



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 65 of 2013

CHRISTOPHER KITUR KIPWAMBOK.....PLAINTIFF

VS

VIPUL RATILAL DODHIA & 3 OTHERS.....DEFENDANTS

(Application for injunction; principles upon which the court will consider an application for injunction; plaintiff alleging that he was allotted suit land by the County Council of Wareng; plaintiff alleging that he was issued with a lease from the county Council; allotment letter different from the suit land; purported lease not dated and not stamped; No title issued to the plaintiff; 1st and 2nd defendants registered owners of the suit land having purchased the same from a 3rd party; prima facie case; no prima facie case established by applicant; application dismissed with costs)

RULING

A. BACKGROUND

The application before me is the Motion dated 18 February 2013 filed by the plaintiff. It is an application brought under the provisions of Order 40 Rule 1(a) and (b) of the Civil Procedure Rules and Sections 1,3 and 3A of the Civil Procedure Act "and all other enabling provisions of the law". The plaintiff has sought the following substantive order :-

That a temporary injunction be issued against the defendants, their assigns or representatives from dealing, alienating, selling or in any manner dealing with the suit land parcel No. ELDORET MUNICIPALITY BLOCK 2/293 pending the hearing of the suit inter partes.

It can be discerned that the plaintiff is seeking the usual order of injunction pending the determination of the suit. The application is based upon the following grounds :-

- (a) That the land parcel No. ELDORET MUNICIPALITY BLOCK 2/293 belongs to the applicant.*
- (b) That the defendants have proceeded to illegally register the same in favour of the 1st and 2nd defendant.*
- (c) That the registration is fraudulent.*
- (d) That no prejudice will be suffered by the Respondents if the orders sought are granted.*

The application is supported by the affidavit of the plaintiff and is opposed by the 1st and 2nd defendants who have sworn a replying affidavit through the 1st defendant. The 3rd and 4th defendants have not yet entered appearance to this suit and have so far not filed any document.

This being an application for injunction, I stand guided by the principles laid out in the celebrated case of ***Giella v Cassman Brown (1973) EA 358***. In the said case, the court of appeal stated that before granting an application for injunction the court needs to be satisfied that the applicant has demonstrated a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted where damages can be an adequate remedy; and finally if in doubt, decide the matter on a balance of convenience.

Often the purpose of an injunction is lost in the arguments of the parties. The court ought always to be alive that its function when considering an application for injunction is to determine the state in which the subject matter of the suit ought to be preserved pending the hearing and determination of the suit. That is why it is important for the plaintiff to establish a prima facie case, for where the plaintiff's case does not look impressive, then there is no purpose in disturbing the subject matter of the suit to the detriment of the defendant. The starting point is therefore an assessment of the plaintiff's case. What then is the plaintiff's case in our instance?

B. THE PLAINTIFF'S CASE

The application herein was filed simultaneously with the plaint and the plaintiff's case is discernable from his plaint, as elaborated in the supporting affidavit to the subject application. In his plaint, the plaintiff has pleaded that he is the owner of the land parcel No. Eldoret Municipality/ Block 2/293. He has pleaded that he became apprehensive that his property was being encroached when he discovered "suspicious activities" on a section of his parcel of land. He then conducted an official search which revealed that the suit land is registered in the names of the 1st and 2nd defendants. The plaintiff has pleaded that the registration of the 1st and 2nd defendants as proprietors is fraudulent. The particulars of fraud are pleaded as follows :-

- a) *Failure to disclose that the parcel was not theirs.*
- b) *Failure to acknowledge that the property was the plaintiff's rightful property.*
- c) *Seeking a registration thereof in the names of the 1st and 2nd defendants while disregarding possession of the plaintiff.*
- d) *Procurement of title documents bereft of any transaction with the plaintiff.*
- e) *Issuing the lease certificate to the 1st and 2nd defendants without any basis or genuine documents in support.*
- f) *Claim of ownership without having adhered to legal procedure.*

The plaintiff has prayed for a declaration that the title documents purported to be registered and in possession of the 1st and 2nd defendants were obtained through fraudulent means and therefore fictitious, null and void. He has also sought for an order directing the 3rd defendant (the Commissioner of Lands) to revoke the title of the 1st and 2nd defendant and a permanent injunction to restrain the 1st and 2nd defendants from dealing with the suit land.

In his supporting affidavit, the plaintiff has pleaded that on 9 June 1995, he was allotted land parcel No. Eldoret Municipality/ Block 2/112 Sub-Plot No.6 by the County Council of Wareng through a letter of allotment. The said letter of allotment is annexed. He has deponed that the said plot was later re-named Eldoret Municipality/ Block 2/293 upon sub-division of Eldoret Municipality/ Block 2/112 and a lease in his favour was drawn by the County Council of Wareng through their advocates M/s Gicheru & Company Advocates of Eldoret. He has further deponed that on 12 October 2013 (probably 2012), he instructed his advocates to conduct a search of the property which he has annexed as CK-3. The search indicates that the 1st and 2nd defendants are the proprietors of the suit land.

The plaintiff has deponed that he paid all the money demanded by the County Council of Wareng in the

letter of allotment. He has deponed that the registration of the 1st and 2nd defendant as proprietors of the suit land is fraudulent as he has never sold the said land to anyone. He has averred that after realizing that the land is in the names of the 1st and 2nd defendants he visited the County Council of Wareng and the town clerk wrote several letters to the District Lands Registrar concerning the anomaly but to no avail. He annexed two letters from the County Council of Wareng to the District Lands Registrar of Uasin Gishu District. He has closed off by stating that the transfer of the land to the defendants is unlawful, illegal and fraudulent.

C. THE DEFENDANT'S CASE

As I mentioned earlier, the application is opposed by a Replying Affidavit sworn by the 1st defendant. In addition, the 1st and 2nd defendants have also filed a joint Statement of Defence. The case of the defendants is revealed in their Defence and Replying Affidavit. It is the case of the 1st and 2nd defendants that the plaintiff has no proprietary rights over the suit land. They have pleaded and deponed that they purchased the suit land from one SEDLYNE BEN ODARI on 7 August 2012, who was the registered lessee and registered proprietor of the leasehold interest in the suit land. The sale agreement is annexed to the supporting affidavit. The 1st defendant has deponed that the said SEDLYNE BEN ODARI was previously the registered proprietor of the leasehold title in the suit land and they have annexed a Copy of the Certificate of Lease in favour of the said Mr. Odari. The 1st defendant has further deponed that after purchasing the suit land, Consent to Transfer was obtained from the Commissioner of Lands, which consent is annexed to the Replying Affidavit. A rates clearance certificate in the name of Sedlyne Odari was also obtained and thereafter a transfer was effected into their names. They have attacked the lease annexed by the plaintiff as not being a valid lease as it is neither dated, stamped, nor registered at any lands registry or at all. They have also attacked the lease annexed by the plaintiff as being invalid for want of signature by the Commissioner of Lands or Lands Registrar. They have denied that the suit land was fraudulently transferred to themselves and have asserted that the plaintiff has no recognizable proprietary interest in the suit land. They have closed off by asking that the application be dismissed.

D. ARGUMENTS OF COUNSEL

This application was argued before me on the 14 March 2013. Mr. E.K. Melly, learned counsel for the plaintiff appeared on behalf of the plaintiff and urged me to allow the application for injunction. He relied upon the application and the annexures thereto. He pointed me to the allotment letter and the lease drawn by the County Council of Wareng and asserted that the suit land belongs to the plaintiff by virtue of having a lease from the County Council of Wareng. He stated that the plaintiff paid the money that he was required to pay to obtain the lease. He also pointed me to the letters drawn by the County Council of Wareng to the Commissioner of Lands requesting that he (the plaintiff) be registered as owner of the suit land. He contended that the lease certificate of the defendants is illegal and without basis.

On the other hand, Mr. A. Kidiavai, learned counsel for the 1st and 2nd defendants strongly urged me to dismiss the application for injunction. He started off by stating that the 1st and 2nd defendants are the registered proprietors of the suit land and referred me to the Certificate of Lease annexed to their Replying Affidavit. He stated that the land was previously in the hands of Sedlyne Odari who sold it to the 1st and 2nd defendants. On the letter of allotment displayed by the plaintiff, Mr. Kidiavai noted that the letter of allotment is in respect of a land parcel No. Eldoret Municipality/ Block 2/112. He averred that there is no evidence that the County Council of Wareng held a lease over the suit land which they could transfer to the plaintiff. He also pointed out that the purported lease of the plaintiff is not dated, and that only a portion of it is annexed.

He queried why the plaintiff did not annex the whole of the said lease. Counsel also pointed out that the lease is not stamped. He referred me to the provisions of Sections 5 and 19 of the Stamp Duty Act. He argued that the lease is not admissible in evidence for want of stamp duty and without it the plaintiff has no foundation to claim the suit land. He argued that a certificate of lease overrides a letter of allotment and that by law courts are obliged to accept a Certificate of Title as conclusive ownership of the land in question. He relied upon my own decision in the case of *Sarah Jepkosgei Kimutai vs Tito Tarus & 5 others (2012) e KLR* and the case of *Wreck Motor Enterprises v Commissioner of Lands & 2 others*

(1997) eKLR. He closed off by asserting that the plaintiff has not demonstrated a prima facie case and is not entitled to the orders sought.

In reply, Mr. Melly stated that the lease instrument displayed by the plaintiff could not be registered before stamp duty was paid. He further stated that it was not dated because if it were dated, it would have accrued penalties for late payment of Stamp Duty. These were of course statements from the bar as there was no deposition on the same. Mr. Melly also stated that the defendants have not demonstrated that the consent to transfer was properly given.

E. DECISION OF THE COURT

I have considered the application, the supporting documents and the arguments of counsel. My first task is to determine whether the plaintiff has demonstrated a prima facie case. A prima facie case was described as follows in the case of *Mrao v First American Bank (2003) KLR 125*;

“..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case.” (at p138)

From the above dictum I need to be satisfied that the plaintiff not only has an arguable case, but that he has a case that has a good probability of success at the trial. The standard as noted is higher than merely an arguable case. My own opinion of what constitutes a prima facie case is that it is a case in which from the material presented, it appears that the applicant will most likely succeed in the suit if all matters hold constant. A prima facie case is a case that appears to be headed for success on merits. It is of course only a preliminary assessment at an interlocutory stage yet critical on the decision of how the subject matter of the suit ought to be preserved pending the hearing of the suit on merits.

The plaintiff has stated that the land belongs to him because it was allotted to him by the County Council of Wareng who proceeded to draw a lease in his favour. I have looked at both the letters of allotment and the lease. The letter of allotment is dated 9th June 1995. It is on the letter head of the County Council of Wareng purporting to allot to the plaintiff a plot measuring 0.03 Hectares located at "Block 2/112 sub-plot 6". The purchase price is Kshs. 20,000/= and what was required to be paid was a deposit of Kshs.5,000/= on or before 31st August 1995 and the balance of Kshs.15,000/= on or before 30th November 1995. The letter of allotment does not describe whether what is being allotted is a leasehold or a freehold interest. If it leasehold, it does not state the term of the lease. The plaintiff appears to have paid the stated amount of Kshs.20,000/= having paid a deposit of Kshs.5,000/= on 4/9/1995 and Kshs.15,000/= on 30/10/1995.

The lease that the plaintiff relies upon does not have the first page and is incomplete. It alleges to be a lease of the land parcel Eldoret Municipality/ Block 2/293. I have stated that it misses the first page but what I can decipher from the rest of the pages is that it is a lease for a term of 99 years from 9th June 1995 at the annual rent of Kshs.200/=. The lease is not dated and neither is it stamped. There is also no explanation why the first page of the lease was not attached.

The plaintiff's case is that the land parcel Eldoret Municipality/ Block 2/293 is the “sub-plot 6” of Eldoret Municipality/ Block 2/112. No material has been placed before me to show the alleged connection between the plot noted in the allotment letter and the suit land Eldoret Municipality/ Block 2/293. No mutation forms nor survey plans have been annexed by the plaintiff. The lease annexed by the plaintiff does not also state that the land noted in the lease is derived from Block 2/112 sub-plot 6. I have not seen the connection between the allotment letter and the suit land noted in the lease.

Assuming that the suit land Eldoret Municipality/ Block 2/293 was derived from land parcel Block 2/112 there is still no material placed before this court to demonstrate that the County Council of Wareng hold title, either freehold or leasehold, to the land parcel Eldoret Municipality/ Block 2/293 which would entitle them to lease out the same to the plaintiff. It goes without saying that the County Council of Wareng could only lease out the suit land if they had title to the same. If they had no title, then they could

not lease the same to the plaintiff, as they would have no proprietary interest to transfer. There is absolutely no material placed before me by the plaintiff to persuade me that the County Council of Wareng had capacity to allot and lease out the suit land to the plaintiff. The purported lease is not worth the paper that it is written on. It is not even dated and neither is it stamped as pointed out by Mr. Kidiavai. It cannot purport to transfer any interest. Without demonstrating that the County Council of Wareng had anything to transfer, the plaintiff cannot succeed. This is more or less what I held in the case of ***Sarah Jepkosgei Kimutai vs Tito Tarus & 5 others, Eldoret E&L No 916 'A' of 2012 (2012 eKLR)***. In the said case the defendants alleged to hold title to the land by virtue of a letter of allotment from the Municipal Council of Eldoret. The plaintiff on the other hand had title to the said land. Given this position I was not persuaded that the Municipal Council of Eldoret could issue an allotment letter to the same land without evidence of them holding a leasehold or freehold title that they could transfer.

In the case at hand, the defendants have demonstrated that they purchased the leasehold interest in the suit land. They purchased the same from one Sedlyne Ben Odari. The agreement for sale is annexed. The defendants have annexed a copy of the Certificate of lease that Sedlyne Ben Odari previously held. It shows that Mr. Odari is the first registered owner of the suit land having been so registered on the 16th January 2012. The interest held is a leasehold interest from the Government of Kenya for a term of 99 years from 1.1.1998. The defendants have annexed the consent to transfer from the Commissioner of Lands. There is no doubt that the suit land was then transferred to the defendants and that they are now the registered proprietors. This is revealed by both the Certificate of Lease annexed by the defendants and the Certificate of Official Search annexed by the plaintiff. Section 26 of the land Registration Act obliges me to take the certificate of lease as conclusive evidence of proprietorship. It provides as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall 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 to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The plaintiff has alleged that the defendants obtained title by way of fraud. I have not seen any evidence of fraud demonstrated by the plaintiff. The transaction by which the defendants obtained title to me appears to have been above board, at least from the material placed before me. There is no evidence tendered that the certificate of lease held by the defendants was acquired illegally, unprocedurally or through a corrupt scheme. In other words, there is no material placed before me by the plaintiff that would entitle me to vitiate the title of the defendants.

From the foregoing, I am of the opinion that the plaintiff has not demonstrated a prima facie case with a probability of success. Having failed to demonstrate a prima facie case, I have no option but to dismiss this application with costs.

I had earlier issued orders of inhibition, ex-parte, inhibiting the registration of any disposition on the suit land pending the interpartes hearing of this application. Since the plaintiff has failed to demonstrate a prima facie case, I see no reason why the defendant should be inhibited from dealing with the suit land. I hereby discharge the order of inhibition.

It is so ordered.

DATED AND DELIVERED THIS 20TH DAY OF MARCH 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

In the presence of:

No appearance on the part of either plaintiffs nor defendants.

No appearance on the part of M/s Rotuk & Company Advocates for the plaintiff.

No appearance on the part of M/s Kidiavai & Company Advocates for the 1st & 2nd defendants.

No appearance on the part of the 3rd & 4th defendants.