



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 599 of 2012

SAMWEL K. RONO & 32 OTHERS.....PLAINTIFFS

VS

JOEL KOMEN & 32 OTHERS.....DEFENDANTS

RULING

(Application for injunction – Principles to be applied in an application for injunction – Plaintiffs owners of the suit land – Defendants alleged to be trespassers – Affidavit sworn by advocate – whether facts undisputed – res judicata - whether current suit is res judicata – Joinder of Parties – Whether each plaintiff ought to have filed separate suits - Whether suit incompetent for misjoinder – whether injunction should issue - Application for injunction allowed)

The application before me is the Chamber Summons application dated 2nd March 2010 filed by the Plaintiffs. The application is brought under the provisions of Order XXXIX rules 1,2 & 3 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all enabling provisions of the law. It will be noticed at the outset that the application was filed before the Civil Procedure Rules were amended on 10th September 2010. The application substantially seeks an order of injunction to restrain the defendants from trespassing, ploughing, cultivating, burrowing, planting, building, fencing or in any other way dealing with land comprised in the titles UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/ NUMBERS 1195, 1131, 1132, 1144, 1166, 1198, 1230, 1125, 1163, 1149, 1137, 1238, 1181, 1145, 1165, 1227, 1228, 1163, 1243, 1229, 1189, 1203, 1208, 1194, 1199, 1222, 1226, 1232, 1231, 1186, 1224, 1201, 1135, pending the hearing and determination of this suit.

The grounds upon which the application is founded are that the plaintiffs are the title holders to the above land parcels and that they have been prevented from cultivating the land owing to the actions of the defendants who interfere with their possession. The application is supported by the Affidavit of Samuel K. Rono who is the 1st Plaintiff. He has sworn the supporting affidavit on behalf of the other 32 plaintiffs/applicants. The 1st plaintiff is the registered owner of the suit land UASIN GISHU/KIPKABUS/1195 whereas the other applicants are registered owners of the other parcels respectively.

It is deponed that the plaintiffs applied to the Government of Kenya to be allotted land at Kipkabus Settlement Scheme. That after vetting, they were allotted the subject parcels of land. That however, the defendants have invaded their parcels of land; the 1st defendant having allegedly invaded the 1st Plaintiff's parcel, the 2nd defendant having allegedly invaded the 2nd plaintiff's parcel, and so on to the 33rd plaintiff and defendant. To the Supporting Affidavit are annexed copies of Title Deeds indicating that the plaintiffs are indeed the absolute registered owners of the titles set out in the application. I have discerned from the titles that the individual parcels of land registered in the names of the plaintiffs were originally comprised in the land parcel UASIN GISHU/KIPKABUS/983 which was sub-divided to bring

forth 31 of the individual titles save for the title numbers 1198 and 1131 whose parent title is UASIN GISHU/KIPKABUS/956. It has also been deposed that the applicants have sought the assistance of the Provincial Administration to rein in the defendants but this has been futile. The applicants hence seek an injunction pending the hearing of the suit.

The application is opposed by the Replying Affidavit of Fatuma Rashid Wangila who has described herself in paragraph 1 of the Replying Affidavit as “*an Advocate of the High Court of Kenya practicing in the firm of M/S Chebii and Company Advocates and having the conduct of this matter on behalf of the defendants/respondents hence competent and duly authorised to swear this Affidavit.*” She continues to depone as follows :-

2. *THAT I have read the Plaintiffs/Applicants application dated 2nd March 2010 together with its supporting affidavit and annexures and wish to respond thereto as follows:-*
3. *THAT the application in question is time bad and has been overtaken by events since the dispute between the parties had been instituted in court way back in 2004 vide ELDORET HCC MISC CIVIL SUIT NO. 21 OF 2004.*
4. *THAT the above suit is still pending.*
5. *THAT the suit in question is ELDORET HCCC No. 36 of 2010 is resjudicata and ought to be struck out.*
6. *THAT to allow this suit to processed would amount to an abuse of the court process.*
7. *THAT the supporting affidavit sworn by SAMUEL K. RONO does not comply with the provisions of order XVIII as the Deponent is swearing the affidavit on behalf of the other Plaintiffs yet no authorization endorsed by the Plaintiffs was filed therewith.*
8. *THAT the fact that new numbers are given after adjudication does not necessarily challenge ownership of the land in question.*
9. *THAT the application in question is bent only to pre-empt the final determination of ELD MISC APPLICATION No. 21 OF 2004 and the same ought to be struck out.*
10. *THAT in response to paragraphs 10 and 12 of the supporting affidavit the administrative authority do not have the jurisdiction to determine a dispute that has already been referred to court.*
11. *THAT this application has been brought to embarrass the Defendants/Respondents.*

The application was canvassed before me on the 19/11/2012. Mr. Chemwok for the applicants urged that I should allow the application for injunction. He relied on the supporting affidavit which I have referred to above. On the other hand, Mr. Komen who appeared for the respondents urged me to dismiss the application. He relied on the Replying Affidavit of Ms. Wangila and made some submissions touching on the validity of the suit which I will refer to shortly.

This being an application for injunction I will follow the guidelines set out in the case of ***Giella vs Cassman Brown (1973) EA 358***, that is that the applicant needs to demonstrate a prima facie case with a probability of success, that the applicant will suffer irreparable loss that cannot be compensated by way of damages, and if in doubt decide the case on the balance of convenience. I will therefore proceed to examine whether the applicants have set out a prima facie case with a probability of success.

In determining whether a prima facie case has been set out, it is important to gauge both the plaintiffs' suit and the defendants' case. The case of the plaintiffs is that they are the registered owners of the suit lands and they are entitled to their occupation. In the Plaintiff, they have inter alia prayed for an order of eviction to have the defendants evicted and an order of permanent injunction to restrain the defendants from

interfering with the suit land. The defendants on the other hand have filed a five paragraph defence which I can easily set out as follows :-

1. *Save where herein expressly admitted the defendant denies each and every allegation contained in the plaint as if the same were set out herein and traversed seriatim.*
2. *The Defendant admits paragraphs 1 and 2 of the plaint.*
3. *The Defendant denies paragraphs 3,4,5,6,7,8,9 and of the plaint and puts the plaintiffs to strict proof thereof.*
4. *The Defendants avers that the matter herein is pending before court vide ELDORET HCCC No 35 of 2004 and the defendant shall at the earliest opportunity raise a preliminary objection as this matter resjudicata.*
5. *The jurisdiction of this court is admitted.*

It will be observed that the defence is a mere denial and raises no triable issues save for the possibility of this matter being res judicata. This point was pressed in the Replying Affidavit of Ms. Rashid. Much of course has been said about an Advocate swearing an Affidavit where the facts are contested. It is always the better option to have the parties themselves swear the Affidavits. To be fair to Ms. Rashid, she has actually not deposed on matters of fact in her Replying Affidavit, but has restricted herself basically to matters of law. However, the effect of this is that the matters of fact deposed in the supporting affidavit of the applicants remain unchallenged. In his Supporting Affidavit, Mr. Rono has deponent as follows in paragraphs 5, 6 and 7 of the affidavit.

5. *THAT as a consequence we set and moved into our respective parcels wherein the defendants without any colour of right, invaded our parcels of land of which as put by our counsel on record on my land is occupied by the 1st defendant and 2nd plaintiff by the 2nd defendant to the 34th plaintiff and 34th defendants.*
6. *THAT the defendants herein by themselves, their agents and or servants relatives have invaded the plaintiff's parcels of land with a view to ploughing.*
7. *THAT the respondents have indeed displaced the plaintiff's hence the need to have the injunction orders, that they do not plough the said parcels till determination of this application and subsequently the case.*

These matters of fact as I have alluded to earlier remain uncontested. I will therefore have to take it that it is not contested by the respondents that they have actually invaded the plaintiff's parcels of land. However, as I set out earlier, the Replying Affidavit and the Defence have raised some points of law which I will have to deal with.

The Respondents have raised the issue that the subject matter of this suit is the same as that in Eldoret High Court Miscellaneous Suit No.21 of 2004 and Eldoret High Court Miscellaneous Suit No. 36 of 2010. The pleadings in the said two suits were however not annexed to the Replying Affidavit and I had to call for the two files to determine whether they touch on the same subject matter as the present suit. I realised that Eldoret HCCC Misc. No.21 of 2004 was an application for leave to institute judicial review proceedings. The applicant in the said suit was one Robert Kimutai Kosgei and the respondents were the County Council of Keiyo, the Provincial Land Adjudication and Settlement Officer, and the Commissioner of Lands. The leave sought was to file a substantive judicial review for orders of Probation (probably Prohibition), Certiorari, and Mandamus touching on the ownership of the land parcel UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/ 848. Leave was granted on 19 February 2004 by Gacheche J. The substantive judicial review application was filed as Eldoret HCCC Misc. Civil Application No.35 of 2004. I think Ms. Wangila must have in her Replying Affidavit meant this suit rather than Eldoret HCCC No.36 of 2004; for even the Statement of Defence alludes to Eldoret HCCC

No.35 and not No.36 of 2004. For good measure, I called for the files Eldoret HCCC No.36 of 2004 and Eldoret HCCC Misc. Suit No.36 of 2004 and on perusal found out that they deal with parties and matters that are completely not related to this suit.

The orders sought in the Judicial Review application in Eldoret HCCC Misc. Civil Application No.35 of 2004 were :-

1. *An order of prohibition restraining the 1st and 2nd Respondents from evicting the applicants rightfully allocated land parcel known as No. U/KIPKABUS SETTLEMENT SCHEME/848 and re-allocating the said land to third parties.*
2. *An Order of Certiorari to remove into this Court for Purposes of of quashing the 1st Respondent's Decision to evict the applicants from the applicant's parcel of land known as U/KIPKABUS SETTLEMENT SCHEME/848 and further unlawfully re-allocating the same to third parties.*
3. *An Order of Mandamus to compel the third Respondent to register the said parcel of land U/KIPKABUS SETTLEMENT SCHEME/848 in the names of the Applicants and issue title deeds for the said land in the names of the applicants respectively.*

The Judicial Review application was dismissed in its entirety on the 24th August 2012 by my brother Ibrahim J.

I do not see the connection between the said Judicial Review application and the present suit. The subject matter in the judicial review application was the land parcel UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/848. I do not see the relationship between that subject matter and the present suit. Even the land parcels that are the subject matter of this suit did not emanate from this title. The argument that this suit is res judicata therefore holds no water.

The Replying Affidavit has also attacked the Supporting Affidavit sworn by the 1st Plaintiff on the grounds that there is no authorisation. I have however seen annexed to the supporting affidavit an authority to sign giving the 1st plaintiff authority to sign any supporting or replying affidavit. I therefore do not see the argument raised by the respondents on this score.

In his oral submissions Mr. Komen also brought in the argument that there is a misjoinder of the suit. His point, as I understood it , was that the individual plaintiffs ought to have brought individual suits against the defendants and not a joint suit as is the case herein. That may be so, but I do not think that there is a serious violation of the provisions of Order 1 Rule 1. In any case if subsequently the feeling is that the suit is better tried by separating the claims of the plaintiffs, that can be done by virtue of Order 1 Rule 2, a matter that can be dealt with later. Further, in his oral submissions, Mr. Komen stated that the respondents have been on the suit land for more than 15 years and that therefore they hold an overriding interest by virtue of Section 28 of the Land Registration Act, 2012. I can not accept this submission from the bar. If that were so, then the respondents needed to swear an affidavit to that effect. Unfortunately there is none in this case and I stated earlier, I must take it that the matters of fact deposed by the applicants are uncontested.

The upshot of this is that I am convinced that the plaintiffs have set out a prima facie case with a probability of success. They are the registered owners of the suit lands and by virtue of Section 24 of the Land Registration Act, 2012, the act of registration has vested upon them the absolute proprietorship of the suit lands. There is no doubt that they stand to suffer irreparably by the actions of the defendants. They are entitled to enjoy their bundle of rights as owners to the exclusion of the defendants who from the material before me appear to be trespassers. The defendants in their Defence have not raised a competing claim. I do not see why I should not stop the respondents from further acts of trespass pending the hearing and final determination of this suit. They are so stopped. In the circumstances, I will allow the application in terms of prayers 2 and 3. The plaintiffs shall also have the costs of the application in any event.

DATED at ELDORET this 27 day of November 2012.

JUSTICE MUNYAO SILA
ENVIRONMENT & LAND COURT AT ELDORET

Delivered on 27/11/2012 in the presence of

Mr. J.M. Alwanga holding brief for Mr. Chemwok for the plaintiffs/applicants

Mr. P.K. Komen for the defendants/respondents.