



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 107 of 2012

FREDRICK .SABAI & 4

Others:.....:PLANTIFFS

VERSUS

PETER CHEMASWET & 4 Others:.....: DEFENDANTS.

R U L I N G.

This is a ruling in respect of a notice of motion dated 1st October, 2012. The application has been brought by five applicants namely Peter Chemaswet, Nathan Sindet Ndiwa, James Boiyo Pello, Robinson Chesboi and Barnaba K. Kiteywo who are the 3rd, 4th, 5th, 6th and 7th defendants respectively in the suit herein. The application sought the following orders:-

- (1) That the application be certified urgent and service thereof be dispensed within the first instance.**
- (2) That pending interpartes hearing the respondents, Fred K. Sabai, Richard Kipsoi, Daniel Kapkara and Eliud Sichei, their agents and/or servants be restrained from selling. Leasing, ploughing, planting any plants and/or crops, erecting structures thereon and/or in any other way dealing in plot Nos. 700, 703, 704, 707 and 708 Kitalale Settlement Scheme Phase II in such manner as to defeat the applicants interests therein.**
- (3) that at the inter-partes hearing of the application the plaint filed on behalf of the respondents herein be struck out.**

(4) that a mandatory injunction be issued removing the respondents; Fred K. Sabai, Richard Kipsoi, Danie Kapkara and Eliud Sichei their agents, servants and/or families members from plot Nos. 700, 703, 704, 707 and 708, Kitalale Settlement Scheme Phase II.

(5) That costs be provided for.

The applicants contend that they were allocated the respective plots on 18th August, 2000. Each applicant has annexed a copy of a letter dated 18/8/2000 from the Provincial Land Adjudication and Settlement office Rift Valley province. They also annexed to their affidavits a copy of a letter dated 15th August, 2012 from the Land Adjudication and Settlement Department Trans Nzoia District which shows a list of those who were allocated plot Nos. 695 to 725 Kitalale Settlement Scheme Phase II. The list shows the name of the allottee, plot no. and acreage.

It is clear from the said list that the applicants Peter Cheswet, Nathan Jindet Ndiwa, James Boiyo pello, Robinson Chesobol and Barnaba K. Kiteywo were allocated plot Nos. 703, 707, 708, 700 and 704 respectively. All the five applicants were each allocated one hectare.

From the list which is exhibited by the defendants/applicants it is also clear that the plaintiffs/respondents are shown as having been allocated 2 hectares each. Their plots are shown as plot Nos. 701, 713, 715, 709 and 696 for Fred K. Sabai, Richard Kipsoi, Daniel Kapkara, Daniel Chemaket and Eliud Sichei respectively. The respondents contend that they have been in occupation of the suit land which they were allocated in 1996. I have gone through the affidavits in support of the application and the replying affidavit in opposition of the application. It is clear that there has been a dispute regarding the allocation from as earlier as 1996. There are minutes on a meeting convened by the provincial administration where the issue of allocation was one of the agenda. It has also emerged from correspondence attached to the replying affidavit that the then provincial administration in attempting to resolve the dispute suggested that some people including the respondents in the application herein be left to occupy 10 acres each which they had already fenced and developed. It is not clear as to when the respondents were allocated the plots they now claim to be theirs. The list which the applicants exhibited only show the allottees as per the records held at the Lands Office Trans Nzoia. It does not show when the allocations were made. However, what emerges from the pleadings herein is that the respondents are occupying the land which is about 10 acres each based on the letter dated 24th May, 2002 written by the then Senior District Commissioner S.E. Oreta. Subsequent correspondence particularly one dated 23/8/2012 which was written by District Land Adjudication and Settlement officer Trans Nzoia shows that the respondents were each allocated 2 hectares but on the ground, they have occupied 10 acres each based on the letter of the DC whom I have mentioned hereinabove.

The defendants/applicants have counter-claimed. The principles of grant of injunction were well set out in the now celebrated case of **Giella vs. Cassman Brown & Co. Ltd 1973 EA.** The same principles were reiterated in the Kenyan Case of **Teresa Shitakha vs. Mary Mwamodo & four others (1982-1988) 1KAR 965 at 966** where the Court of Appeal stated thus;-

“Those principles were first an applicant must

show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will not normally

be granted unless the applicant might otherwise suffer

irreparable injury, which would not adequately be

compensated by an award of damages. Thirdly, if the

***court is in doubt, it will decide an application on the
balance of convenience.”***

In the present case, the applicants have demonstrated that they have a prima facie case with probability of success. This without having to consider other factors entitles the applicants to an injunction. I therefore confirm the injunction issued on 26/11/2012. The same shall last until the hearing and determination of the suit herein. There were two other prayers which the applicant sought namely that the suit be struck out and a mandatory injunction be issued removing the respondents from the suit land. The law regarding striking out of pleadings is well settled. A pleading can only be struck out in the clearest of cases. It can be given where it is shown that it is clearly hopeless and that not even an amendment can save it. This remedy ought not to be lightly given.

In the present case, there are issues which need to be settled at a full hearing. For instance, it is not clear from the pleadings when the plaintiffs/respondents were allocated the plots which they are laying claim to. The court has to hear the parties and ascertain whether there was double allocation or not.

This is therefore a case where the court can proceed to strike out the plaintiff. As for the prayer for a mandatory injunction the conditions for grant of the same are now fairly well settled. Firstly an applicant must demonstrate existence of special circumstances. Secondly the case must be one which is clear and can be decided at once. Thirdly the act done must be a simple and summary one which can easily be remedied. Fourthly, a mandatory injunction can be given at interlocutory stage where it is shown that the defendant is attempting to steal a march on the plaintiff i.e. by doing something which will defeat the injunction where he has had notice of the same.

In the present case a look at the applicants' case in totality shows that the respondents' action is neither a simple one which can be readily remedied nor is it a clear case which can be decided at once. There are no special circumstances which have been demonstrated to warrant the issue of mandatory injunction at interlocutory stage.

I therefore find that the prayer to have the suit struck out and an order of mandatory injunction are not maintainable. The same are hereby rejected. As the applicants have partly succeeded in their prayers, I will award them $\frac{3}{4}$ (three quarters of the costs of this application).

It is so ordered.

Dated, signed and delivered in open court at Kitale on this 20th day of March, 2013.

E. OBAGA.

JUDGE.

In the presence of Mr. Litunya for Mr. Ngeiywa for defendant/applicant.

CC – Joan.

E.OBAGA.

JUDGE.

20/3/2013.