



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 940 of 2012

Formerly HCC 95 OF 2011

VERONICA SUM.....PLAINTIFF

VS

JOEL SUM.....DEFENDANT

RULING

**(Application for injunction, principles upon which the court will assess an application for injunction, applicant claiming defendant has trespassed on part of the suit land, part of suit land alleged to have been sold to a third party and being subject matter pending in a previously instituted suit, defendant claiming to be agent of the third party, no evidence of encroachment outside the area already pending determination in the previous suit, application for injunction dismissed).**

The application before me is an application dated 2 June 2011. It is an application filed by the plaintiff under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010. The principal prayer in the application seeks the following order:-

*“That there be an order of injunction to restrain the defendant his agents and or servants and those claiming under the defendant from encroaching on, cultivating, leasing or in any other way interfering with parcel number L.R. 2226 pending the hearing and final judgment of this cause.”*

The application is supported by a Supporting Affidavit sworn on 2 June 2011, and a Supplementary Affidavit sworn on 2 December 2011. The application is opposed.

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

To determine whether the applicant has set out a prima facie case, I will need to assess the plaint, the application and the supporting affidavits of the applicant. Since the defendant has filed defence and Replying Affidavits, I will need to gauge the plaintiff’s case in light of the defences raised by the defendant. It is from this assessment that I will determine whether the plaintiff has set out a prima facie case.

It is the plaintiff’s case that she is the administrator of the Estate of Ernest Sum (deceased) to which land parcel LR 22226 (the suit land) belongs. The plaintiff has pleaded that the defendant has without any

colour of right purported to enter into lease agreements with several third parties over portions of the suit land without the authority of the plaintiff. It is further the plaintiff's case that these third parties have attempted to enter into and cultivate portions of the suit land to the detriment of the estate of Ernest Sum. It is further the plaintiff's case that a considerable portion of her land is contracted to plant seed maize on behalf of Kenya Seed Company Limited. It is further her case that if the cultivation by the defendant and the third parties is allowed to continue, the same will contaminate the seed maize which will result in unnecessary litigation with Kenya Seed Company Limited. The plaintiff has pleaded that the defendant needs to be restrained from encroaching on the suit land and leasing it out to third parties. In her witness statement attached to the plaint, the plaintiff has described the defendant as a caretaker of one Celine George and that there exists a dispute between herself and Celine George on portions of the suit land, the subject matter of an existing suit being Eldoret HCCC No. 27 of 2008. The prayers in the plaint are two.

(a) An order of injunction to restrain the defendant from encroaching on the suit land and leasing it out to third parties.

(b) Costs of the case.

Upon being served with the summons and the application herein, the defendant filed Defence and two Replying Affidavits, one filed by himself and the other by Celine George. The defendant in his Defence has denied that he has encroached on the plaintiff's land. It is his Defence that 100 acres of the suit land had been sold to Celine George and he has been residing and cultivating this portion of 100 acres since 1984. The defendant has described himself as a relative of Celine George. The defendant has pleaded that he has always worked on the land without interruption by the plaintiff. He has further pleaded that it is within his knowledge that there is a case between the plaintiff and Celine George on the ownership of the portion of 100 acres. In his affidavit, the defendant has inter alia stated that the suit land land is over 1000 acres and he has never encroached on the area outside the 100 acres sold to Celine George.

Celine George in her affidavit has deponed that she purchased 100 acres of the suit land sometimes in the late 1970s. She has described the defendant as her relative who has been on the land ever since with the knowledge of the plaintiff. She has averred that there is a pending suit between her and the plaintiff and that the court had issued orders of status quo pending the hearing of the said suit. She has deponed that she is at a loss as to why the plaintiff has asserted that the defendant has encroached on her land and has further deponed that the contracts between Kenya Seed and the plaintiff have nothing to do with her portion of 100 acres. She has deponed that even if the defendant leased out portions of land, the same were on her 100 acres of which he did with her full authority. It is her contention that the plaintiff has come to court with unclean hands and that she (the plaintiff) does not deserve the remedy sought. There were further affidavits filed but I think the gist of the defendant's case is captured in his initial supporting affidavit and the affidavit of Celine George.

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

The application was argued before me on the 6<sup>th</sup> of December 2012. The parties had filed their written submissions to the application and I offered them the opportunity of supplementing the same with oral submissions. Miss. Mufutu, Counsel for the applicant relied entirely on the written submissions whereas counsel for the respondent made some brief oral submissions. Counsel for the applicant in her written submissions averred that the plaintiff has locus standi as the administrator of the estate of Ernest Sum. She vitiated the allegation by Celine George that the latter bought 100 acres of the suit land. She argued that Celine George has not denied that there have been leases to 3<sup>rd</sup> parties. She further argued that the defendant has encroached on the area away from the 100 acres which are separately in dispute. She stated that it is necessary to have a barrier to the contracted Seed crop and that the defendant's actions have exposed the plaintiff to the risk of litigation by Kenya Seed which will lead to loss that cannot be compensated by way of damages. She closed off by asserting that the plaintiff has demonstrated a prima facie case and urged me to grant the injunction.

On the other hand, Mr. Gicheru, counsel for the respondent argued that the plaintiff has failed to set out a prima facie case and does not deserve the remedy of injunction. It was his view that the prayers in the

plaint ask for an injunction, the same prayer in the application, and if I am to grant the application, then I will have decided the suit on merits at a preliminary stage. He referred me to the Court of Appeal decision in ***Robert Entwistle & 7 others vs The Registered Trustees of Nairobi Baptist Church & 2 others Nairobi Civil Application No.NAI 312 of 1999***. He also argued that the application has been overtaken by events. The subject matter was a maize crop planted in 2011 and in the ordinary cause of events, this crop must have been harvested at the time the application was being argued. He also asserted that the defendant was in possession and that if I am to grant an injunction, I will effectively be issuing an order of eviction. He argued that the defendant was an agent of Celine George and therefore the correct party to have been sued was Celine George and not the defendant. He also argued that there was no surveyor's report attached that could show that the defendant has encroached on an area outside the 100 acres claimed by Celine George. He urged that I dismiss this application.

I will start with Mr. Gicheru's argument that this suit is incompetent. His point is that this suit is incompetent and cannot therefore found a prima facie case on the basis that it only seeks an order of injunction which is similar to the prayers sought in the present application. It is true that the plaintiff seeks an order of injunction but I take this prayer to mean an order of permanent injunction and not a prayer for an interim injunction. The application herein is seeking interim relief pending the hearing and determination of this suit on merits. The drafting may have been poor, but I do not hold the view that this suit is incompetent for that reason. I have also considered the argument that the subject matter is a maize crop of 2011 which by now must have been harvested. That may be so, but I think it does not entirely extinguish the suit, as the plaintiff would still be entitled to be protected from future encroachment.

The plaintiff's claim as I have understood it, is that the defendant is a trespasser and has leased out portions of the plaintiff's land without having a right to do so. It is her case that he needs to be stopped from trespassing and leasing out her suit land. However, it appears to me that the defendant has been cultivating an area of 100 acres with authority from Celine George who claims a purchaser's interest in the same. The interest of Celine George is the subject matter of another suit filed prior to this suit. The defendant has deponed that there was an order of status quo issued in the said suit. My view is that if Celine George had disturbed this order of status quo through her agent, the defendant, then the proper thing to have done was not to institute this suit but rather to institute an application for contempt in the suit Eldoret HCCC No. 27 of 2008. If the plaintiff's case is that the defendant has independently of the dispute in Eldoret HCCC No. 27 of 2008, encroached on land that does not form the 100 acres in dispute, then it was incumbent upon the plaintiff to bring forth evidence either by way of a Surveyor's report or a valuer's report to demonstrate an encroachment outside the area of dispute in Eldoret HCCC No. 27 of 2008. No professional report has been annexed and there is indeed absolutely no material placed before me by the plaintiff to demonstrate where exactly the defendant is alleged to have encroached, and whether the same is beyond the 100 acres under dispute in Eldoret HCCC No. 27 of 2008.

The defendant has deponed that he has only cultivated the 100 acres claimed by Celine George and no more. I think it was incumbent upon the plaintiff to demonstrate that the area cultivated by the defendant is beyond the 100 acres under dispute. I am afraid that the plaintiff has failed to demonstrate at this preliminary stage that the cultivation is beyond the 100 acres which is already the subject matter of a dispute pending before court.

Further, the application as drafted is for an order to restrain the defendant from "encroaching on, cultivating, leasing or in any other way interfering with (the suit land)...". If I am to issue this prayer as sought, then I will definitely affect the orders of court as may have been issued in a prior existing suit touching on the same piece of land. This is because part of the suit land is under litigation between the plaintiff and Celine George. The plaintiff has not sought in her application for an order to restrain the defendant from encroaching beyond the 100 acres but it is for an order to restrain the defendant from the entire suit land. If the injunction was drafted so as to seek an order of injunction outside the 100 acres claimed by Celine George, I would probably have been a little bit more sympathetic to the applicant. But even then, I am not sure that I will not have vitiated the res judicata rule as the same issue may probably be in issue in the suit Eldoret HCCC No.27 of 2008.

The upshot of the foregoing is that I am not satisfied that the plaintiff has demonstrated a prima facie case

of trespass against the defendant touching on the suit land. In case I am wrong on this, the balance of convenience tilts in favour of the defendant who cannot be enjoined as he is utilizing the suit land under the authority of Celine George who claims 100 acres of it.

I therefore dismiss the application dated 2nd June 2011 with costs to the defendant.

DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JANUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Delivered in open court in the presence of

Miss J.J. Kiplimo holding brief for Mr. Manani of M/s Manani Lilan & Co Advocates for the Plaintiff/Applicant.

Mr. P. Gicheru of M/s Gicheru & Co Advocates for the defendant/Respondent.