



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

E & L 135 OF 2013

KIPKEMBOI KOSGEI.....PLAINTIFF

VS

SAMUEL KIPKOECH & 4 OTHERS.....DEFENDANTS

(Application for injunction; principles upon which the court will determine an application for injunction; Suit filed by father seeking to have his sons permanently restrained from the suit land; defendants claiming that the land is ancestral land and that it is held in trust for them; defendants making a counterclaim for a portion of the said land; whether such trust recognized in law; prima facie case; whether in the circumstances of the case prima facie case disclosed; balance of convenience; status quo to prevail pending trial).

RULING
PART A : INTRODUCTION

1. The plaintiff in this suit is the father of the defendants. Contemporaneously with the filing of the Plaint, the plaintiff has filed this Motion dated 2 March 2013 under the provisions of Order 40 rule 1 and 2 of the Civil Procedure Rules, seeking orders of injunction, to restrain the defendants from trespassing into, cultivating, dealing and or interfering with the plaintiff's parcel of land Nandi/Mutwot/204 pending the hearing and determination of this suit.
2. The grounds upon which this application is made are that :-
 - (a) *The plaintiff is the registered owner of the land parcel Nandi/Mutwot/204 measuring 15.0 hectares.*
 - (b) *The plaintiff is in possession and use of the land Nandi/Mutwot/204.*
 - (c) *The defendants, their servants, agents and or employees are interfering with the plaintiff's use and possession of the land.*
 - (d) *It is just, fair and expedient that an injunction be issued to restrain the defendants from interfering with the plaintiff's use and possession of that land known as Nandi/Mutwot/204.*
3. The application is supported by the affidavit of the plaintiff.
4. The defendants, who are unrepresented, have opposed this application. They have also contested the entire suit by filing a defence and have asserted rights over the suit land through a counterclaim.

5. A little background as revealed in the pleadings will shed more light on the contest herein.

PART B : BACKGROUND

6. In his plaint filed through M/s Mwinamo Lugonzo & Co Advocates, the plaintiff has stated that he is the registered owner of the land parcel Nandi/Mutwot/204 (the suit land). He has pleaded that the defendants have without justification or lawful reason entered into the plaintiff's parcel of land and have ploughed the same, and are interfering with the plaintiff's possession of the said land.
7. The plaintiff's claim against the defendant is for a declaration that the defendants are trespassers onto the suit land and that the plaintiff is the legal owner of the land parcel. He has also sought an order of permanent injunction restraining the defendants from trespassing into the suit land or in any other way interfering with the same.
8. The supporting affidavit to the Motion herein has more or less repeated the averments in the plaint and the identity of the defendants is not revealed other than to stat that they and their servant/agents and or employees are interfering with the suit land and have trespassed into it with the intention of ploughing the same.
9. The relationship between the plaintiff and the defendants is disclosed in the counterclaim and insinuated in the defence. In their defence, the defendants have admitted that the plaintiff is the registered owner of the suit land. They have however contended that the plaintiff inherited the land as only son, and that the land is thus ancestral land and that the plaintiff is only holding the same in trust for the family and has no right to deprive them of their right to cultivate and/or own it. They have stated that they were born and grew up on the suit land and live on it by right and are not trespassers. They have pleaded that they live on the suit land with their wives and children and that the orders sought by the plaintiff will deprive them of their rights to inheritance and also exacerbate landlessness. They have averred that the plaintiff's main aim is to disinherit the defendants.
10. It is pleaded that the mother of the defendants died in 2003 and the plaintiff has now married a new wife who has polarized his mind against the defendants. They have pleaded that the plaintiff is a known sot in the neighbourhood, and that he is recklessly selling and leasing off the subject land and consuming the proceeds at the detriment of the defendants who are jobless and whom he has not allocated any part or share of the land to cultivate for the sake of feeding their families which has forced them to lease small pieces of land elsewhere which is not enough for their families. They have asked that the plaintiff's suit be dismissed.
11. In their counterclaim, the defendants have averred that the suit land was inherited by the plaintiff from their grandfather and that it is therefore ancestral land. They have counterclaimed for a portion of 2 hectares each since the plaintiff is "misusing the cultural obligation bestowed upon him and is recklessly disposing of the suit land. The defendants have stated that "as heirs of their grandfather's estate, they are legally entitled to a share of the suit property".
12. The replying affidavit to the subject application has been sworn by the 1st defendant on behalf of all the others. The same more or less is an elaboration of the pleadings that I have set out above. The defendants have in addition stated that if the application is allowed the same will serve as an eviction against them yet they have lived on the suit land since birth. It is also deponed that the plaintiff has chased away two of their brothers who are not defendants in the suit. The 1st defendant has alluded to differences over the use of the land which was referred to the local administration but that the plaintiff has defied advice. A letter dated 19/3/2013 from the Chief Mutwot location addressed "to whom it may concern" is annexed to the replying affidavit.
13. The application was argued before me on 7 May 2013 when Mr. Mwinamo, learned counsel for the plaintiff urged me to allow the application. The 1st plaintiff who had sworn the affidavit spoke for the rest of the defendants.
14. It is against this background that I have to decide this application for injunction.

PART C : DETERMINATION BY COURT.

15. The court's role in an application for an interlocutory injunction, is to make a decision on how the subject matter of the suit ought to be preserved pending the hearing and determination of the suit. A determination of the application for injunction is not a pronouncement of who has won the contest, which can only be decided upon hearing the case on merits. It is merely a pronouncement of how to preserve the subject matter pending the hearing of the suit. The case of **Giella vs Cassman Brown (1973) EA 358** has a three point guideline to a court faced with an application for injunction. It was stated that an applicant has to demonstrate a prima facie case; that the court ought ordinarily not to allow an application for injunction unless damages will be an inadequate remedy; and finally if in doubt, the matter should be decided on a balance of convenience.

16. I think this is one of those difficult cases where it is not easy for the court to pronounce itself as to a prima facie case.

17. The plaintiff's case is squarely that he is the registered owner of the suit land and he has indeed annexed a copy of the title deed to the application. As registered owner, he is of course vested with full rights of proprietorship including the right to exclusive possession of the suit land. His rights are contained in Section 25 as read with Section 28 of the Land Registration Act, Act No.3 of 2012. I think I better set them out herein for full effect :-

S. 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.

S. 28. *Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—*

(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.*

18. It will be seen under Section 25 that the rights of the proprietor are held subject to the overriding interests under Section 28 and also Section 25(2) provides that nothing shall be deemed as relieving a proprietor from any duty or obligation to which the person is subject to as a trustee.

19. One of the overriding interests which is noted in Section 28 (b) is trusts, including customary trusts.

20. The case of the defendants is that since the land is ancestral land, acquired by the plaintiff through his father (the defendants' grandfather). They have pleaded therefore that the plaintiff holds the land in trust for them.

21. There are a number of authorities which have recognized trusts based on customary law. In ***Kanyi v Muthiora (1984) KLR 712***, the respondent in the appeal sued the appellant claiming that she (the appellant) held certain land in trust for her under Kikuyu customary law. The respondent was an unmarried daughter of the deceased husband to the appellant. The court held that the act of registration of the land did not extinguish the respondent's right under Kikuyu customary law and that the appellant was not relieved of her duty or obligation to which she was a trustee for the respondent's land. There was overwhelming evidence of a trust in favour of the respondent. (per Chesoni J at p 723). Per Kneller J, the respondent also had overriding rights stemming from her possession and occupation of part of the land (then recognized as an overriding interest under Section 30 (g) of the Registered Land Act (CAP 300) (repealed by the Land Registration Act, Act No.3 of 2012) although the land was registered in the name of the appellant (at p720).

22. In ***Gathiba v Gathiba (2001) 2 EA 342***, the case concerned land registered in the name of the plaintiff of whom the defendant was one of four brothers. It was argued by the defendant that the suit land belonged to their deceased father but registered in the name of the plaintiff on his own behalf and in trust for the defendant. Khamoni J, held that the concept of trust exists in many customary laws in Kenya including Kikuyu customary law. The registration of the land under the Registered Land Act (now repealed) did not extinguish a trust originating from customary law. The court held that there was a resulting trust in favour of the defendant and ordered the land to be sub-divided equally between the plaintiff and defendant.

23. ***Mbui v Mbui (2005) EA*** is probably closest to the facts of our case. In this case, the appellant was the registered owner of the subject property while the respondent was his son. The appellant filed suit to have the respondent evicted from the suit land and on appeal argued that he was the absolute statutory owner. It was held that the rights of a proprietor are held subject to overriding interests and that customary law rights may give rise to a trust. It was further held that the subject land was ancestral land which the appellant had inherited from his father. The respondent had been on the land since his birth and had occupied his portion since he built his house with the consent of the appellant. The land included an aspect of "inter-generational equity". On the circumstances of the case, the court of appeal held that a trust was disclosed.

24. I have not yet heard the evidence and I do not wish at this stage of the proceedings to make any pronouncements as to whether or not there exists a trust in the circumstances of this case. I am also unable to tell whether the plaintiff holds the land absolutely or whether there are some overriding interests running in favour of the defendants. That, I can only decide upon hearing the evidence of the parties and considering the case on merits. For now, I can only say that each side appears to have some sustainable, legal claim over the suit land. That being the case, I will decide this application on a balance of convenience.

25. In my opinion, the convenience lies in having the status quo that has been prevailing prior to the filing of this suit, continue operating, pending the hearing and final determination of this suit.

26. I therefore order the status quo prevailing prior to the filing of this suit to continue prevailing until the final determination of this suit.

27. The costs of this application shall be costs in the cause.

It is hereby ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MAY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.M. Ngumbi holding brief for Mr. Mwinamo of M/s Mwinamo Lugonzo & Co for the applicant.

Defendants/respondents – Acting in person.