



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 270 of 2013

JULIUS KIPLAGAT KIPCHONGE & ANOTHER PLAINTIFF

VS

KENNEDY LURIONGO DEFENDANT

RULING

The application before me is the Motion dated 20th March 2013 filed by the plaintiffs. It is an application for injunction brought inter alia under the provisions of Order 40 Rules 1,2,3 and 4 of the Civil Procedure Rules, 2010. The application is seeking orders to restrain the defendant from trespassing and/or ploughing the land parcel Cherangany/Chebororowa/110 until the final determination of this suit. The grounds upon which the application is based are inter alia, that the suit property is registered in the names of the plaintiffs; that the defendant loaned the 1st plaintiff Kshs.97,000/= in the year 2006; that the 1st plaintiff defaulted repaying the aforesaid amount prompting the defendant to forcefully plough a portion of the suit land from the year 2007 until the year 2012; that the plaintiffs will suffer irreparable damages and loss if the defendant forcefully ploughs the land again this year. The application is supported by the affidavit of the 1st plaintiff.

No response has been filed by the defendant to this application. Indeed the defendant has neither entered appearance nor has he filed defence. This does not however mean that I must automatically allow the application for injunction. I must still be satisfied that the applicant has attained the standards set out in the case of *Giella vs Cassman Brown (1973) EA 358*. First there must be established a prima facie case; secondly an injunction will not normally be granted unless the applicant will be occasioned loss that cannot be compensated by an award of damages; and finally, if in doubt I will have to decide the application on a balance of convenience.

The case of the plaintiffs as set out in their plaint, which was filed on 29 April 2013, is that they are joint owners of the land parcel Cherangany/Chebororowa/10 having become so registered on 23 June 2010. The cause of action against the defendant as pleaded is that the defendant has been unlawfully utilizing 5 acres of the suit land from April 2007 to December 2012. The reliefs claimed in the plaint are a declaration that the defendant is not entitled to enter the suit land or utilize it in any way, and damages and mesne profits, for trespass.

The supporting affidavit to the subject application has been sworn by the 1st plaintiff. He has deponed that he is the co-owner alongside his brother, the 2nd plaintiff, of the suit land. He has deponed that he was born and bred on the suit land until 2009 when he moved to a different parcel of land. He has stated that he left the land in the hands of a farm worker by the name Ludialo Areng'. He has averred that the defendant has been ploughing about 5 acres of the land from the year 2007 on the pretext that he (the 1st plaintiff) owes him Kshs. 97,000/=. He has deponed that from the year 2007 to date, the debt must have been recovered. He has stated that there have been efforts to have the chief settle the matter out of court in

vain.

It is from the above material that I have to determine this application for injunction.

At the outset, I must state that no certificate of title was annexed to the supporting affidavit. I have however looked at the list of documents filed alongside the plaint and I have seen the Certificate of Title to the suit land. The same shows that the plaintiffs became registered as owners on 23rd June 2010. The previous owner was one Chemwetich Kapkong who was the first registered owner having been so registered in the year 1974.

It is not stated whether the plaintiffs bought the suit land from the former registered owner.

It will be discerned that the plaintiffs have pleaded that the defendant started ploughing the land from the year 2007 but at this time the plaintiffs were not the registered owners. The time when the plaintiffs took possession of the suit land is also not disclosed. It is not clear whether the plaintiffs took possession earlier than the year 2009 when they became registered owners or whether they had taken possession prior to the year 2009. Neither is it elaborated, nor is it explained, why the plaintiffs allege that the defendant has been ploughing the land from the year 2007 yet they did not have proprietary interest in the suit land. I do not also understand the deposition that the 1st plaintiff has been living on the land till 2009 when he moved out and left a farm worker yet in the same vein he has deponed that the defendant has been forcefully ploughing 5 acres of the suit land since the year 2007.

There are a lot of gaps in the plaintiffs' claim which I am unable to reconcile. There are some facts which I think the plaintiffs ought to have included in their supporting affidavit to enable me understand better the nature of their case.

Nevertheless, I can see that the plaintiffs are registered owners of the suit land. As registered owners they are entitled to all proprietary rights including the exclusive right of possession. The defendant has not filed any document to demonstrate that he has a competing claim against the plaintiffs that would entitle him to occupy, or make use, of the suit land. In as much as the evidence is thin, I think that a prima facie case has been established by the plaintiffs. They are therefore entitled to the injunction sought.

I therefore allow the application and issue an order of injunction stopping the defendant from any further ploughing entering into or making use of the suit land, pending the hearing and determination of this suit. The costs of this application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF MAY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

N/A for M/S Limo Rotich & Co for the Plaintiffs

Defendant - Absent. Has not yet entered appearance.