



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 407 of 2012

FANKIWA LTD.....PLAITNIFF

VS

JOSEPH KOMEN & 5 OTHERS.....DEFENDANT

(Application for injunction; principles upon which the court will rely upon in an application for injunction; application filed 5 years after filing suit; whether applicant entitled to injunction despite the delay; principles of equity; delay in filing application for injunction; application dismissed; applicant advised to set down suit for hearing)

RULING

The application before me is an application dated 4February 2013. It is an application filed by the plaintiff and brought under the provisions of Order 40 Rule 1 of the Civil Procedure Rules. It seeks orders of injunction against the defendants. Specifically, the plaintiff seeks orders that the defendants by themselves, their servants, agents, employees or any other persons acting for or on their behalf be restrained by way of temporary injunction from ploughing, cultivating, wasting, selling, leasing or otherwise dealing with the land parcel No. Soy/Kipsomba Block 12/30 pending the hearing and determination of this suit.

The application is supported by the affidavit of Mark Kiptarbei Too who is a director of the plaintiff company. The defendants have not filed any response to the said affidavit and indeed have not filed any appearance nor defence in this matter despite having been duly served.

This suit was commenced by way of a Plaint filed on 14 February 2008. In the said plaint, the plaintiff, a limited liability company, has pleaded that it is the registered owner of the land parcel Soy/ Kipsomba Block 12/ 30 having purchased the same from Lonrho Agribusiness E.A Limited on or about the year 2001. It is further pleaded that the defendants on or about December 2002 without any colour of right, trespassed and invaded the suit land, and have continued to occupy it while committing acts of waste. It is pleaded that due to the defendants' acts of trespass, the plaintiff has been denied access and use of the suit land.

The substantive prayers in the suit seek orders of eviction and permanent injunction to restrain the defendants from continuing to occupy or deal with the suit land.

The defendants were duly served with summons but as stated above, they have neither filed appearance nor defence.

No action was taken by the plaintiff to list this matter for hearing and the matter remained quiet until the plaintiff filed this application.

The plaintiff has through the supporting affidavit of Mark Too, deponed that it is the registered owner of the suit land and has displayed a certificate of title. It is deponed that the defendants have continued to occupy the suit land despite the plaintiff being the registered owner and utilizing it to the detriment of the plaintiff. It is further deponed that the defendants' actions amount to acts of impunity and that they are inconsistent with the plaintiff's rights to own the land. It is deponed that the plaintiff will suffer irreparable damage incapable of compensation by an award of damages unless the injunction sought is granted.

I had mentioned earlier that the defendants have not filed any response to this application. It does not however mean that where an application is unopposed, then it must be allowed as a matter of course. Every applicant must demonstrate that he is entitled to the prayers sought in accordance with the applicable law and the facts of the matter. In our case, this being an application for injunction, the principles laid out in the case of ***Giella v Cassman Brown (1973) EA 358*** do apply. First I must be satisfied that the applicant has laid out a prima facie case with a probability of success; secondly, I must be alive to the tenet that an application for injunction will not normally be granted unless the applicant stands to suffer loss which is not reparable by an award of damages; and finally if in doubt, decide the matter on a balance of convenience.

Apart from the principles in the case of ***Giella v Cassman Brown*** I am also alive to the position that the remedy of injunction is an equitable remedy and the maxims of equity do apply.

The applicant has pleaded in his plaint that it is the owner of the suit land. In the application, the certificate of title has been displayed and there is no doubt that the applicant is the sole proprietor of the suit land. As proprietor the applicant is entitled to all proprietary rights that vest in such ownership including the right of exclusive possession. I have no doubt that the applicant has laid out a prima facie case with a probability of success.

I however have difficulty on whether the applicant has satisfied the second limb of the principles in ***Giella v Cassman Brown***, that of irreparable loss. As stated earlier, every proprietor is vested with proprietary rights that ought to be respected including the right of exclusive possession. There is of course loss that is suffered when a proprietor is divested of his proprietary rights by other persons. I would have had no difficulty in concluding that the plaintiff stands to suffer irreparable loss if it were not for the delay in bringing this application and that delay makes me question whether the plaintiff indeed stands to suffer any irreparable loss.

I mentioned earlier that this suit was filed on 14 February 2008. In the plaint, the plaintiff pleaded that the defendants moved into the suit land in the year 2002. The present application was filed on 5 February 2013 about five years after the suit was filed. I do not know what urgency has suddenly arisen that was not present from the year 2002 and more specifically from the year 2008 when this suit was filed. Of course for the years that the plaintiff had not been in occupation of his land, it may be assumed that he suffered loss but it does not seem that it is loss which the plaintiff felt was irreparable as it did not take any action to have an injunction until about 11 years after it is alleged that the defendants moved into the suit land. The sudden realization that it will suffer irreparable loss does not conform to its lackadaisical attitude. I am therefore not convinced on the question of irreparable loss.

Moreover, the remedy of injunction is founded in equity and one of the maxims of equity is that "delay defeats equity". With regard to the remedy of injunction, I cannot state it better than to quote the text Hanbury and Maudsley, *Modern Equity*, 10th Edition at page 92 where it is stated as follows :-

"As we have seen, the plaintiff must come promptly in the case of an ex parte injunction, as any delay illustrates that his case is not urgent. Where the plaintiff has voluntarily delayed his motion for an interlocutory injunction, he is unlikely to establish that his case is such that it would be unreasonable to make him wait until trial..."

In Snell's *Equity*, 30th Edition at p 33 para 3-16(quoting Lord Camden L.C in *Smith v Clay (1767) 3 Bro. C.C. 639n . at 640n*) it is asserted that a court of equity "*has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.*"

My feeling is that the applicant has been guilty of laches which would disentitle the plaintiff from seeking the equitable remedy of injunction.

My view is that where there is unreasonable delay in bringing an application for injunction then the avenue is for the plaintiff to set down the suit for hearing instead of pursuing an application for injunction. Five years to me constitutes unreasonable delay and I do not think that the applicant is now entitled to an application for injunction.

It is now incumbent upon the plaintiff to set down the suit for hearing and prove its case. This application is dismissed but with no orders as to costs.

DATED and DELIVERED THIS 30TH DAY OF APRIL 2013

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT & LAND COURT AT ELDORET

Delivered in presence of:

Mr. E.K. Maritim Advocate of M/s Kalya & Co for the plaintiff/applicant

N/A for the defendants who have not yet entered appearance