REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 886 of 2012

SIMON KIPNGETICH BETT.....PLAINTIFF

VS

RICHARD C. KANDIE.....DEFENDANT

(Application for injunction – Principles to be applied in application for injunction – Suit filed by registered owner seeking possession of land and eviction of defendant – registered owner seeking application for injunction - defendant with competing claim and counterclaim – Limitation of actions – whether defendant has an arguable case based on adverse possession – whether application for injunction should issue – balance of convenience - application for injunction dismissed)

R U L I N G

The application for determination is the Amended Notice of Motion dated 27 June 2012 filed by the Plaintiff. The application is brought under the provisions of Order 40 Rules 1,2 and 3, Order 21 Rule 1 of the Civil Procedure Rules, 2010, Section 3A and 63(e) of the Civil Procedure Act. The substantive prayer in the application is prayer number 4 which seeks the following order :-

"That pending the hearing and determination of this suit this court be pleased to restrain the defendant by itself (sic), its directors (sic), agents, servants, workers or any other person acting under it (sic) from entering , remaining, trespassing or in any other manner whatsoever interfering with the Plaintiff's possession and occupation of all that parcel of land known as TITLE NUMBER LEMBUS/KIPTUIM/468 which belongs to the plaintiff/applicant."

The grounds upon which the application is made are that the plaintiff is the lawful owner of the land parcel Lembus/Kiptuim/468. It is further stated in the grounds that the defendant is a trespasser and has no right whatsoever to remain on the said land but has refused to render vacant possession despite numerous notices to vacate. The application is supported by the Affidavit of the plaintiff sworn on the 27 June 2012. The applicant in his affidavit has adverted that he is the legal owner of the suit land and has annexed a copy of the Certificate of Title to the suit land. The certificate indicates that the plaintiff is actually the owner of the suit land having been registered as sole proprietor from the 17.11.2009. In his affidavit, the plaintiff has further deposed that the defendant has been occupying the said plot without his permission whatsoever. The plaintiff has also stated that he has asked the defendant to vacate but that the defendant has threatened him with violence. He has repeated that he is entitled to possession of the land and that the defendant has no right to be there.

The application is opposed and the defendant has filed a lengthy Replying Affidavit going to 32 paragraphs sworn on 18 July 2012 and filed on 23 July 2012. For brevity, I will reduce the essence of the

defendant's reply as follows;-

a) That he bought 2 acres of the suit land from the defendant on 17 July 1998 and that he paid the purchase price in full.

b) That he thereafter took possession of the suit land on the same date 17 July 1998 , put up his matrimonial home and has been living there with his family since then.

c) That at the time he purchased the suit land from the defendant the same had not yet been transferred to the defendant.

d) That an attempt was made to have the suit land subdivided so that the defendant's portion may be transferred to him but the transfer was never completed.

e) That from about the year 2006 or thereabouts the plaintiff started harassing him and his family.

f) That in the year 2009, the defendant obtained title to the suit land but failed to have the defendant's interests recognised.

g) that given the circumstances the status quo should be maintained until the determination of the case in full.

The defendant has annexed various documents to his Replying Affidavit, including a sale agreement between himself and the plaintiff (RCK-1), the application for Consent to subdivide the suit land (RCK-2), the letter of consent to subdivide (RCK-3), and a number of photographs to demonstrate that he is in physical possession of a portion of the suit land.

The application was canvassed before me on 14 November 2012. Mr. M.K Chemwok Advocate appeared for the defendant. There was no appearance on the part of the firm of M/S Nyagaka S.M & Co Advocates who are on record for the plaintiff. The date of 14 November 2012 was given in court on 11 July 2012 where Mr. Orina held brief for Mr. Nyagaka for the plaintiff with no appearance on the part of the respondent. The date was therefore taken by counsel for the plaintiff/applicant and no reason was given for his absence in court on the 14 November 2012 to prosecute the plaintiff's application. I ordered that the matter do proceed in the absence of counsel for the applicant and Mr. Chemwok proceeded to urge me to dismiss the application. He referred me to the Replying Affidavit which I have already alluded to above. More importantly, he pressed that the defendant has been in possession for a long time and has indeed filed a counterclaim to the plaintiff's suit seeking a declaration that he is entitled to 2 acres of the suit land. Despite there being no appearance on the part of counsel for the plaintiff, I will still consider the application on merit only that I will not have the benefit of oral submissions from counsel for the applicant.

This being an application for injunction I need not reinvent the wheel and I am guided by the principles set down in the celebrated 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 have thererefore to consider three principles; that is, that the plaintiff has set out a prima facie case with a probability of success, that if I do not grant the injunction the applicant might otherwise suffer irreparable injury which will not be adequately compensated by an award of damages, and finally if I will be in doubt, to decide the application on a balance of convenience.

To establish whether the plaintiff has set out a prima facie case with a probability of success the court has to turn to the Plaint and assess the mettle of the plaintiff's case. In the event that there is no Defence or Replying Affidavit/Grounds of Opposition filed by the respondent then this will be the only source of assessment. However, in my view, if a defendant has filed a Replying Affidavit/Grounds of Opposition and/or a Defence, the Plaint cannot be considered in isolation and regard must be given to the Reply/Defence of the respondent. A careful, though preliminary, assessment must then be made of the case of the party seeking an injunction gauged against the Reply and/or Defence raised by the respondent. It is not an easy exercise, unless in the clearest of cases, for a judicial officer to determine the existence of a prima facie case. This is because a prima facie case goes beyond an arguable case.[3] In the case of ***Mrao vs First American Bank[4]*** the court of appeal stated as follows on what a prima facie case is .

"I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."[5]

The court of appeal further elaborated that *"... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case."* ***[6]***

The difficulty of course, is that at this stage of the proceedings, the court has not heard the case and has not taken in tested evidence to gauge the strength of the cases of the parties particularly that of the applicant. The court only relies on the Pleadings and Affidavits of the parties. Be as it may, this is a task that must be performed and I must assess the applicant's case and decide whether on the material before me there exists a right which has apparently been infringed by the defendant and which will bring the applicant's case to the threshold of a prima facie case. As I mentioned earlier, where there is a defence or reply, such case must be gauged against the reply/defence raised. In this instance, the defendant has not only filed a Replying Affidavit and a Defence but has also raised a Counterclaim.

In his plaint, the plaintiff has averred that he is the sole owner of the suit land and has annexed to his supporting affidavit the certificate of title which no doubt shows that he is the sole owner of the suit land. Taken in isolation, it is not in contention that as the sole registered owner, the plaintiff has a right to enjoy the suit land to the exclusion of all others. The effect of registration is brought forth under Section 24 of the Land Registration Act, 2012[7] which inter alia provides that *"the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."*[8] Section 25 of the same statute safeguards the rights of the proprietor but subject to leases, charges and other encumbrances[9] and to the conditions and restrictions , if any, shown in the register, and to certain interests which do not require noting.[10] The overriding interests under Section 28 of the statute are various.[11] For our purposes Section 28(b) and (h) may be important. Section 28(b) provides for trusts as overriding interests and Section 28(h) provides for rights acquired by prescription.

The defendant has claimed that a portion of the suit land was sold to him and that he has been in possession of the suit land from 1998. The defendant as earlier noted has filed a Counterclaim and has sought that he be declared owner of two acres of the suit land. He has annexed documents to demonstrate that the plaintiff sold him part of the suit land and has also stated that he has been in possession since 1998. The Plaintiff has not filed a supplementary affidavit to deny these claims although he has denied the same, without elaborating, in a Reply to Defence .

Now, taken together, it is discernable that both parties have set out competing claims. To me, both the plaintiff and defendant have established prima facie cases with probabilities of success. It is a 50-50 scenario. In an instance such as this, I have to fall back on the other principles set out in the case of ***Giella vs Cassman Brown[12]*** to asses whether I need to grant the injunction sought by the plaintiff. I will therefore assess whether the plaintiff will suffer irreparable harm and since I am in doubt as to the strength of the cases of both parties, consider the balance of convenience.

To me, The assessment of irreparable harm has to be done on a case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the applicant, a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of application for injunction, then there is no irreparable harm. Such harm must also be harm that cannot be adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance.

It is however arguable that in land matters, the denial to a proprietor of land, of the enjoyment of his proprietary rights by the unlawful action of another party would result in irreparable harm. This is because it is almost impossible to quantify the loss occasioned to a proprietor by denying him the enjoyment of his bundle of rights. Indeed it may be a loss that is not capable of being adequately compensated by an award of damages. If I am to go by this argument then the applicant is bound to suffer irreparable harm. But as I analysed earlier, the respondent appears to have a competent counterclaim and it may very well be that it is the respondent whose proprietary rights need protection. I must also take into account the defendant's reply that he has been in actual occupation of the suit land. I have seen annextures to the replying affidavit demonstrating that the defendant is in actual occupation.

In the circumstances of this matter, I will have to decide this application on a balance of convenience. In the same way that irreparable harm is assessed, the balance of convenience has to be assessed on a case by case basis the court being alive to the fact that different cases have different circumstances. I am not swayed that the balance of convenience favours the applicant. In the light of our case, the defendant/respondent has been in occupation since 1998. The applicant has not been making use of the portion occupied by the respondent for the fourteen or so years to date. I think the balance of convenience tilts in favour of the defendant rather than to the plaintiff. Indeed if I proceed to grant the order sought by the applicant I will essentially be evicting the plaintiff from the suit land yet he may have a legitimate claim to it which claim can only be assessed upon hearing of the matter.

In think the circumstances of this case call for the *status quo ante* to be maintained pending the hearing and determination of this case. The *status quo* as I understand it is that the parties are living on separate portions of the suit land. They should continue doing so without one party interfering with the quiet possession of the other. Neither should the plaintiff alter the proprietorship of the suit land pending the hearing and determination of this case.

I am therefore inclined to dismiss the application dated 27th July 2012 with costs and make the order that the status quo as I have explained above to be maintained pending the final determination of this suit.

Dated this 22nd day of November 2012.

MUNYAO SILA
JUDGE ENVIRONMENT & LAND ELDORET

Delivered on 22/11/2012 in the presence of

Mr. E.K. Maritim holding brief for Mr. Chemwok for the respondent.

N/A for M/s Nyagaka S.M. & Co Advocates for the applicant.

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

[2]At page 360.
[3] See the dictum of Hancox J in *The Francois Vieljeux Case* (1984) KLR 1 at page 14.

[4]Mrao vs First American Bank (2003) KLR 125.

[5]Ibid, at page 137.
[6]Ibid, at page 138.
[7]Act No.3 of 2012.
[8]Section 24(a) of The Land Registration Act,2012.
[9]Section 25 (1) (a).
[10]Section 25 (1)(b). These rights are laid out in Section 28 and are the so called “overriding interests”.

[11]These include spousal rights over matrimonial property, trusts including customary trusts, rights of way, rights of water and profits subsisting at the time of first registration under the Act, natural rights of light, air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; leases not exceeding two years, periodic tenancies and indeterminate tenancies; charges for unpaid rates; rights acquired by prescription

[12]Supra note 1.