



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 998 of 2012

DAVID RANDICH.....PLAINTIFF

VS

JOEL TIROP BUSIENI.....DEFENDANT

*(Application for injunction; principles to be considered in an application for injunction; plaintiff registered owner of land; Land Dispute Tribunal deciding in favor of respondent; whether tribunal had jurisdiction; order made after repeal of Land Disputes Tribunal Act; defendant alleging that he purchased the land; no written agreement displayed; no consent of land control board displayed; plaintiff seeking nullification of the sale; prima facie case; whether plaintiff has established a prima facie case; whether injunction can issue against a person already in occupation of land; application allowed)*

RULING

The application before me is the Motion dated 24 September 2012 filed by the plaintiff. It is an application brought inter alia under the provisions of Order 40 Rules 1,2,3,4,5 and 10 of the Civil Procedure Rules, 2010. It is an application for injunction. The plaintiff seeks an interlocutory order of injunction to restrain the defendant/respondent from moving in, or evicting or removing the plaintiff, from the land parcel NANDI/KAMOIYO/1114 pending the hearing and determination of this suit. The plaintiff has also sought orders to restrain the defendant from executing the decree in respect of Kapsabet Land Dispute Tribunal Case No.59 of 2011 pending the hearing and determination of the suit.

The application is founded on the grounds that

- (a) The plaintiff is the registered owner of the suit land.
- (b) That the agreement of sale between the plaintiff and defendant touching on the suit land has been frustrated.
- (c) That the defendant has moved in to evict the plaintiff from the suit land in implementation of the decree in Kapsabet LDT No.59 of 2011.
- (d) That the intended eviction will occasion the plaintiff irreparable loss.

The application is supported by the affidavit of the plaintiff and is opposed by the defendant.

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**. In the said case, it was stated that when considering an application for injunction, the court needs to be alive to three principles. First, the applicant has to demonstrate a

prima facie case with a probability of success; secondly, the court needs to be alive to the tenet that an injunction will not normally be granted unless the applicant demonstrates that he will suffer loss that cannot be reparable by an award of damages; and finally, if in doubt, decide the matter on a balance of convenience.

It is therefore inevitable that the starting point will be an assessment of the plaintiff's case as pleaded in his plaint and as evidenced further by the depositions in his supporting affidavit. Since the defendant has in this case filed a Defence and a Replying Affidavit to the application, the assessment of the plaintiff's case has to be made in light of the pleadings and depositions of the defendant.

In his Plaint, the plaintiff has pleaded that he is the registered owner of the suit land NANDI/KAMOYWO/1114 measuring 2.4 Hectares (approximately 6 acres) . He has annexed a copy of the certificate of title to his supporting affidavit. The same indicates that he is the first registered proprietor of the suit land having been so registered in the year 1988. He has pleaded that at sometimes back (without stating exactly when), he entered into an agreement with the defendant to sell the said land to the defendant. He has pleaded that the defendant made part payment and left a balance of kshs.200,000/=. He has further pleaded that the defendant never completed payment of the purchase price and that no consent of the Land Control Board was ever issued to sub-divide and transfer the portion paid for by the defendant. The plaintiff has prayed that the contract between himself and the defendant be rescinded and that he be allowed to refund the part of the purchase price paid by the defendant. He has also sought an order of eviction to remove the defendant from the suit land and costs of the suit. In his supporting affidavit, the plaintiff has elaborated that there was a case instituted by the defendant at the Kapsabet Land Disputes Tribunal. He has claimed that an award was made that the defendant should pay him Kshs.200,000/= (presumably the balance of the purchase price) and a further kshs.5,000/= as damages to him. He has deponed that the defendant applied for a review of this order which was rejected. He has further deponed that the award of the tribunal was a nullity as the Tribunal had no jurisdiction to hear the matter.

The defendant in his Defence, has pleaded that the entire suit land belongs to him by virtue of purchase. He has pleaded that there exists an agreement of sale and that there are signed transfer forms for the suit land. With regard to Kapsabet LDT No. 59 of 2011, he has pleaded that the same has been concluded and that if the plaintiff was not satisfied with the decree, he should have appealed or set the same aside. In his Replying Affidavit, the defendant has deponed that he is in possession of the suit land. He has repeated that if aggrieved, the plaintiff ought to have appealed against the order of court dated 17 July 2012 instead of filing this suit. He has in his affidavit alluded to annexures marked as JTB 1(a) – (d) which are said to be consent, transfer forms and court orders. However a perusal of the affidavit only shows annexures 1 (b), (c) and (d) which are an order dated 7/2/2012 from the Principal Magistrate's Court at Kapsabet, a Decree issued on 27/10/2011 by the Principal Magistrate's Court at Kapsabet and an order dated 18 July 2012 from the same court. All these are issued in respect to Kapsabet LDT No. 59 of 2011. There is no annexure 1(a) and neither are there annexed any transfer forms or any consent to the Replying Affidavit.

The applicant filed a supplementary affidavit in reply to the respondent's replying affidavit. In his supplementary affidavit, the applicant has averred that the decree of Kapsabet LDT No.59 of 2011 is null and void. He has further stated that there is no forum for appeal as the enabling statute was repealed by the Environment and Land Court Act, 2011. He has further pointed out that by the time this application was made, the time for filing a Judicial Review had lapsed and none could be made between the time the award was made and the final ruling by the Kapsabet Court. He has further pointed out that the respondent himself made an application for review of the decree after adoption and therefore contributed to the delay which led to the lapse of time for a judicial review application. He has averred that there is no law which bars him from stopping the enforcement of a decree which is a nullity. He has denied ever executing any transfer forms or that the consent of the land control board was issued.

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

It is apparent that the case of the plaintiff is that he does not deny having entered into an agreement to sell part or the whole of the land parcel NANDI/KAMOYWO/1114 to the defendant. What he wants is an

order to nullify the agreement of sale on the grounds that the defendant has never completed the purchase price and that there was no consent of the land control board to the transaction. He also wants the defendant evicted from the suit land.

It is not clear to me what sort of agreement the plaintiff had with the defendant for no written agreement has been annexed by either party. It is not very clear whether the sale was for the whole or a portion of the suit land. Neither is the purchase price discernable. What the plaintiff has pleaded in his plaint is that there is a balance of Kshs.200,000/= for the purchase price which the defendant has not paid. The defendant has countered this by stating in his defence that the whole of the purchase price has been paid. However, as I stated earlier, it is not apparent what the purchase price was and neither is clear what amount of money was paid by the defendant. It is not possible for me to determine at this stage, whether the defendant paid the whole of the purchase price or did not so pay. It is not in doubt however, that the dispute between the two parties was referred to the Kapsabet Land Disputes Tribunal in which the defendant in this suit was the plaintiff with the plaintiff herein being the party sued alongside one Elita Jeptoo (who is not a party to this suit). The Tribunal made an award which was filed in the Principal Magistrate's Court at Kapsabet as Land Dispute Tribunal Case No.59 of 2011. The award has not been annexed by either party and it is difficult for me to know precisely what the Tribunal decided and when exactly the award was made. The Decree issued is however annexed to the Replying Affidavit. It is dated 27 October 2011 and it makes the following orders.

**DECREE**

**NANDI/KAMOYWO/1114**

*THIS MATTER coming up for reading and adoption of the award filed on 4/10/11 before the Hon.G. MUTISO –RM on the 27<sup>th</sup> day of October 2011 in the presence of both parties.*

**IT IS HEREBY ORDERED.**

1. ***That Joel Busienei the plaintiff herein to pay Kshs. 200,000/= for 0.83 acres and Kshs.5,000/= before the whole land is transferred to him.***
2. ***THAT the Land Registrar do remove caution placed on the said land by Elita Jeptoo Randich.***
3. ***THAT David Randich do surrender the Original Title Deeds of NANDI/KAMOYWO/1114.***
4. ***THAT the whole parcel of land of 5.93 acres be transferred to JOEL TIROP BUSIENEI –the plaintiff herein.***
5. ***THAT right of appeal is 30 days.***

***GIVEN under my hand and the seal of this Honourable court this 27<sup>th</sup> day of oct (probably October) 2011.***

***G.M . Mutiso***

***Resident Magistrate.***

That seems to have followed an application for there is annexed an order of 7/2/2012. The order indicates that on 7/2/2012 David Randich appeared in court and stated as follows :-

*“ I want the plaintiff to be ordered to pay Kshs.205,000/= to me as ordered by the LDT before the land is transferred to him.*

*Court : The LDT ordered the plaintiff to pay to the defendants Kshs.205,000/=. The plaintiff says that he paid that money to a third party.*

*I find that the plaintiff has not complied with the order of the LDT. The land shall remain in the name of the defendants and the caution shall remain in place until the plaintiff pays the Kshs. 205,000/= to the defendants as ordered by the LDT.*

*G.M. Mutiso (SRM)*

*7/2/2012.*

That was not the end of the matter as , there seems to have been an application dated 23/7/2012 upon which a ruling was made and an order issued on 19 September 2012. The order is as follows :-

**ORDER**

*This matter coming up for Ruling of the application dated 23/7/2012 before R. Koech Senior Resident Magistrate in the presence of both counsels.*

***IT IS HEREBY ORDERED.***

***1. That the award of 14/5/2011 adopted by this court as judgement on 27/10/11 provided that the plaintiff/applicant pay kshs. 205,000/= to the family of Mary Chesang Barngetuny and not the 2<sup>nd</sup> respondent herein.***

***2. To that extent the orders of 18/1/2012 and 7/2/2012 were issued erroneously and are set aside.***

***3. That the decree of 27/10/2011 shall be executed to the letter subject to confirmation that the plaintiff/applicant has paid Kshs.205,000/= to Mary Barngetuny or nominee or successor in title.***

***Dated at Kapsabet this 18<sup>th</sup> day of July 2012.***

***R. Koech***

***Senior Resident Magistrate***

*Issued at Kapsabet this 19<sup>th</sup> day of Sept (probably September) 2012*

Although the date that the award of the tribunal was made cannot be perceived, it is discernable from the above that the award was filed on the 4<sup>th</sup> October 2011 and adopted on 27<sup>th</sup> October 2011 at the Kapsabet Principal Magistrate's Court. There seems to have been some application/s that culminated in the ruling of 18 July 2012. It will also be seen, and I need not to elaborate, that the Decree as issued by the Kapsabet Principal Magistrate's court is not the same as the order of 18 July 2012.

By the time the award was filed on 4<sup>th</sup> October 2011, the Land Disputes Tribunal Act, had already been repealed by Section 31 of The Environment and Land Court Act, 2011 which statute was assented to on 27 August 2011 and commenced on 30 August 2011.

The contemplation of the ELC Act was to have matters of land and environment determined by the Environment and Land Court. Section 30 of the ELC Act, sought to have some transition to the new regime. It provides that

*S.30 (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.*

It is arguable, without attempting to decide the point with finality at this stage of the proceedings, that Section 30 the Land Disputes Tribunal is not one of those tribunals covered by Section 30. This is because by dint of the provisions of Section 31, the Land Disputes Tribunal itself was dissolved owing to the repeal of the Land Disputes Tribunal Act. It is however not in doubt that the plaintiff herein could not take the avenue of appeal as the appeal process which was in the Land Disputes Tribunal Act could not be pursued owing to the repeal of the statute. Having been repealed, it is arguable that nothing could be done pursuant to the Land Disputes Tribunal Act, including the act of filing an award unless the same fell within the transitional provisions contained in Section 30 of the ELC Act.

That aside, it is my view that the matters that the Tribunal decided were not matters within the jurisdiction of the Tribunal. The jurisdiction of the Tribunal as set out in Section 3 of the repealed statute was to hear disputes relating to

- (a) *The division of, or the determination of boundaries to land, including land held in common.*
- (b) *A claim to occupy or work land, and*
- (c) *Trespass to land.*

The issues that went before the tribunal related to the enforcement of an agreement of sale which are not matters that were within the jurisdiction of the tribunal. The decision of the tribunal on the face of it appears to have been made without jurisdiction. I cannot allow the same to be enforced any further unless the defendant places material at the hearing of this suit which would make me change my mind.

The decision of the Tribunal and all other subsequent orders, in my view, cannot be said to have been decisions that can invite the doctrine of *res judicata* since in my view they were not decisions that can be captured by Section 7 of the Civil Procedure Act for the reason that the decision was not one of a court that was competent to try such matter.

The plaintiff also pleaded that there was no consent of the land board to transfer the suit land to the defendant. The defendant has alleged that there was consent issued and transfer. However, no such consent was annexed to his replying affidavit. The only import that I can make, on the basis of the material before me, is that there was no consent issued by the land Control Board. Consent of the Land Control Board is mandatory for all transactions touching on agricultural land, and there is consensus that the suit land is agricultural land. Section 6 of the Land Control Act nullifies various transactions touching on agricultural land if consent of the land control board is not issued. These transactions include sales and sub-divisions of land. If no consent was issued, and there appears to have been none in our case, then the purported sale between the plaintiff and defendant is null and void and cannot be enforced.

Now if this sale to the defendant is null and void, then the defendant has no claim whatsoever over the suit land. His remedy would lie in seeking to have the money paid under the purported sale transaction repaid, but he cannot enforce the said agreement.

Taking all these factors into consideration, I am of the view that the plaintiff has demonstrated a prima facie case with a probability of success. He stands to suffer irreparable loss if the defendant continues to deprive him of his proprietary rights over the suit land. Mr. Cheluget for the respondent in his submissions argued that the defendant is on the suit land, and that by this application, the plaintiff is seeking to have him evicted from the suit land. In my view this application should be taken for what it is, as an application to stop the defendant from further interference with the suit land. I do not buy the argument, which is not uncommon, that if the defendant is in possession of land, then an injunction cannot issue. A person with no color of right to be on land does not acquire those rights merely because he has entered into possession of such land. If his continued occupation is not supported by law, then he cannot be allowed to continue being in occupation and he can be prevented from continuing in occupation by way of an injunction. In an application for injunction, so long as the applicant demonstrates a prima facie case with a probability of success, then he is entitled to orders of injunction even if those orders

mean that the respondent has to stop further occupation of land that he is in possession of. In this instance, the plaintiff has demonstrated that he has a prima facie case with a probability of success. In the premises I allow the application for injunction and order :-

(a) That the execution of the award of the Kapsabet Land Disputes Tribunal and the subsequent decree and orders made in Kapsabet Land Disputes Tribunal Case No. 59 of 2011 be and are hereby stayed pending the hearing and determination of this suit.

(b) That there be a prohibitory order prohibiting the registration of any disposition in the title to the land parcel Nandi/ Kamoiywo/1114 pending the hearing and determination of this suit.

(c) That pending the hearing and determination of this suit, the defendant be and is hereby restrained whether by himself or through his servants/agents from evicting the plaintiff, interfering with the plaintiff's possession, or use, of any portion of the land parcel Nandi/ Kamoiywo/1114.

(d) That the defendant will bear the costs of this application.

It is so ordered.

DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF FEBRUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Delivered in the presence of

Mr. P.K. Komen holding brief for Mr. Choge for the plaintiff/applicant.

Mr. Y.M. Barasa holding brief for Mr. Cheluget for the defendant