



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 44 of 2013

Formerly HCC 60 of 2012

JEMUTAI TANUI.....PLAINTIFF

VS

JULIANA JEPTEPKENY & 5 OTHERS.....DEFENDANT

***(Application for injunction; principles to apply in application for injunction;
plaintiff having inherited suit land from her deceased father;
defendants who are her children preventing plaintiff from full use of land
claiming that same is family land; rights of proprietor on transmission;
no trust pleaded by defendants; injunction issued)***

RULING

The application before me is the application dated 28 March 2012 filed by the plaintiff. It is an application brought under the provisions of Order 40 of the Civil Procedure Rules, 2010. In the said application, the applicant is seeking the following order :-

That a permanent injunction do issue against the defendants herein jointly and severally restraining them from interfering with the quiet possession by the purchasers namely Carolyne Spencer, Michael Maiyo Yator and Philip Kiptoo Tanui of their entitlement and the occupation and use by the plaintiff of the remainder of the suit land pending the hearing and determination of the suit.

Although, the application as drawn seeks a "permanent injunction", it is apparent that what the plaintiff wants is an interlocutory injunction pending the hearing and determination of the suit. The application is supported upon the following grounds :-

That the plaintiff is the beneficial owner of the portions of land transmitted to her via succession proceedings in respect of her late father Kiplalang Kiplanduk (deceased) being L.R No. 8802 and L.R No.

79/412 measuring 18.7 acres and one (1) acre respectively.

That the defendants jointly and severally have been interfering with the plaintiff's quiet use and occupation of the said piece of land despite being children of the plaintiff.

That the defendants have denied the purchasers access to their purchased portions.

That the plaintiff has a prima facie case with overwhelming chances of success.

That the balance of probability is in favour of the plaintiff.

That the plaintiff stands to suffer irreparable loss and damage unless the orders sought are granted.

The application is supported by the affidavit of the plaintiff and is opposed by the defendants who have filed a Replying Affidavit.

This being an application for injunction, I will rely upon the time tested principles set out in the case of ***Giella v Cassman Brown (1973) EA 358***. In the said case, the court of appeal stated that when faced with an application for injunction, the court needs to be alive to three principles; first to succeed, the applicant must lay out a prima facie case; secondly, the court ought to be alive to the tenet that an injunction will not normally be granted if damages can be an adequate remedy; and thirdly, if in doubt, the court will decide the application on a balance of convenience.

To determine whether an applicant has set out a prima facie case, it is inevitable that a preliminary assessment of his case as laid out in his pleadings and supporting affidavit be made. Where the respondent has replied to the application and/or has filed Defence to the suit, this assessment must be made in light of the defence and response raised by the defendant. It is after an assessment of the totality of the pleadings and responses by both parties that the court can arrive at the conclusion that the plaintiff has laid out a prima facie case.

The starting point inevitably is the plaintiff's case as laid out in his pleadings and as explained in her supporting affidavit. In her pleadings, the plaintiff has pleaded that she is the owner of 18.7 acres out of the land parcel L.R No. 8802 and one acre out of the land parcel No.7914/2 through transmission vide succession proceedings in respect of the plaintiff's late father one Kiplalang Kiplanduk (deceased). The plaintiff has pleaded that the defendants are her children and she has allowed them use of the various portions of land that were transmitted to her for their own advancement. She however opted to sell to three persons namely Carolyne Spencer, Michael Maiyo Yator and Philip Kiptoo Tanui a portion measuring one acre in total at a consideration of Kshs. 700,000/=. A survey for purposes of demarcating this one acre was to be done but it is pleaded that the defendants blocked the sub-division process. It is also pleaded that the defendants proceeded to evict one of their brothers Joseph Kiplagat Kosgei Ruto from the suit land and have also refused to allow the plaintiff access to the land. For these reasons, the plaintiff has sought orders of permanent injunction to restrain the defendants from

(a) Interfering with the sub-division process of curving out the entitlement of Carolyne Spencer, Michael Maiyo Yator and Philip Kiptoo Tanui.

(b) Interfering with peaceful occupation of Carolyne Spencer, Michael Maiyo Yator and Philip Kiptoo Tanui of their entitlement once their entitlements (sic) is identified via sub division process.

(c) Interfering with peaceful occupation and use by the plaintiff, Joseph Kiplagat Kosgei Ruto and any other nominee of the plaintiff of the suit land.

(d) In any manner dealing with the suit property.

The plaintiff has also sought an order of eviction against the 1st defendant.

The defendants upon being served, entered appearance through the firm of M/s Chemitei & Company Advocates. They filed replying affidavits to respond to the plaintiff's suit but they have so far not filed any Defence. The substantive affidavit is that of the 1st respondent Juliana Jeptekeny as the other respondents have simply alluded to the affidavit of the 1st respondent in their replying affidavits. In her replying affidavit, the 1st respondent has averred that they are all the children of the plaintiff. She has deponed that their grandfather Kiplalang Kiplanduk had three wives, their mother being born out of three children in the first house. The defendants themselves are nine siblings in number. She has admitted that succession proceedings for the estate of Kiplanduk (deceased) was filed being Eldoret High Court Succession Cause No. 256 of 1996 and she has annexed a copy of the confirmed grant. The 1st respondent has further deponed that the plaintiff has always wished to deny them what she describes as "our land" and has wanted to use it alone with Joseph Kiplagat Rutto alias Hillary Kiplagat who is one of her brothers (not a defendant in the suit). She has deponed that the plaintiff has intended to sell the suit land without involving them in the process a matter that they had taken up before the provincial administration. She has annexed a letter from the acting Chief of Kapsoya Location, Eldoret which attempts to bar any sale of the suit land. She has also averred that there have been family meetings over their dispute and certain resolutions reached of which she has annexed minutes of two family meetings held on 14 November 2010 and 23 April 2011 which made certain resolutions with regard to how the suit land should be managed and used by the family. She has deponed that they later learnt that the plaintiff had sold the land to some people who are unknown to them and they stopped the surveyor from proceeding to sub divide the land. Indeed charges of assault were commenced against Daniel Tanui and Samuel Sabai. She has deponed that the alleged sale is strange to them and that since the same is family land, there must be consultation with other family members. She has also stated that they have never denied the plaintiff use of "her portion" but she (the plaintiff) has denied them use of the family land. She has deponed that since the land belonged to their grandfather, it is logical to state that the land belongs to the family and the plaintiff has no absolute right to deal with it without involving the family members. She has prayed that the plaintiff do sub-divide the land to all of them as they are the plaintiff's biological children without discrimination. She has also deponed that the Constitution requires that no person be discriminated at all hence the conduct of the plaintiff is not only malicious but discriminatory. She has averred that the plaintiff has not demonstrated any prima facie case, or that she will suffer any irreparable loss nor a positive balance of convenience. For these reasons the respondents have opposed the application for injunction.

The counsels opted to file written submissions and none offered any oral submissions despite opportunity being accorded.

In his submissions, counsels for the plaintiff, M/s Kimaru Kiplagat & Co Advocates, have submitted that in their replying affidavits, the respondents have admitted that the suit land belongs to the plaintiff. They have also submitted that the defendants have no colour of right over the land nor any right to prevent a sub-division and sale of the same. They have urged me to allow the application for injunction.

Counsel for the respondents on the other hand submitted that the respondents have been in occupation of the suit land and therefore their consent is required for any transaction to take place. He has submitted that the plaintiff is holding the said land in trust for the defendants as she herself inherited it from her father. He has submitted that the plaintiff has not demonstrated a prima facie case nor prove any loss that cannot be compensated by way of damages. He has also submitted that the balance of convenience is in favour of the respondents who are on the suit land. He has asked that the application be dismissed with costs.

I have considered the application, the response by the respondents and the submissions of counsel.

It is not in contention that the plaintiff acquired through transmission, 18.7 acres and one acre out of the land parcel L.R No.7914/2 and L.R No. 8802. This is apparent from the Certificate of Confirmation of Grant issued on 26 September 2011 vide Eldoret Succession Cause No. 256 of 1996 in the matter of the Estate of Kiplalang Kiplanduk (deceased). The quarrel that the plaintiff has is that the defendants, who are her children, have denied her the use of her land as she wishes. They have indeed denied her the right to sub-divide the land and sell it as she wishes or have it utilized as she wishes. In their response, the

defendants have indeed not denied that they have refused to have the plaintiff utilize the land as she pleases. They have however legitimized their actions by stating that the suit lands are family lands and that the plaintiff cannot use the same as she wishes without first consulting them. They have gone further to aver that since the plaintiff acquired the lands through transmission, she in turn holds the said lands in trust for them and that she cannot therefore sell the same without their consent.

The rights of a proprietor are contained in Section 25 of the Land Registration Act, Act No. 3 of 2012.

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.

(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.

I am not sure whether the plaintiff has yet to obtain the certificate of title to what was bequeathed to her for none was exhibited by either herself or the respondents. It is however not in doubt that she is the sole legitimate owner of defined portions of the two land parcels. I think that as owner, despite her ownership not yet being registered, she has all the rights that a registered owner would be vested with. In the premises she would hold the said lands only subject to leases, charges or the overriding-her entitlement to the said lands is indeed not in dispute. In the premises, the plaintiff is entitled to hold the subject lands only subject to leases, charges or the overriding interests noted in Section 28 of the Land Registration Act. The overriding interests set out in Section 28 are as follows :-

(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 question in this proceedings is whether the defendants as children to the plaintiff have any right vested upon them by law which would entitle the plaintiff to consult them when making any decision that affects her land.

Counsel for the respondents has not provided me with any legal provision or any legal authority that obligates an owner of land who has obtained such proprietorship through transmission to consult her children before making any decisions touching on such land. On my part, my search has not revealed any law that requires such consultations. It would of course be a good thing if the respondents as children of the deceased were consulted but there is no legal obligation to do so.

I have also not seen any law that requires the parents as owners of land to sub-divide the same to their children inter vivos. Such parents to me have total control over their land but of course they can, and they usually do, allow their children, through a licence, to make use of such land. Neither is there any law that obligates such parents to make sure that when allowing their children permission to use, they must make sure that no child is discriminated and that such use must be equal. In the absence of such law, I am unable to import any to any statute.

The rights of any proprietor of land whether such proprietor has children or not, is the same. The rights of proprietorship are not affected because such proprietor has children. There is no law that says that where a parent holds land, then he holds the same as trustee for any children that he/she has. This statement is of course made without any prejudice to the rights of children to enforce any rights of parental responsibility. Where a proprietor becomes proprietor by transmission, his rights are not affected unless the transmission has restrictions placed upon that proprietorship. For example, one could become a proprietor by transmission but such transmission may make clear that the proprietor is holding the land transmitted to him as trustee. There are no restrictions in the confirmed grant herein and nothing that indicates that the plaintiff was bequeathed the lands to hold the same in trust for the respondents.

The respondents have in their depositions averred that the plaintiff holds the same in trust because they are her children. If they wish to claim any such trust then they must have a counterclaim to this suit. As I pointed out, there is no defence and no counterclaim to this suit. I on my part am unable to import such a trust at least at this preliminary stage of the proceedings. My opinion, at this stage of the proceedings, of course subject to change on merits if evidence to the contrary is provided, is that the plaintiff as owner is free to use the land as she wishes as the respondents have not demonstrated to me any prima facie evidence that the plaintiff holds the lands in trust for them.

I think that the plaintiff has set out a prima facie case with a probability of success. I therefore allow the application and issue an interlocutory injunction restraining the defendants from interfering with the rights of proprietorship of the plaintiff. They must abide by any directions that the plaintiff gives regarding the user of the lands bequeathed to her. They must not stop any sort of sub-division or sale that is entered into by the plaintiff.

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:

N/A for Kimaru Kiplagat & Co for the plaintiff/applicant

Mr. T.K. Kiplimo holding brief for M/s Chemitei & Co for the defendants