REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 17 of 2013

DELIVERENCE CHURCH.....PLAINTIFF

VS

MUSA TOROTICH CHEPKURUI Alias

MUSA TOROTICH KETINYO.....DEFENDANT

RULING

The application before me is the Motion dated 17 January 2013. It is an application for injunction brought inter alia pursuant to the provisions of Order 40 Rule 1 and 3. The same seeks to restrain the defendant from dealing, cultivating or doing anything on 2 acres of land parcel L.R.No. 9507. The grounds upon which the application is made include the assertions that the plaintiff is the owner of the said two acres and has been in occupation of the same since the year 2000; that the defendant as one of the administrators of the estate of Paul Chepkurui Ketinyo (deceased) approved the distribution of the 2 acres to the plaintiff; that the defendant has begun interfering with the peaceful occupation by the defendant of the said land; and that the plaintiff has extensively developed the said land by putting up a church building.

The application is opposed by the defendant who filed two replying affidavits.

This being an application for injunction, I need to be satisfied that the plaintiff has laid out a prima facie case; be alive to the tenet that an injunction will not normally be granted unless damages are an adequate remedy; and if in doubt decide the matter on a balance of convenience. These are trite principles laid out in the case of ***Giella vs Cassman Brown (1973) EA 358.***

In applying these principles, it follows that I need to make a preliminary assessment of the plaintiff's case. Where the application is opposed, this assessment has to take into consideration the defences raised by the respondent. The starting point is inevitably the plaintiff's case which was commenced by plaint.

The case of the plaintiff is discernible from its pleadings and the supporting affidavit. It is the plaintiff's case that it purchased one acre of the suit land from the defendant on 31st March 2000 out of the land parcel L.R. No. 9507. Later the same year, the plaintiff bought another one acre and all payment was made in full. It is pleaded that the church took over the two acres in 2001 and has been paying the rates for the land since then.

The defendant is one of the administrators of the estate of the late Paul Chepkurui Ketinyo (deceased) who was the registered proprietor of the land parcel L.R.No. 9507. The plaintiff has pleaded that in the succession cause of the late Ketinyo, being Eldoret High Court Succession Cause NO. 35 of 2000, the

grant was confirmed on 11 July 2005 with the plaintiff being noted as one of the beneficiaries and entitled to 2 acres. The grant was later amended on 18 February 2011 but the amended grant did not affect the 2 acres of the plaintiff. The plaintiff has alleged that from the year 2011, the defendant has been disturbing the quiet possession of the plaintiff on the 2 acres of land by removing the fence and has proceeded to plough one acre of the same. The plaintiff has in his plaint sought orders of permanent injunction to restrain the defendant from interfering with the suit land and for orders compelling the defendant to transfer the suit land to the defendant.

The supporting affidavits to the application have more or less repeated the averments of the plaint. An agreement dated 31/3/2000 is annexed to the supporting affidavit. There is also annexed a note said to be evidence of the sale of the second acre. Also annexed are photographs showing that the plaintiff has built a church building on the suit land.

The defendant upon being served, filed a statement of defence and a counterclaim. In his defence, the defendant has admitted being one of the administrators of the estate of the late Ketinyo. He has also admitted selling one acre of land out of the land parcel L.R.No. 9507 to the plaintiff but has asserted that the plaintiff was awarded 2 acres instead of 1 acre when the grant was confirmed after being hoodwinked into signing the consent on the mode of distribution. The defendant has asserted that the plaintiff unlawfully and illegally took occupation of 2 acres of land instead of the one acre legally sold to the plaintiff. He has denied having harassed the occupation of the land by the plaintiff.

In his counterclaim, the defendant has counterclaimed for one acre of the land from the plaintiff which he has asserted the plaintiff occupies illegally and/or unlawfully. The defendant has averred that the plaintiff has used its position as a religious institution to induce him to surrender an extra one acre. He has counterclaimed for a declaration that the plaintiff is only entitled to one acre and an eviction order to issue against the plaintiff. In the alternative, he has claimed an equivalent of the current market value of one acre to be paid to him.

In his replying affidavit, the defendant has asserted that there was only one agreement of sale for one acre entered into on 31st March 2000 for a consideration of Kshs. 60,000/=and no other agreement. He has acknowledged receipt of Kshs. 92,000/= from the plaintiffs but has stated that this amount reflected the element of interest as the plaintiff paid the money in bits.

I have considered the application, the affidavits by both parties, and the submissions of counsel.

The plaintiff's case is that it is entitled to two acres of the suit land and that the defendant has no business interfering in the two acres. It is for this reason that it has sought the prayers in the plaint. I have seen the agreement annexed to the supporting affidavit of the plaintiff and considered the effect of the confirmed grant in Succession Cause No. 135 of 2000.

The agreement is one dated 31st March 2000 between the plaintiff and the defendant. The subject matter is one acre out of the land parcel No. L.R No. 9507 at a consideration of Kshs.60,000/=. The agreement states that kshs.60,000/= has been paid leaving a balance of Kshs.20,000/=. Now it cannot be that the consideration for the purchase of one acre could be Kshs.60,000/= and there be a balance of Kshs.20,000/= once an amount of Kshs.60,000/= is received. There must be a problem with the said agreement. The explanation given by the defendant is that the consideration was actually kshs.80,000/= which was erroneously indicated as Kshs. 60,000/=. This does not appear to be denied by the respondent who in the supplementary affidavit has admitted not paying the sum of Kshs. 20,000/= for the first one acre.

I have also seen the second note which the plaintiff alleges was reflecting an agreement for a second acre. That note is as follows :-

Addendum Agreement

I Musa Torotich Chepkurui do hereby acknowledge receipt of Kenya Shillings Thirty Five Thousand

(Kshs.35,000) from Deliverance Church Board of Trustees through Pastor Isanda being for the payment of the purchase consideration as per the sale agreement of land parcel No. LR 9507 this 20.9.2002.

Signed
Musa Toroitich Chepkurui (Signature)
Pastor David Isanda (Signature).

This memorandum in my view is too ambiguous to support any claim of an agreement to the sale of a second acre. The same does not refer to any particular agreement, either the first agreement of 31 March 2000, or an alleged second agreement. To me, it is merely a note acknowledging payment of money for the purchase of land, but the subject matter of the payment is not clear.

In his affidavit, the plaintiff has alleged that this payment was made in respect to a second agreement for the sale of a second acre. It has alleged to have paid Kshs. 92,000/= so far for this second acre. The defendant denies and has stated that this payment is in respect of the earlier agreement of 31 March 2000. I think on this point, I have to give the benefit of doubt to the defendant. No agreement has been demonstrated by the plaintiff for the sale of a second acre and I cannot assume that there was one in the absence of the same. Neither has the plaintiff stated what the purchase price was for that second acre. I think from the material placed before me at this stage of the proceedings, there is no proof of any purchase of a second acre by the plaintiff.

However, the plaintiff seems to have been awarded two acres in the confirmed grant. I do not know why the defendant allowed the plaintiff two acres in the confirmed grant rather than allow him one acre if that was their agreement. The explanation offered by the defendant is that he was hoodwinked into signing the consent on distribution of the estate of the deceased. The plaintiff insists that this was because two acres had been sold to it.

Now , this suit is not a suit suing the administrators of the estate of Ketinyo to have two acres transferred to it in accordance with the distribution ordered by the court. If the administrators have refused to transfer the two acres as ordered by the succession court, then the remedy of the plaintiff lies in asking the court (either the succession court or this court) to order the enforcement of that confirmed grant. But this is not the nature of the suit before me. The plaintiff in this suit has asked for specific performance to compel the defendant to transfer two acres to itself. For the plaintiff to succeed, it must sue the administrators of the Estate of Ketinyo and not sue the defendant herein in his own personal capacity.

The obligation to transfer land ordered in a succession matter is the duty of the administrators. As I have pointed out, this suit is not a suit against the administrators but is against the defendant in his personal capacity. The defendant in his personal capacity does not have power to transfer two acres of the suit land to the plaintiff. To sustain such an action, the suit has to be against the administrators of the estate of Ketinyo, and I have seen from the confirmed grant that the Estate is being administered by four people, one Rael Kobil Ketinyo, Jacob Kiprono, Annah Chepkosgei Kimutai and the defendant. The plaintiff's suit against the defendant in his personal capacity, and which seeks to have the defendant in that capacity transfer the two acres to the plaintiff appears to me to be unmaintainable.

As to the order of permanent injunction sought, the same may be sustainable, if the plaintiff demonstrates an entitlement to the 2 acres that it occupies. I am not sure that the plaintiff is entitled to the same through agreement, for there is no agreement for the second acre. There could however be a case that the plaintiff is entitled to the two acres through transmission, for it is not necessary for a transmission of land to be supported by an agreement for sale. The defendant of course has a counterclaim on this second acre based on the position that there was no sale of the second acre. Again if the counterclaim is solely based on lack of a sale, but does not address the issue of transmission, then there is doubt as to success of the defendant's case.

This suit no doubt places this court in an awkward and difficult situation as the plaintiff has the benefit of two acres granted in the succession matter but which the defendant contests. I think the correct forum for the defendant's contest to the second acre must lie in rectification of the confirmed grant and not through

a counterclaim. So long as it is not rectified, it could very well be that the plaintiff is entitled to the second acre, not because of a sale agreement, but through transmission.

There is serious doubt as to the strength of the plaintiff's case in the absence of an agreement but I am also in doubt as to the case of the defendant in the face of the two acres transmitted to the plaintiff in the succession matter which order still subsists. The defendant has stated that he will apply to set it aside, but until this is done the order subsists.

Being in doubt, I therefore will decide this matter on a balance of convenience. The balance of convenience is in favour of the plaintiff. It has developed a church which is no doubt used by a huge congregation. There will be significant hardship if I am to restrain them from making use of the suit land. In the premises, I will allow the plaintiff to remain in use and occupation of the suit land

pending the hearing of this suit. I will however require the plaintiff to make an undertaking in damages to the defendant.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF MAY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:-

Mr. H.K. Ngeno holding brief for Mr. Kiboi for the plaintiff/applicant.

Miss J.C. Tarus holding brief for Mr. Omboto for the defendant/respondent