



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 734 of 2012

SAMWEL KIRWA BOEN.....PLAINTIFF

VS

1. ATTORNEY GENERAL

2. EZEKIEL KIPROTICHDEFENDANTS

(Injunction – Principles for the grant of an injunction. Suit seeking to declare a decision of the land disputes tribunal and of the subordinate court as void – Limitation of actions on judgements and orders of the court – Sections 2 and 4 of the Limitation of Actions Act – Previous suit filed by way of Judicial Review – Whether suit is res judicata – Whether applicant has satisfied the conditions for the grant of an injunction.)

R U L I N G

The application for determination is that dated 27 July 2011. It is a Notice of Motion application filed by the Plaintiff under the provisions of Sections 3A, 63 of the Civil Procedure Act and Order 40 Rule 1&2 of the Civil Procedure Rules. It substantially seeks the following Orders contained in prayers 3 and 4 of the application :-

3. *That a temporary injunction do issue to restrain the 2nd defendant either acting by himself, servants and/or agents from trespassing upon, wasting, damaging , alienating, encumbering, and/or otherwise dealing in any manner whatsoever with land parcel No. Nandi/Lelmokwo/553 situated at Lelmokwo sub location Kapsabet Division measuring 7.02 Hectares pending the hearing and determination of this suit.*

4. *That an inhibition order do issue against the registration of any dealings either arising out of Kapsabet Land Disputes Tribunal or the Principal Magistrate's Court Kapsabet 78/97 over Land Reference No. NANDI/LELMOKWO/553 registered in the names of the plaintiff/applicant pending the hearing of this application and the suit.*

The application is supported by the Affidavit of the Plaintiff sworn on the 27 July 2011.

The application is opposed by the 2nd defendant who filed a Replying Affidavit sworn on the 28 July 2011.

The application was canvassed before me on the 19 November 2012. Mrs. N.Kosgei appeared for the applicant whereas Mr. M.K Chemwok appeared for the 2nd respondent. The 1st respondent did not attend and neither have they filed any Reply to the application. I ordered the application to proceed.

Mrs. Kosgei urged that I should allow the application. She argued that the plaintiff has a prima facie case

with a probability of success and that he will suffer irreparably if the orders sought are not granted. Mr. Chemwok on the other hand did not think that the plaintiff has a case with a probability of success and urged me to dismiss the application.

This being an application for injunction, I will turn to the time tested principles set out in the case of ***Giella vs Cassman Brown***[1]. In the said case it was stated that

“The conditions for the grant of an interlocutory application are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.[2]

I will therefore first assess if the plaintiff has set out a prima facie case with a probability of success. I will refer to the Plaint filed by the Plaintiff and to the Supporting Affidavit filed.

The plaintiff's case is that he is the registered owner of the land parcel NANDI/LELMOKWO/553 measuring about 7.2 ha. I did not quite understand the plaintiff's pleadings that the suit land NANDI/LELMOKWO/553 was previously registered as NANDI/LELMOKWO/196. It is not clear to me whether NANDI/LELMOKWO/553 resulted from a sub-division of NANDI/LELMOKWO/196. Be as it may, it is further the plaintiff's case that there was a decision of the Land Disputes Tribunal of 30/10/1997 which has been annexed to his supporting affidavit. The decision of the Tribunal, at least from what I can discern, reveals that there was a dispute between the plaintiff and the 2nd defendant on the ownership of the land parcel NANDI/LELMOKWO/196. The Tribunal decided to award the 2nd defendant 4.2 acres out of this land parcel. The decision of the tribunal was then filed before the Principal Magistrate's Court at Kapsabet as Land Dispute Tribunal Case No.78 of 1997. In the decree issued, it is ordered that :-

(a) Judgement is entered for the plaintiff in terms of the said award who shall be entitled to 4.2 acres out of parcel Number NANDI/LELMOKWO/553.

(b) The court shall sign all the transfer documents in favour of the plaintiff if the Defendant fails to do so.

It will be observed at this juncture that the Tribunal appeared to be dealing with Land Parcel NANDI/LELMOKWO/196 but that the decree of the court was in respect to Land Parcel NANDI/LELMOKWO/553. This discrepancy has not been adequately explained to me. I came to learn from the submissions of counsels that there had been a Judicial Review application Eldoret High Court Miscellaneous Suit No.20 of 1998 which sought to quash both the decision of the Tribunal and of the Kapsabet Court. I called for the file and I have perused the same. I noted that the application had sought for orders inter alia of certiorari to quash the decision of the Land Disputes Tribunal and of the Kapsabet Court alluded to above. The matter was decided by my brother, The Honourable Justice J.R.Karanja, on the 1st March 2011. Justice Karanja dismissed the application for Judicial Review with costs. His view was that it was not only incompetent but also unmerited in substance.[3] It appears that the plaintiff did not file an appeal against this decision but decided to file this suit.

The principal prayer in the Plaintiff's suit is for a declaration that the Tribunal's decision dated 30/10/1997 and the adopting decision of the Kapsabet Principal Magistrate's Court Land Dispute Tribunal Case No.78 of 1997 *“is illegal, null and void and incapable of giving rise to any rights recognisable by law”*. I feel that the orders sought in this suit are more or less the same as those sought in Eldoret High Court Miscellaneous Suit No.20 of 1998[4] which has already been decided on merits. Without deciding the point with finality, this suit may very well be *res judicata*.

I have also taken note of the fact that the decision sought to be declared illegal is the Land Disputes Tribunal Decision of 30/10/1997 and the decree of 4/12/1997 of the Principal Magistrate's Court at Kapsabet which entered judgment in accordance with the decision of the Tribunal. At the hearing of this application, I posed the question whether I am not barred by limitation of actions to entertain the dispute. Mrs. Kosgei thought that I had jurisdiction but gave no reasons to support that position. Mr. Chemwok

thought that it is for this reason that Karanja J. dismissed the suit NO.20 of 1998.

My independent assessment at this stage is that this Honourable Court may not have jurisdiction to entertain the Plaintiff's suit by dint of the provisions of Sections 4(4) as read by the provisions of Sections 2(4)(b) of The Limitation of Actions Act (CAP 22) Laws of Kenya. Section 4(4) of the Limitation of Actions Act (CAP 22) provides that

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

Section 2(4) of the same statute provides that

2 (4) In Part III, references to a right of action include references to a cause of action and to a right to receive money secured by a mortgage or charge on any property or to recover proceeds of the sale of land, and to a right to receive a share or interest in the movable estate of a deceased person; and references to the date of the accrual of a right of action are-

(a)...

(b) in the case of an action upon a judgment, references to the date on which the judgment was delivered;

The decisions that this suit attempts to quash are the Tribunal decision of 30/10/1997 and the adopting decision of the Kapsabet Court of 4/12/1997. This suit was filed on 15 July 2011 and there is no doubt that more than 12 years had lapsed after the two decisions sought to be quashed to the filing of the suit. I feel strongly that by virtue of the above provisions of the Limitation of Actions Act, this suit may very well be out of time. This is my preliminary assessment of the case and the parties may persuade me otherwise when hearing the case on merits.

However my preliminary assessment will direct my decision on whether or not the Plaintiff has established a prima facie case with a probability of success. My view is that he has not on the basis that this suit may be res judicata and/or barred by Section 4(4) as read by Section 2(4)(b) of Limitation of Actions, Act (CAP 22) Laws of Kenya. I need not therefore go further to look into the other two principles of the decision in ***Giella vs Cassman Brown***.

The upshot is that the application dated 27 July 2011 must fail. It is hereby dismissed with costs. It is so ordered.

DATED at ELDORET this 27TH day of NOVEMBER 2012.

JUSTICE MUNYAO SILA
JUDGE ENVIRONMENT AND LAND COURT

Delivered on 27/11/2012 in the presence of

Mrs. N. Kosgei for the plaintiff/applicant.

Mr. Alwanga holding brief for Mr. Chemwok for the 2nd respondent.

N/A for State Law Office for 1st defendant/respondent.

[1]Giella vs Cassman Brown (1973) EA 358.

[2]At page 360.

[3]Page 9 of the decision of 1/3/2011.

[4]The judicial review application.