncle one RUGARUK CHEPKWONY by way of gift to the defendant. She has also deponed that the land is “otherwise owned and held in trust for all the members of the initial registered owner.” She has contended that the family of the initial registered

owner was to sub-divide the same upon a meeting held by all family members; that the defendant cannot be the only person to benefit from the land.

The defendant has opposed the application by the plaintiffs and has filed a Replying Affidavit. It is his case that he is the sole registered owner of the suit land. He has annexed a copy of the title deed showing that he got registered on 9 September 1995. He has deponed that his father, Kigen Rugaruk Chepkwony transferred the land to him and prior thereto he sought and obtained consent from the Land Control Board. He has annexed a copy of the LCB consent which curiously appears to have been issued on 7th December 2011 through an application dated 6th December 2011 made to the relevant Land Control Board. It is his case that one Charles Kigen whom he alleges to be a distant relative has been claiming the suit land. He has deponed that his grandfather was a polygamous man with two wives and had several children. That the girls of his grandfather got married save for one who was childless and who came back home but was settled in a land “kilometers” away from the suit land. It is his case that this childless aunt and Charles Kigen used the suit land on a lease basis. The dispute between him and Charles developed when Charles refused to pay him money for the lease after which the defendant then started to use the land. Thereafter Charles started making allegations that the suit land ought to be shared equally.

The respondent has further denied that the plaintiffs are on the suit land. He has denied that the plaintiffs have been in uninterrupted possession of the suit land for 30 years. He has deponed that his father properly transferred the suit land to him in 1995. He has also denied that he is holding the suit land in trust for the plaintiffs.

It is against the above background that I have to determine this application for injunction.

At the outset, I must say that the drafting of the OS and the Supporting Affidavit was not very precise and could have been a lot better. Given its rather wanting quality it has not been easy for me to grasp the flow of the plaintiffs’ pleading. Nonetheless, I think that the plaintiffs are attempting to set up a dual claim to the suit land; one based on adverse possession and the other based on a customary trust. The first claim, I believe, is based on the allegation that the plaintiffs have been resident on the suit land for a period in excess of 30 years. The second claim, as I deciphered it, is based on the allegation that the defendant got himself registered fraudulently as the sole owner of the suit land; that the suit land was supposed to be owned by the whole family of Rugaruk Chepkwony; and that the defendant cannot be the sole beneficiary of the suit land.

The defendant’s case, as I took it, is that he was properly registered as the owner of the suit land. He has denied possession by the plaintiffs and has denied that he holds the suit land by way of a customary trust in favour of the plaintiffs.

It would appear that at some point the suit land was registered in the names of one Rugaruk Chepkwony, the father of the defendant. Rugaruk is uncle to the plaintiffs. It is not clear from the pleadings of both plaintiffs and defendant whether Rugaruk is still alive. It has not come out clearly how the plaintiffs as nieces to Rugaruk would be entitled to land that was initially registered in the names of Rugaruk by way of customary law so as to put forth a customary trust. A customary trust is assumed to have been created by customary law. The plaintiffs ought to have put forth their case clearly and argued on what basis they are entitled to the suit land by way of a customary law. I am afraid that this has not been clearly set out by the plaintiffs. At this stage of the proceedings, it is my view that there has not been sufficient material that would set up a prima facie case that the plaintiffs are entitled to the suit land by way of a customary trust. This is despite the rather suspicious manner in which the defendant appears to have had himself registered as the owner of the suit land. It will be seen that he became registered as owner in 1995 but consent to transfer was obtained in 2011. This however does not mean that the plaintiffs are by virtue of the suspicious registration in favour of the defendant, entitled to the suit land. The plaintiffs have quite a lot to do to prove the customary trust that they allege.

I am a bit more sympathetic, at this stage of the proceedings and with the material before me, with the claim of the plaintiffs that they are entitled to the suit land by way of adverse possession. The defendant has attempted to deflect this by claiming that there was a lease between him and Charles Kigen. The

particulars of this lease have not been elaborated, i.e the term, the rent etc. It seems to me that the plaintiffs have actually been in possession of the suit land but I cannot tell for how long, as this can only come out by way of evidence at the hearing of the suit. The plaintiffs put forth some photographs showing their possession. The defendant has denied the plaintiff's possession but I think he ought to have put forth more substance to demonstrate his possession by way of a report of a surveyor or land economist. Further, if he alleges that the land was leased out, then it would appear that he has not been in possession. I think I am inclined on a balance of probabilities to believe that it is the plaintiffs who are in possession.

The main purpose of an injunction is to preserve the subject matter of the suit pending the hearing of the case. For the purposes of this matter, I think justice will best be served if I issue the following orders which I hereby do.

1. That the plaintiffs continue with their possession as it were before the interference by the defendant that brought forth this suit.
2. That an inhibition order do issue restraining the registration of any entries in the register of the land parcel ELGEYO MARAKWET/ KESSUP "B" / 479.
3. That costs of the application be costs in the cause.

It is so ordered.

DATED and DELIVERED AT ELDORET THIS 23RD DAY OF JANUARY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT ELDORET