



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT ELDORET

E & L 257 OF 2013

CHEPWOGEN LANGAT MARITIM.....PLAINTIFF

VS

PHILIP KIPTOO BETT.....DEFENDANT

RULING

The application before me is the Motion dated 11 April 2013 filed by the plaintiff. It is an application brought pursuant to the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010 and Section 7(a) of the Environment and Land Court Act. This is an application seeking orders of injunction to restrain the defendant from "trespassing onto the applicant's land parcel or interfering with the peaceful and lawful possession and use of Plot No. 22 Kaplelach Farm 7300/1 measuring 1.58 acres pending the hearing and determination of this suit."

The grounds upon which the application is based are that the plaintiff is the lawful owner of Plot No 22 at Kaplelach Farm LR 7300/1 measuring 1.58 acres (the suit land); that the respondent has illegally and forcefully trespassed onto the suit land; that the respondent has not title document to the land; and that the applicant stands to suffer undue loss and damage unless the court intervenes.

The application is supported by the affidavit of the plaintiff.

The defendant has not entered appearance to this suit. He has neither filed a Statement of Defence nor a response to the subject application. This does not however mean that the application must be allowed. This being an application for injunction, the applicant must still demonstrate that he is entitled to an injunction following the principles laid out in the case of *Giella v Cassman Brown (1973) EA 358*. In the said case it was held that for an applicant to succeed, he must demonstrate a prima facie case with a probability of success; that the court must be alive to the tenet that an injunction will not normally be granted unless damages will be an inadequate remedy; and finally if in doubt, the court will decide the application on a balance of convenience.

The plaintiff's case is discernable from his plaint as elaborated in the affidavit in support of this application. It is pleaded that the plaintiff is the legal owner of the suit land described in the plaint as Plot No.22 at Kaplelach Farm 7300/1. It is stated that the plaintiff bought the suit land from the owners on 24th March 2013 for a consideration of Kshs. 230,000/= and has so far paid Kshs. 100,000/= . It is averred that the plaintiff took possession and is willing and ready to clear the balance in June 2013 as per the agreement. It is further pleaded that the land has yet to be transferred to the plaintiff's name until the completion of the purchase price in June 2013. It is stated that at the time of the initial payment, the vendor had told the plaintiff to enter the land and that the title would be given upon full payment. It is further elaborated that the plaintiff then took possession of the suit land but was surprised to see the defendant preparing the same in readiness for planting. It is stated that the defendant ploughed the land

with the full knowledge that the land belonged to the plaintiff. It is pleaded that the acts of the defendant have prejudiced the plaintiff and that the plaintiff is now unable to use her land. In her plaint, the plaintiff has inter alia sought for orders of :

Permanent injunction restraining the defendant from trespassing onto the plaintiff's land.

a. *A declaration that the plaintiff is the legal owner of Plot No.22 at Kaplelach Farm 7300/1.*

The supporting affidavit to this application has more or less repeated the averments in the plaint. The same however elaborates that the plaintiff bought the suit land from the legal owner through Robert Samoei Rongoe, Richard Kipkemboi Kirarei and Paul Kipkorir Metto who all signed a sale agreement on 24th March 2013. The agreement alluded to is annexed to the affidavit. It is stated that a sum of Kshs.100,000/= was paid upon execution of the agreement and that it was agreed to settle the balance by 31st June 2013. It is deponed that the plaintiff immediately took possession and fenced the land as she awaits title documents upon completion of the purchase price as agreed. It is deponed that the owner and his relatives were to get alternative land for the owner and that is why all of them were involved in the transaction. It is stated that the defendant forcefully entered the plaintiff's land and started ploughing the same. It is for this reason that the plaintiff has sought the injunction.

The application was canvassed before me on 9 May 2013 when Mr. J.K. Mutai, counsel holding brief for the firm of S.K. Kitur & Co Advocates for the plaintiff, urged me to allow the application. No authorities were referred to me.

I have considered the application in light of the pleadings and the submissions of counsel. It is the plaintiff's contention that she is the owner of the suit land after purchasing the same through an agreement entered into on 23 March 2013. I have keenly looked at the agreement which is annexed to the supporting affidavit. It is a homemade handwritten agreement and I think it is best if I set it out in full. It states :-

Sale of Farm Agreement Kaplelach Farm Parcel No. 22 (1.58 ac)

It is hereby agreed that Robert Samoe Rongoe (grandfather) ID No. ** and Richard Kipkemboi Kirarei (uncle) ID No. *** on behalf of Paul Kipkorir Meto (owner of the parcel) Kaplelach Farm have agreed to sell the above parcel No. 22 (1.58 ac) to Chepwogen Langat Maritim ID No. *** at the total amount of Ksh. 230,000/= (two hundred and thirty thousands only).*

Today the 24th March 2013, KSH 100,000 has been paid and a balance of KSH 130,000 to be paid on or before 31st June 2013.

This agreement is made before Kaplelach Ass. Chief Mrs Magdaline Koech (signed)

Seller

(1) Robert Samoe Rongoe (signed)

(2) Richard Kipkemboi Kirarei (signed)

(3) Paul Kipkorir Meto (signed) 1.4.13.

Buyer : Chepwoget Langat Maritim

Witness - David Rono (signed)

- Ezekiel Sigei (signed).

It is from the above agreement that the plaintiff purportedly claims proprietary rights over the suit land.

I have serious issues to raise with the purported agreement. If I am interpreting it correctly, the owner of the land appears to be one Paul Kipkorir Meto, but it seems as if Samoe Rangoe and Richard Kipkemboi Kirarei are selling it on behalf of the owner. I don't understand this aspect of the transaction.

There is also nothing to demonstrate that the suit land exists as described either through the annexure of a certificate of title or other proof of description of the land parcel. Neither is there any proof that the land is registered in the name of Paul Kipkorir Meto and nothing to demonstrate that he has a right to sell the land, if at all the land exists as described. I can also see from the agreement that the plaintiff herein has not signed the same. There is no clause in the agreement as to when possession is to be handed over to the plaintiff.

I do not see how such an agreement can be enforced.

The plaintiff in her pleadings has contended that she is now the owner of the land as described in the plaint but she has nothing more than this purported agreement to demonstrate any proprietary rights.

It is trite law following the provisions of Section 3(3) of the Law of Contract Act, that an agreement for sale of land must be in writing for the same to be enforced. It must be signed by the parties and attested. This purported agreement is not signed by the plaintiff.

If I am to accept the description of the land as given, it is apparent that the same is agricultural land. It follows that the consent of the land control board is mandatory pursuant to the provisions of Section 6 of the Land Control Act, CAP 302. No consent of the land control board to this transaction has been availed. Although this agreement is dated 24 March 2013 and one may argue that the Land Control Act only voids the agreement after 6 months which have not lapsed, however, no proprietary interest can be said to have been transferred before consent of the land control board is issued. The plaintiff cannot therefore allege that there has been transferred to her any proprietary rights over the suit land. In brief, she cannot claim to be the legal owner of the suit land.

From the material presented before me, and even in the absence of any response by the defendant, I am unable to find that the plaintiff has demonstrated a prima facie case that she is the legal owner of the suit land to entitle her to protection.

If I am wrong on this, then it means there is doubt and the matter has to be decided on a balance of convenience.

The balance of convenience in this case tilts in favour of the defendant who appears to be in possession of the suit land. I do not yet know his entitlement to be on the suit land, but I have not seen any proprietary interest demonstrated by the plaintiff which this court can be called upon to protect.

It behoves upon the plaintiff to provide adequate material to demonstrate that she has acquired a proprietary interest over the suit land (assuming that it exists as described) which can then be protected. For now, I am afraid that the material presented does not demonstrate any proprietary interest acquired by the plaintiff. I am therefore unable to allow this application for injunction. The plaintiff may yet prove her case at the full hearing of the suit by providing sufficient material to demonstrate ownership of the suit land. But for now, this application for injunction is hereby dismissed. Since the defendant did not file any document to oppose it, I make no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

N/A for S.K. Kitur & Co for the plaintiff/applicant

N/A for the defendants who have not entered appearance.