



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 42 of 2013

NOAH TALAM PLAINTIFF

VS

JOSEPH KOECH TONUI.....DEFENDANT

(Application for injunction; principles upon which the court will consider the application for injunction; plaintiff registered owner of suit land by transmission; claim that defendant is trespasser; defendant alleging to be step-brother to deceased; defendant having filed an application for annulment of grant; application for annulment still pending; prima facie case; application for injunction allowed; order of inhibition issued; suit stayed pending outcome of the application for annulment)

RULING

The application before me is the Motion dated 30 January 2013 filed by the plaintiff. It is an application brought under the provisions of Order 40 Rule 1,2,3(3), 4 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act. The applicant is seeking orders of injunction to restrain the defendant from interfering with the suit land Uasin Gishu/Kaptagat Scheme/160. The application is based on the grounds that the plaintiff is the owner of the suit land; that the defendant has threatened to plough the said land forcefully; and that if the defendant is not restrained, the plaintiff's interest of planting and cultivating his parcel of land shall be prejudiced and he shall suffer greatly. The application is supported by the affidavit of the plaintiff and is opposed by the defendant who has filed a replying affidavit and has also filed a defence to the plaintiff's suit.

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

The starting point is therefore to assess whether from the pleadings and the affidavit in support, the plaintiff has laid out a prima facie case. In my view, a prima facie case is one in which, from a preliminary assessment of the material, the court is of the view that the applicant will most likely succeed in his case if all things hold constant. The plaintiff herein has pleaded that he is the registered owner of the suit land which is registered as Uasin Gishu/Kaptagat Scheme/160 measuring approximately 8.4 Hectares. The plaintiff has pleaded that the defendant on 27th January 2013, forcefully entered into the said parcel of land, ploughed it without his consent and threatened the life of the plaintiff. It is pleaded that the defendant has been leasing the land from the plaintiff but the plaintiff is no longer interested in leasing it out to the defendant but wants to utilize it himself. The plaintiff has thus sought orders of perpetual injunction to restrain the defendant from interfering with the suit land.

In his supporting affidavit, the plaintiff has annexed a copy of the title deed and search certificate of the suit land which indicates that he (the plaintiff) is the registered owner thereof. He has deponed that initially, the land was registered in the name of his father, one Kiptalam Kimaswai who died. The plaintiff then filed a succession cause being Eldoret High Court Succession Cause No.175 of 2010. He has deponed that he obtained a grant of letters of administration which were confirmed on 21 November 2011. He has annexed a copy of the confirmed grant which shows that he is the sole beneficiary of the estate of Kiptalam Kimaswai. The whole of the suit land which comprised the only property of the deceased was vested in him alone. He has continued to depone that he has been leasing part of the suit land to the defendant due to financial constraints. However, for this planting season, he refused to lease the land to the defendant who then became furious. He has deponed that as he was ploughing the land, the defendant threatened him and on the 25th January 2013, the defendant came with a tractor and ploughed almost 2 acres of land before he was chased away. He has further deponed that on the 27th January, 2013 the defendant yet again appeared with a tractor and there was a confrontation between the two. He has deponed that unless restrained, the defendant will enter the suit land and cause him great loss.

As mentioned earlier, the defendant has responded to the subject application by filing a replying affidavit. In addition to filing Defence, the defendant has also filed a Notice of Preliminary Objection. The preliminary objection is that *"(this) suit is sub judice since there is a suit pending in court over the same subject matter being Eldoret High Court Succession Cause No. 175 of 2012."*

I directed that this preliminary objection be subsumed in the arguments of the parties with regard to this application. In his Replying Affidavit, the defendant has deponed that Kiptalam Kimaswai (deceased) was married to two wives; the plaintiff's mother being the first wife and the mother to the defendant (Esther Cherotich Misoi) being the second and only surviving wife. He has deponed that Kimaswai died on 30 June 1991 and has attached the certificate of death. He has stated that under the law of succession, he as a child to the deceased, is entitled to benefit from his estate. He has deponed that from way back in 1992, they mutually agreed with the defendant to informally divide the suit land into two equal portions as the deceased had two wives. He has stated that he has been farming the one half of the portion of the suit land from 1992 to date. He has denied that he has been leasing the farm from the plaintiff. He has averred that the plaintiff failed to disclose material facts when filing the succession cause specifically that he failed to disclose that the deceased was polygamous. He has deponed that on learning about the issue of the grant he instructed his advocates to file an application to revoke/nullify the grant. He has annexed the said application to his affidavit. He has deponed that the present case is sub judice because the Succession matter is still pending. He has inter alia sought that this application be dismissed as being sub judice.

In his statement of defence, which is very brief, the defendant has denied that the plaintiff is the legal owner of the suit land, has denied that the land was leased to the defendant, has denied that he forcefully entered the suit land as pleaded by the plaintiff and has stated that there is a pending suit being the succession matter.

The plaintiff filed a supplementary affidavit in which he deponed that the confirmed grant was obtained after going through the full succession process and that the defendant never raised any objection. He refuted that the deceased had two wives and has asserted that the deceased only had one wife (the plaintiff's mother) who died, and that the deceased never married again or stayed with Esther Cherotich Misoi. On the summons for revocation of grant, the plaintiff has stated that he is a stranger to the six persons named as applicants in the summons. He has reiterated that he only leased out the land to the defendant to ease his financial burdens. He has denied that the defendant is his brother and has stated that he is not even a member of his family.

This application was canvassed before me on 18 March 2013. Mr. Tarus, learned counsel for the applicant urged me to allow the application. He took me through the application and the supporting affidavits. He stressed that the applicant is the registered owner of the suit land having obtained the same by transmission vide Eldoret Succession Cause No. 175 of 2010. He insisted that the defendant has only been a lessee of the suit land. He averred that the issues raised by the respondent in the application for annulment of grant are contested by the applicant. He argued that the defendant should be restrained until the application in the succession matter is determined.

On the other hand Mr. Mukabane learned counsel for the respondent urged me to disallow the application for injunction. His core issue is that the orders sought herein can be given in the succession matter and therefore this suit is sub-judice. He urged me to stay this suit pending the hearing and determination of the succession matter. He further argued that the respondent is the person who has been cultivating the land since 1992 as one of the family members of the deceased. He stated that it is only after the plaintiff obtained title that he sought to evict the defendant. He stressed that the title of the plaintiff has been subjected to challenge in the succession matter. He argued that the plaintiff has not been utilizing the land since 1992 and is therefore not going to suffer irreparable loss if this application is not granted.

I have considered the application and the rival submissions of counsels. The first issue is whether this suit is sub judice as argued by Mr. Mukabane. I have looked at the Succession cause and I have seen that the respondent has filed an application to annul the grant that was issued to the plaintiff. That application is still pending. I am aware that if the grant is annulled, the status with regard to the ownership of the suit land may change. It is probable that the court handling the succession matter may hold that the defendant is entitled to benefit from the estate of the deceased. But again, the court handling the succession matter may hold differently and refuse to annul or revoke the grant issued to the plaintiff. I do not know how the court will decide the succession matter. That said, I am not of the view that the issues in the succession cause are the same issues in this matter. True, the two cases are related but the issues in the two cases are different. Mr. Mukabane has argued that this suit is sub judice.

The import of sub-judice in our civil procedure is captured by section 6 of the Civil Procedure Act, It provides that :-

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The issue in this matter is whether the defendant ought to be restrained from dealing with the suit land so long as the plaintiff's title subsists. This issue is different from the matters in the succession cause although of course the plaintiff's position in the suit land is subject to change depending on the decision in the succession matter. I do not therefore agree with Mr. Mukabane that the issues at hand are similar to those in the succession cause or that this application ought to be heard in the succession matter. The two suits are closely related but I think they agitate separate issues.

The question that I need to deal with, and which I will deal with, is whether the defendant ought to be restrained pending the hearing and determination of this suit. This will of course depend on whether the plaintiff has laid out a prima facie case with a probability of success. The plaintiff is the current registered owner of the suit land. He is the sole registered owner and he holds a certificate of title to the suit land. Section 26 of the Land Registration Act provides that :-

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.
(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

By virtue of the above provision, I am obliged to take it that the plaintiff is the bona fide proprietor of the suit land. There is no counterclaim raised by the defendant that asks that the title be cancelled because it was obtained by fraud or misrepresentation. Neither is there a prayer to have the plaintiff's title cancelled because it was acquired illegally, unprocedurally or through a corrupt scheme.

Section 25 of the Land Registration Act pronounces the rights of the proprietor. It provides that :-

25. (1) 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, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

It will be observed from the above that the plaintiff as proprietor is entitled to enjoy the suit land only subject to leases, charges or other encumbrances noted in the register or to the overriding interests elaborated in Section 28 of the Act. (a) spousal rights over matrimonial property;

(b) trusts including customary trusts ;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.

The respondent has not pleaded that he is entitled to any of the above overriding rights.

As matters stand, the plaintiff is still the registered proprietor of the suit land. I am of the view that he is entitled to enjoy those proprietary interests to the exclusion of all others including the defendant. Matters would probably be a little different if the defendant had a competing claim of his own pleaded in the defence or in a counterclaim. At the moment, he does not have any competing claim. What he has is an

application pending before the probate court. I do not know if he will succeed in the said course. But unless and until he succeeds, the plaintiff is now proprietor of the suit land and is entitled to enjoy the suit land to the exclusion of all others.

In the circumstances, I am of the view that the plaintiff has established a prima facie case with a probability of success and I allow the application for injunction. However, since there is the succession matter which might change the plaintiff's position, I order that this suit be stayed pending the outcome of the succession matter. I also issue an order of prohibition, prohibiting the registration of any disposition in the suit land until such further orders of this court. In the meantime the defendant shall be barred from dealing with the suit land. Costs of the application to the plaintiff.

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:

Mr. T.K. Kiplimo advocate holding brief for Mr. J.R. Tarus of M/s Tarus & Company Advocates for the plaintiff/applicant.

Mr. F.O. Mukabane advocate of M/s Terer & Company Advocates for the defendant/respondent.