



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 150 of 2013**

**FRANCIS KIBII CHERUTICH.....PLAINTIFF**

**VS**

**JOHN MBUTHIA.....1ST DEFENDANT**

**JOSEPH KAMAU MBUTHIA.....2ND DEFENDANT**

**JOSEPHENE CHESIRE.....3RD DEFENDANT**

***(Application for injunction; principles to be applied in an application for injunction; plaintiff having been allotted suit land by the Settlement Fund trustees; defendants alleging to have settled on the land and acquired title by adverse possession; prima facie case: whether case of plaintiff can be defeated by the long occupation of the defendants; whether one can claim adverse possession on land registered under the SFT; application for injunction allowed).***

**RULING**

I have before me a Motion dated 14 March 2013 filed by the plaintiff. It is an application principally brought under the provisions of Order 40 rules 1,2,3,4,10 and 9 of the Civil Procedure Rules. It is an application for injunction seeking to restrain the defendants from entering, cultivating, planting, alienating, trespassing, and/or dealing with the land known as Mochongoi Block III Plot No.14. The grounds upon which the application is based are inter alia that the plaintiff is the lawful allottee and/or owner of the suit land and that the defendants have illegally invaded and trespassed onto the same without any colour of right.

The application is opposed by the defendants who have not only filed a reply to the subject application but have also filed 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 a court grants an order of injunction, it needs first to be satisfied that the applicant has laid out a prima facie case with a probability of success; secondly, be alive to the tenet that an injunction will not normally be granted unless the applicant stands to suffer loss which cannot be compensated by an award of damages; and finally if in doubt, decide the application on a balance of convenience.

An assessment of whether or not an applicant has demonstrated a prima facie case is inevitably made from an assessment of the pleadings and supporting material of the applicant. Where the respondent has filed defence and opposing material to the application, the assessment of whether a prima facie case has been demonstrated by the applicant must be made in light of the pleadings and material placed by the respondent.

In his plaint, the plaintiff has pleaded that he is the lawful allottee of the suit land. He has stated that the said land was allotted to him by the Settlement Fund Trustee; that he paid the requisite fees, and took possession of his land. He has pleaded that sometimes in July 2012, he went to check on his parcel of land only to find that the defendants had entered it, cultivated crops and erected a structure on it. In his plaint he has sought prayers for a declaration that the defendants are trespassers on the suit land; a permanent injunction to restrain them from dealing with the suit land; and orders of eviction, and mesne profits for trespass and unlawful encroachment.

In his supporting affidavit, the plaintiff has explained that he was allotted the suit land by the Settlement Fund Trustees on 30 September 1998 and that he paid the requisite allotment fees. He has annexed some payment receipts to the SFT. He has deponed that he then left the land in the custody of one Samwel Kiplenge (deceased) who had requested the plaintiff to utilize the land as he made arrangements to move to his own parcel of land. The plaintiff has elaborated that the defendants are his neighbours and allottees of the neighbouring land parcel Mochongoi Block III Plot No.15. He has averred that on 10 July 2012, he went to cultivate the land only to find maize crops and a temporary structure on the land. On inquiry he discovered that the house belonged to the 1st defendant and the same was erected for him by the 2nd defendant. The maize crop belonged to all the defendants.

He then approached the defendants and inquired why they had trespassed onto his land and the defendants demanded proof of ownership which the plaintiff displayed to them. The plaintiff took steps to report the matter to the area chief and also to the Baringo Land Adjudication and Settlement Officer who wrote a letter confirming that the plaintiff was owner of the suit land. The plaintiff has deponed that the Chief, assisted by some elders, listened to the dispute and ruled in his favour. The defendants were ordered to harvest their crops and vacate the land by December 2012.

In January 2013, the plaintiff went to cultivate the land only to find that the defendants have already cultivated it. The plaintiff went back to the Chief and they visited the land but the defendants became hostile and threatened them. The plaintiff then reported to the District Officer Mochongoi Division who summoned all the parties. The D.O deliberated the matter on 19 February 2013 in the presence of all parties and made a decision that the suit land belonged to the plaintiff and that the 2nd defendant offered to voluntarily withdraw. However, on 6 March 2013 when the plaintiff went back to the land, he found that the defendants had not vacated as promised and that they were still cultivating the land. It is then that he opted to file this suit and the application for injunction.

The defendants upon being served entered appearance through the firm of S.M. Omae & Co. Advocates. As earlier stated, they also filed Defence and a Replying Affidavit to the subject application. The Replying Affidavit is sworn by the 2nd plaintiff.

In their joint statement of defence, the defendants have pleaded that the plaintiff has never been in possession of the suit property since 1996 when the defendants settled on the land. The defendants have also denied that the plaintiff is the lawful allottee of the suit land and have pleaded that if at all the suit land was allotted to the plaintiff, the plaintiff failed to comply with the conditions of allotment. They have pleaded that they have been in occupation of the suit land openly, peacefully and without interruption since the year 1996. They have further pleaded that the plaintiff's suit is time barred. They have put the plaintiff to strict proof of all allegations pleaded in the plaint.

In the Replying Affidavit sworn by the 2nd defendant, it has been explained that the 1st defendant is the son of the 2nd defendant whereas the 3rd defendant is wife to the 2nd defendant. It is admitted that sometimes in 1996, the 3rd defendant was allotted the land parcel Mochongoi Block III/15 and that they moved there and occupied it. However, the same was rocky and steep and only a small portion of it was suitable for cultivation. The suit land, Plot No. 14 was partly occupied by one Samson Kiplenge (deceased). They inquired from the said Samson who the owner of the land was, and Samson told them that he did not know, and that they are free to use the land. They started using a portion of about one acre whereas the other was used by Samson and other people to whom Samson had leased the land to. In 1986/87 the 2nd respondent and Samson dug a spring on the land. In the year 2000 Samson was allotted some land and he moved out of the suit land. By the time he was leaving, Samson had erected a house and

planted some trees on the land and Samson sold to the 2nd defendant the trees but he removed the house.

He has deponed that since early 2000 he has been in occupation of the suit land and has even constructed a house for his son, the 1st defendant. He also leased out a portion of it, one half of an acre to a neighbor in the year 2006. He has averred that the first time the plaintiff came to the suit land was on 2 July 2012. The 2nd defendant went to complain to the Chief and all parties were summoned. It is then that the plaintiff produced receipts showing that he had paid for the land. He has admitted being asked to vacate the land by the Chief and later the D.O but has claimed the land for having lived there for 16 years.

The plaintiff filed a supplementary affidavit which basically refuted the allegations raised by the respondents in their replying affidavit.

The application was canvassed before me on 16 April 2013. Mr. M.K. Chebii, learned counsel for the plaintiff urged me to allow the application. He stated that the plaintiff is an allottee of the suit land from the Settlement Fund Trustees (SFT) but that the title is still with the SFT. He pointed me to an allotment letter dated 30 September 1998 from the Director of Land Adjudication and Settlement and some receipts paid to the SFT annexed to the plaintiff's supporting affidavit. He reiterated the contents of the supporting and supplementary affidavit and submitted that Samson Kiplenge was the licensee of the plaintiff who was allowed to cultivate and lease the said land. He argued that the defendants could not claim adverse possession on the suit land because the land is still under the SFT which is a part of the government. He submitted that one cannot claim adverse possession on land registered under the government. On this point, he relied on the case of ***Kiprop Kanda v Gabriel Biwot Kanda Eldoret Court of Appeal, Civil Appeal No. 219 of 2003***/ He argued that the defendants are therefore trespassers.

On the other hand, Mr. B.O. Obutu for the defendants argued that the plaintiff has no claim over the land. He submitted that the plaintiff did not comply with the letter of offer of 30 September 1998 and therefore the offer lapsed after 90 days. He further submitted that the defendants have been in possession since the year 1996 and that the plaintiff has never been on the suit land. He argued that the purpose of an injunction is to preserve the subject matter in the state that it is, and in this instance, the subject matter must be preserved with the defendants in possession. In his view, the status quo needs to be maintained until the finalization of the case.

I have considered the application, the reply to the application and the submissions of the parties. It is not in contention that the plaintiff was offered the suit land by the SFT through the allotment letter of 30 September 1998. The allotment letter offers the plaintiff Plot No. 14. The letter states that the offer is valid for 90 days within which period the allottee ought to pay 10% deposit failure which will lead to cancellation of the offer. The receipts annexed by the plaintiff are dated 14/6/2012 for Kshs. 8,000/= and 19/6/2012 for Kshs.16,277/=. This last receipt is recorded as being "*last payment on Plot No.14 Block III...*".

Counsel for the respondents has argued that there was no compliance with the letter of offer and therefore the offer lapsed and the plaintiff cannot now allege to be entitled to the said land. I cannot at this stage tell whether the plaintiff paid the 10% deposit as requested or whether he fully complied with the letter of offer. It however appears that irrespective of whether or not the plaintiff fully complied with the terms of the allotment letter, the SFT still kept the land in favour of the plaintiff and accepted the payment on 19/6/2012 as the final payment for the suit land. The SFT did not re-allot the suit land. The question of whether or not the plaintiff complied with the conditions of offer is to me a matter squarely between the plaintiff and the SFT and I do not see how the defendants can seek to challenge it unless of course there was a subsequent allotment to them in place of the plaintiff. There is none in this regard and I am unable to accept the submissions that the suit land is now no longer available to the plaintiff.

I think the more substantive argument is that the plaintiff is time barred from claiming the suit land and that the defendants have a legitimate claim over the suit land based on adverse possession. On this point, I do agree with the submissions of Mr. Chebii that the defendants cannot claim the benefit of long possession so long as the land is still registered under the government through the SFT. There are numerous authorities on this point starting with the case ***Gitu v Ndungu (2001) 2 EA 376***, which settled

the point that one cannot allege adverse possession on land that is registered under the SFT and that time for calculating possession for purposes of founding a claim on adverse possession does not begin to run so long as the land is still under the SFT. This position was affirmed in the case of ***Kiprop Kanda v Gabriel Biwot Kanda*** cited by counsel for the plaintiff.

The issue of adverse possession cannot therefore be raised where the land is still registered under the SFT and it follows that adverse possession against a title holder who holds such title after allotment by the SFT can only begin to run after he acquires title from the SFT. In our instance, the land is still registered under the SFT and my position at this preliminary stage is that time for adverse possession cannot be said to have started running against the plaintiff. The long possession and occupation of the suit land by the defendants, though disputed by the plaintiff, in my view counts for nothing since the land is still registered under the SFT. It is not therefore necessary for me to make a preliminary determination as to whether the defendants have been in possession since the year 1996 as claimed.

The plaintiff has demonstrated that the land has been allotted to him and all that he is awaiting for is the issuance of title into his name. The defendants on the other hand have not demonstrated that they have a sustainable competing claim over the suit land. Although not yet registered as proprietor, I think the plaintiff is perfectly entitled to the proprietary rights that any proprietor would have.

Mr. Obutu argued that I cannot grant the injunction sought because the defendants are in possession. I do not buy this contention which is not an uncommon argument. I do not think that all that a trespasser needs to do is enter land and by virtue of that entry an injunction cannot issue against him to prevent him from further acts of trespass. An injunction can and will issue against a person in occupation of land if such person cannot demonstrate that his occupation is lawful or that he has a legitimate arguable claim over the said land. I could only allow the defendants to continue in possession if they had demonstrated a sustainable competing claim in which instance I would have had to decide the case on a balance of convenience which no doubt tilts in their favour. However, the plaintiff in my view has demonstrated a prima facie case with a probability of success and therefore I will not decide this application on the basis of the balance of convenience.

Having demonstrated a prima facie case with a probability of success, I do not hesitate to issue the injunction sought. I therefore issue an order restraining the defendants from entering upon, planting, ploughing, using, or in any other way interfering with the plaintiff's possession of the suit land until the hearing and determination of this suit. The plaintiff will also have the costs of this application.

It is so ordered.

DATED AND DELIVERED THIS 25TH DAY OF APRIL 2013.

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT & LAND COURT AT ELDORET**

***Delivered in the presence of :***

***Mr. M.K. Chebii of M/s M.K. Chebii & Co Advocates for the plaintiff.***

***Mr. D.O. Obutu of M/s S.M. Omae & Co Advocates for the defendants.***