



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 924 of 2012

Formerly HCC 193 of 2012

NICHOLAS KUNDU WANYAMA.....PLAINTIFF

VS

BENSON KOSGEI KIBET & ANOTHER.....DEFENDANT

*(Application for injunction; principles for the award of injunction ; plaintiff claiming ownership of suit land; suit land registered in the name of 1st defendant having purchased from 2nd defendant; plaintiff claiming to have purchased suit land from deceased husband to the 2nd defendant ; prior suit between plaintiff and deceased ; 1st defendant in possession of suit land ; application for injunction dismissed )*

RULING

**A. BACKGROUND**

The application before me is an application dated 19 September 2012 filed by the plaintiff. It is an application brought under the provisions of Order 40 Rule 1 and it seeks an order of injunction to restrain the defendants from trespassing into, wasting, evicting or interfering with the plaintiff's quiet possession of the land parcel ELDORET MUNICIPALITY/BLOCK 21 (KINGONGO) 1940 (the suit land) pending the hearing and determination of this suit. The application is supported by the Affidavit of the plaintiff. The application is opposed.

This being an application for injunction, I will apply the principles set out in the case of **Giella vs Cassman Brown (1973) EA 358**. First , I need to be satisfied that the plaintiff has set 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 can be a sufficient remedy; and finally if in doubt decide the case on a balance of convenience.

To determine whether an applicant has set out a prima facie case, the totality of the applicant's pleadings must be looked at. If the applicant is the plaintiff, this means assessing the Plaintiff alongside the application and the affidavits in support. It is from this material that a court can make a preliminary assessment of the plaintiff's case and determine whether it reaches the threshold of a prima facie case. Where there is a Defence or Replying Affidavit filed, the plaintiff's case cannot be looked at in isolation but must be gauged against the defences raised by the respondent. It is from an assessment of the plaintiff's case in light of the defences raised that a court can proceed to determine whether the plaintiff has set out a prima facie case.

**B. THE PLAINTIFF'S CASE**

The starting point is therefore the plaintiff's case. In his pleadings, the plaintiff has pleaded that he is the absolute owner of the suit land. It is his pleading that he purchased the suit land from one Stephen Nyongesa Karibu (deceased) sometime in the year 1991. It is further the plaintiff's case that there was a border dispute with the late Karibu in 1998 which culminated in the filing of a suit Eldoret SPMCC No.1031 of 1998 which the plaintiff has pleaded and deposed that it ended in his favour. It is further the plaintiff's case that Karibu died in 2008 before he could transfer the suit land to him. The plaintiff has averred that in June 2012, the 2<sup>nd</sup> plaintiff, who is wife to Stephen Nyongesa Karibu, colluded with the 1<sup>st</sup> defendant to evict the plaintiff from the suit land.

To the supporting affidavit, the plaintiff annexed an agreement purporting to be a copy of the agreement of the sale of the suit land. The agreement is drawn between the plaintiff and one Stephen Nyongesa Karibu. It was drawn in 1991 and is for a sale of a portion of ¼ acre out of a plot described as 10492/EMTIN/ FARM with the purchaser being the plaintiff herein. In his further affidavit, the plaintiff has annexed the judgement in Eldoret SPMCC No.1031 of 1998. He is the plaintiff in the said case and Stephen Nyongesa Karibu is the defendant in the said suit. From the judgement, I can discern that the trial magistrate ordered Stephen Nyongesa (the defendant in the said case) to transfer to the plaintiff land registered as ELDORET MUNICIPALITY BLOCK 21 KINGONGO 17. There is also annexed to the said affidavit a draft Memorandum of Appeal drafted by Stephen Nyongesa. Also attached are certain proceedings from which I could discern that there was an application for stay of execution of the judgement in Eldoret SPMCC No.1031 of 1998 pending appeal.

It is also the plaintiff's case that he has been in peaceful and actual occupation of the suit land since 1991 and is now his only place of abode and source of livelihood. He has pleaded that the defendants have invaded the suit land by pouring construction materials and threatened to pull down his only place of abode. He has annexed some photographs to his affidavit which he has stated demonstrate the destruction caused to his developments by the defendants. He has stated that if the defendants continue with their acts of interference, he stands to suffer irreparable loss. It is his pleading that the defendants have no basis and standing to interfere with the suit land. In his prayers, the plaintiff has sought a declaration that he is the absolute owner of the suit land and has also sought an order of permanent injunction to restrain the defendants from interfering with the suit land.

### **C. THE DEFENDANTS' CASE**

The defendants are represented by two different firms of advocates. I should probably start with the defence and reply of the 2<sup>nd</sup> defendant to the subject application. She has denied the plaintiff's claim and has further pleaded that if ever there was an agreement between the plaintiff and Stephen Nyongesa, the same was a forgery. She has further pleaded in her defence that she has been the beneficial owner of the suit land and as owner was entitled to all rights and privileges appurtenant thereto including the right to dispose the suit land. In her written statement, the 2<sup>nd</sup> defendant has stated that she sold and transferred the suit land to the 1<sup>st</sup> defendant. In her Affidavits in reply to the subject application, the 2<sup>nd</sup> defendant has argued that she has never been a party to the proceedings in Eldoret SPMCC No.1031 of 1998 as the dispute therein was between the plaintiff herein and Stephen Nyongesa. She has also pointed out that the subject land in the said case was Eldoret Municipality/ Block 21 (Kingongo) 17 and not the suit land in the present suit which is Eldoret Municipality/Block 21 (Kingongo) 1940. She has also pointed out that the agreement annexed to the plaintiff's affidavit refers to a land parcel 10492/ Emtin/Farm and not the suit land herein. She has averred that it is within her knowledge that it is the 1<sup>st</sup> defendant and not the plaintiff who is on the suit land.

The 1<sup>st</sup> defendant on his part has pleaded that he is the sole registered proprietor of the suit land Eldoret Municipality Block 21 (Kingongo) 1940. He has asserted that as registered owner, he holds all the proprietary interests that go along with such ownership. He has denied that the plaintiff resides on the land and has pleaded that the reliefs sought by the plaintiff cannot be available to him. To his affidavit, he has attached a copy of the title deed to the suit land and an official search indicating that he is the proprietor of the suit land. He has deposed that he is not aware of the suit Eldoret SPMCC No.1031 of 1998 and is a stranger to the purported agreement between the plaintiff and Stephen Nyongesa. He has

deponed that in any event, the agreement refers to Plot No. 10492/ Emtin Farm and not Eldoret Municipality/ Block 21 (Kingongo) 1940 which is the suit land. In his further affidavit, the 1<sup>st</sup> defendant has annexed a valuation of the suit land indicating that the land is improved with semi permanent structures and is owner occupied. It is his position that the plaintiff has not demonstrated a prima facie case with a probability of success and has urged that the application ought to be dismissed.

#### **D. ARGUMENTS OF COUNSEL**

The application was canvassed before me on 10 December 2012. Mr. M.J Omusundi, learned counsel for the plaintiff, urged me to allow the application for injunction. He relied on the plaintiff's pleadings and supporting affidavits. He pointed out that the injunction is merited as the applicant has been on the suit land since 1991. He directed me to the agreement showing that the plaintiff bought the suit land from Stephen Nyongesa. He also referred me to the judgment in SPMCC 1031 of 1998 and averred that in the suit Stephen Nyongesa was ordered to transfer the suit land to the plaintiff. He stated that the suit land therein was Eldoret Municipality/ Block 21 (Kingongo) 17 and the suit land resulted from a sub-division of the same. He stated that the current title was obtained by the 1<sup>st</sup> defendant in May 2012 to defeat the judgment in Eldoret SPMCC 1031 of 1998.

Mr. R. K. Limo, learned counsel for the 1<sup>st</sup> defendant, argued that the applicant has not set up a prima facie case with a probability of success. He averred that the applicant is attempting to execute the purported judgement in Eldoret SPMCC No.1031 of 1998 through this suit. It was his view that if the applicant intends to benefit from that judgment, he should proceed to execute the same in the said suit and that if the matter went on appeal, it was incumbent upon the applicant to move the court for the appropriate orders. It was also his view that the applicant has not shown the nexus between the agreement of 1991, the suit Eldoret SPMCC No.1031 of 1998 and this suit. He argued that the agreement related to a land parcel Plot No.10492/EMTIN/FARM and that Eldoret SPMCC No.1031 of 1998 related to the land Eldoret Municipality /Block 21 (Kingongo) 17 whereas this suit relates to Eldoret Municipality / Block 21 (Kingongo) 1940. He argued that no connection has been given between the three land parcels. He further argued that no material had been placed before court to demonstrate that the suit land emanated from a sub-division of Plot No. 17. He referred me to the valuation report and argued that if the suit land was sub-divided from Kingongo 17, then there must have been several sub-divisions and there had to be a basis established why the applicant is interested in this particular land parcel. He also referred me to the valuation report which shows that the same is owner occupied.

Mr. A.T Kiboi, learned counsel for the 2<sup>nd</sup> defendant reiterated the arguments of counsel for the 1<sup>st</sup> defendant. He added however, that by a resolution passed in 1999 by the Chief of the area who was mediating the dispute between the plaintiff and Stephen Nyongesa, the former was refunded his money and the agreement of 1991 was voided.

In reply, Mr. Omusundi argued that the suit land was a sub-division of Plot No.17. He also offered that the mediation of 1999 was irrelevant as the subject matter went to court and judgment delivered.

#### **E. DECISION OF COURT**

This is an application for injunction by the plaintiff and the first thing I need to be satisfied is that the plaintiff has set out a prima facie case with a probability of success.

The plaintiff in his plaint pleaded that he is the absolute owner of the suit land. This cannot be so, as the title deed and the Certificate of official search indicate that the suit land is in the name of the 1<sup>st</sup> defendant. It is not in doubt that the suit land is registered in the name of the 1<sup>st</sup> defendant and not the plaintiff. As registered owner, the 1st 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.

The plaintiff in his plaint has sought a declaration that he be declared the owner of the suit land. I cannot issue such declaration without first cancelling the title of the 1<sup>st</sup> defendant. There is no specific prayer in the Plaint seeking an order that the title of the 1<sup>st</sup> defendant be cancelled and that the plaintiff be registered in place of the 1<sup>st</sup> defendant as the proprietor of the suit land. Assuming that I could still issue such order in the absence of a specific prayer, I cannot vitiate the title of the 1<sup>st</sup> defendant unless the plaintiff puts forth material that would enable the court to cancel the proprietorship of the 1<sup>st</sup> defendant. This in accordance with Section 26 of the LRA can only be done if the 1<sup>st</sup> defendant obtained the title by fraud or misrepresentation to which it must be proved that he is a party. The court can also cancel the title if it was obtained illegally, unprocedurally or through a corrupt scheme. No allegations of fraud or misrepresentation have been set out by the plaintiff in his pleadings. Neither are there any particulars of fraud or misrepresentation set out in the Plaint against either defendant. It has also not been pleaded that the 1<sup>st</sup> defendant became the registered owner illegally, unprocedurally or through a corrupt scheme. In short, the plaintiff has not pleaded any of the situations that would entitle this court vitiate the title of the 1<sup>st</sup> defendant. In the absence of such pleading, I do not see how the title of the 1<sup>st</sup> defendant can be impeached.

Further, it is the plaintiff's case that he purchased the suit land by way of agreement with the late Stephen Nyongesa. The agreement exhibited indicates that it is in respect of a land described as Plot No. 10492/EMTIN/FARM. I agree with counsels for the defendants that it has not been demonstrated how this agreement is in any way related to this suit. No material has been tabled to show that the land described as Plot No. 10492/EMTIN/FARM is the same land as Eldoret Municipality/ Block 21 (Kingongo) 940, the subject matter of this suit. There has also been reference to the judgement in Eldoret SPMCC No.1031 of 1998. I have perused the judgement in that case which was attached by the applicant. The subject matter in the said case was land described as Eldoret Municipality/ Block 21 (Kingongo) 17. The judgement in the said case ordered the defendant therein, Samuel Nyongesa, to execute a transfer of the said land to the plaintiff who is also the plaintiff herein. The plaintiff's counsel argued that the suit land herein Eldoret/Municipality Block 21 (Kingongo) 940 resulted from a sub-division of Eldoret Municipality/ Block 21 (Kingongo) 17. I have perused the title annexed to the 1<sup>st</sup> defendant's affidavit and the same indicates that indeed it is a sub-division of Plot No.17. The valuation report annexed to the further affidavit of the 1<sup>st</sup> defendant has an extract of the map of the area showing several parcel numbers including parcel Numbers 1936-1941. It is highly probable that all or some of these parcels were carved out of Plot No. 17 for if it were sub-divided then it must have borne forth more than one parcel of land. The plaintiff has however not demonstrated why he is only interested in the parcel No. 1940 and not in the rest of the sub-divisions of Plot No. 17. The nexus between the initial agreement, the land parcel Eldoret Municipality/ Block 21 (Kingongo) 17, and the present suit land has not adequately been made.

I also note that there was litigation in relation to Eldoret Municipality /Block 21 (Kingongo) 17 in Eldoret CMCC No.1031 of 1998. The plaintiff has pleaded that the court ordered that the said land be transferred to him. If this was the order, then the plaintiff is of course free to pursue the execution of the said order through the said suit. It was also not made very clear to me what the status of the appeal filed from the said suit is at the moment.

My assessment , at this preliminary stage, is that the plaintiff has not set out a prima facie case with a probability of success. If I am wrong on this point, the balance of convenience tilts in favour of the 1<sup>st</sup>

defendant. Not only is he the registered proprietor, he is also in actual occupation of the suit land. His occupation is ably demonstrated in the valuation report annexed to his further affidavit which indicates that the suit land is “owner occupied”. I cannot make an order to evict him considering that he is the registered owner.

In my view, the applicant has not met the test of the case of *Giella vs Cassman Brown*. The plaintiff may of course turn the tables when the matter proceeds for full hearing, an opportunity that he will have.

The upshot of the above is that I do not find merit in the application herein. I dismiss the same with costs to the defendants.

DATED and DELIVERED THIS 16<sup>th</sup> DAY OF JANUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT ELDORET**

Delivered in the presence of

Mr. H.K. Ngeno of M/s Gicheru & Co Advocates for the plaintiff.

Mr. R.K. Limo of M/s Limo R.K. & Co. Advocates for the 1st defendant.

Mr. A.T. Kiboi of M/s Chemitei & Co. for the 2nd defendant.