



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 713 of 2012

JOHN KIPKEMBOI LELEI.....PLAINTIFF

VS

ELIUD KONES KIPRONO.....DEFENDANT

*( Application for injunction – two applications for injunction one by plaintiff and the other by defendant- principles to apply in an application for injunction- defendant owner of suit land – plaintiff claiming defendant obtained registration by fraud- defendant registered owner for a period of over 21 years – Limitation of Actions – Defendant in possession of suit land – balance of convenience in application for injunction – application by plaintiff dismissed – application by defendant allowed )*

R U L I N G

There are two applications before me for determination. The first is an application dated 10<sup>th</sup> May 2011 (first application) filed by the plaintiff and the second is an application dated 1<sup>st</sup> October 2012 (second application) filed by the defendant. In the first application the plaintiff has sought an order of injunction to restrain the defendant from evicting the plaintiff, trespassing into, sub-dividing, alienating, selling, leasing, charging, or in any way dealing with the the suit land Nandi/Chepterit/490 pending the hearing and determination of this suit. In the second application, the defendant is seeking an order of injunction to restrain the plaintiff from dealing in any way, interfering, building upon, occupying, and/or by any other means dealing with the property of the defendant known as Nandi/Chepterit/490.

It is discernable that both parties have sought orders to injunct the other from dealing with the suit land pending the hearing and determination of this suit. So what brought forth this state of affairs ? To understand this position, I will set out the background of this suit.

Background

This suit was commenced by way of Complaint on 11 May 2011. The plaintiff has filed this suit as the personal representative of the Estate of Philemon Kipyego Tenai (deceased) who died on 18 January 2011. The plaintiff is son to the deceased. It is the plaintiff’s case that Philemon Tenai (deceased) was the registered owner of the suit land having purchased it on 12/6/1980 from one Joseph Kipsanga arap Samoei. It is his case that in October 2010 while conducting a search to the suit land, he discovered that the suit land had been secretly and fraudulently transferred to the name of the defendant. It is the contention of the plaintiff that the transfer of the suit land to the defendant was fraudulent and illegal. To the plaintiff, the transfer was illegal as no consent was obtained from the land control board yet to him this is agricultural land for which consent of the LCB is required by virtue of the Land Control Act. The consent to transfer was obtained from the Town Council of Kapsabet. It is also the plaintiff’s case that there was never an agreement for sale and that the deceased never signed the transfer forms .

Alongside the plaint, the plaintiff filed the application of 10 May 2011 seeking injunctive orders. He did not succeed in persuading the court to grant him interim orders of injunction pending the hearing of the application inter partes.

The defendant upon being served filed and entered appearance and defence on 1 July 2011. In his Statement of Defence, the defendant has averred that he is lawfully registered as proprietor of the suit land and has been in possession of the same for a period in excess of 12 years without interruption. He contended that he became registered as proprietor of the suit land after purchasing it from Philemon Tenai (deceased). He asserted that all prerequisites were complied with, culminating in a formal transfer in his favour. He also provided that there had been previous suits touching on the suit land decided in his favour being, Kapsabet RMCC No.43 of 1990 and Miscellaneous Civil Application No.3 of 1991. He also pleaded that in any event the suit was time barred by dint of the provisions of the Limitation of Actions Act, CAP 22, Laws of Kenya. Alongside the Defence, the defendant filed a Replying Affidavit to the plaintiff's application of 10 May 2011.

The application of 10 May 2011 first came up before court on 13/5/2011 but the plaintiff did not succeed in getting interim orders. It was ordered to be heard on 31/5/2011 but there is no record that the matter was attended to on that day. It then came before court on 23/6/2011 when an order was made for it to be heard on 6/7/2011. There is no record of the matter having been attended to on 6/7/2011 and the next record of the proceedings is for 20/2/2012 at the Civil Registry when counsel for the respondent took 9/5/2012 for the hearing of the application dated 10/5/2011. On 9/5/2012 counsel for the plaintiff sought an adjournment so that a supplementary affidavit to the application may be filed. Leave was granted for a supplementary affidavit to be filed and the matter adjourned to 11/7/2012 for inter partes hearing. On 11/7/2012 counsel for the plaintiff sought an adjournment and the matter was then adjourned to 7 November 2012 for inter partes hearing.

Before 7/11/2012 the defendant filed the application dated 1 October 2012 under certificate of urgency. The application was grounded on the reason that the plaintiff had forcefully taken over control of the suit land and had stationed security guards to stop any activities thereon as well as forcefully harvesting the plaintiff's tea plantation. The matter was certified as urgent but no interim orders were granted. After a couple of adjournments the matter was placed before me for directions on 12/11/2012. I directed that both applications be heard simultaneously on the 28/11/2012. Both parties were agreeable to filing written submissions which they would highlight on 28/11/2012. On 28/11/2012 both counsels for the plaintiff and defendant appeared before me and stated that they entirely wished to rely on their written submissions.

### **Submissions of the parties.**

It is the submission of the plaintiff that he is entitled to injunctive orders and that the defendant should be restrained from the suit land. He has argued that the defendant obtained the suit land fraudulently as there was no consent of the land control board yet the suit land is agricultural land. He has attacked the consent of the Kapsabet County Council as being invalid and incapable of transferring any interest in the suit land. He also stated that there is a pending criminal matter Kapsabet Criminal Case No.1915 of 2012 wherein the defendant has been charged with the offence of obtaining registration of a title deed by false pretenses. He has asserted that the validity of the title by the defendant is questionable. He also argued that the plaintiff was on the suit land and has been on the land for over 40 years; that he has mature tea on the land which he relies on for survival; that he will suffer irreparable loss if he is evicted from the suit land. He stated that the plaintiff has established a prima facie case of fraud and sought for the injunction.

The defendant on the other hand has sought injunctive orders against the plaintiff. It is his contention that he is the registered owner of the suit land and that he obtained the same during the lifetime of the deceased, father to the plaintiff. He has averred that he has been in actual occupation of the suit land for 22 years now and has made substantive developments on the said land. He has asserted that he is actually the one who harvests tea and not the plaintiff. He annexed to his Supplementary Affidavit delivery notes for tea showing that he is the one who delivers the tea from the suit land. He has urged that there have been previous proceedings touching on the suit land which were determined in his favour. He annexed an

order from the suit Kapsabet RMCC No.43 of 1990 indicating that the court ordered that he be placed in possession of the suit land which order was issued on 5 October 1994. He has declared that the plaintiff has no case with a possibility of success and has asked that the plaintiff be restrained from interfering with the suit land pending the hearing of the suit.

## **DETERMINATION**

I am faced with two applications for injunction. The principles for the grant of an injunction were laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case the court stated that the court needs to consider three principles. First, that an applicant has to establish a prima facie case with a probability of success, secondly that an injunction will not normally be granted if damages can be a sufficient remedy, and thirdly, if in doubt decide the matter on a balance of probabilities.

Thus, I first need to be satisfied that either applicant has set out a prima facie case. I will therefore need to assess both the plaintiff's and defendant's cases as they both have on record applications for injunction.

The plaintiff's case is that the defendant obtained the suit land fraudulently and without first having obtained Consent of the Land Control Board (LCB). It is his argument that the suit land is agricultural land. From the material before me, I cannot make a determination at this stage on whether or not the suit land is agricultural land. The plaintiff has not laid before me any facts to suggest that the suit land is within a land control area. In the absence of such material I cannot at this stage of the proceedings make a determination that it was a requirement for the consent of the LCB to be obtained. I cannot in the same vein say that the consent obtained by the Kapsabet County Council on 20 June 1990 was invalid. I guess that the plaintiff will have to substantiate his allegations at the full hearing of the suit.

The other basis of the plaintiff's suit is that the deceased never signed any agreement or any transfer documents transferring the suit land to the defendant. To support his contention, the plaintiff has annexed to his supporting affidavit statements made by an officer working at the lands office and one from the office of the Director of Public Prosecutions, Eldoret, directing that the defendant be charged with an offence of "Obtaining Registration of a Land Title by False Pretences" contrary to Section 320 of the Penal Code. He has stated that there is an ongoing case Kapsabet Criminal No.1915/12. However, the charge sheet to these proceedings has not been annexed. I cannot therefore tell whether the proceedings in Kapsabet Criminal Case No.1915/12 relate to the parties herein or what nature of charge the proceedings relate to. Even assuming that the suit relates to the defendant herein, I cannot prejudge the outcome of that case and I must presume the defendant innocent unless and until proven guilty. This is a right given to all accused persons by virtue of Article 50 (2) (a) of the Constitution of Kenya, 2010.

The defendant is the registered proprietor of the suit land and he has exhibited a Certificate of Title showing that he became registered as proprietor of the suit land on 2 July 1990. The eviction order that he attached in Kapsabet RMCC No.43 of 1990 shows that there was a dispute between one Oscar James Kipruto Tuigong as plaintiff and Philemon Kipyego Tenui (probably the deceased), Daniel Mastamet and Eliud Kiprono (the defendant herein) as defendants. The order authorizes the defendant herein to be placed in possession of the suit land. I cannot tell the nature of the proceedings in this suit as the pleadings were not annexed. However, the order indicates that at some point, a determination was made that was in favour of the defendant. In view of this, I am hesitant at this stage to take a position that will go contrary to this order without having heard the benefit of contrary evidence.

I feel that at this stage, the plaintiff has not laid sufficient material before this court that will demonstrate that he has a prima facie case with a probability of success. I am not saying that the plaintiff's case will fail. The court may be inclined to think otherwise after hearing the suit on merits and after assessing the evidence provided at the hearing. It is only that at this stage, there is insufficient material that would in my view get the plaintiff to the threshold of a case with a probability of success.

If I am wrong on this point, I nevertheless feel that the balance of convenience tilts in favour of the defendant. In as much as the plaintiff alleges that he has been in occupation of the suit land, I doubt this position. The defendant has deponed that he has been on the suit land for 22 years. He has attached the

order in Kapsabet RMCC No.43 of 1990 putting him in possession of the suit land. He has also attached tea delivery notes indicating that it is him who has been harvesting tea on the suit land and has been the one making deliveries of the same. He has also attached an affidavit of the Chief of Chepterit Location indicating that since the said Chief became an Administrative officer in the area in 1999, the defendant has been in occupation of the suit land and that he has been the person harvesting the tea plantation. The Chief has deponed that the defendant has made developments comprising of a house, kitchen, store, two water tanks and electricity connection. The Chief has also deponed that it is only on 14 August 2012 when the plaintiff stationed guards to the suit land. Given this state of affairs, I think the balance of convenience tilts in favour of the defendant and not the plaintiff in so far as occupation and use of the suit land is concerned.

The upshot of the above is that I dismiss the plaintiff's application dated 10 May 2011 with costs. I allow the application of the defendant dated 1 October 2012 with costs.

Specifically, I order :-

1. That pending the hearing and determination of this suit, the plaintiff whether acting by himself, his agents, servants and/or assigns be and is hereby restrained from entering upon, building upon, occupying, harvesting tea from, or in any other way interfering with the land parcel NANDI/CHEPTERIT/490.
2. That the application dated 10 May 2011 be and is hereby dismissed with costs.
3. That the plaintiff do bear the costs of the application dated 1 October 2012.

It is so ordered.

DATED and DELIVERED this 20<sup>th</sup> day of December 2012

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Delivered in the presence of

Mr. Mitei holding brief for Mr. Momanyi for plaintiff

Mr. Anditi holding brief for Mr. Chepkwony for the defendant