

REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 60 of 2012

CLEOPHAS KIPKOECH MUTAI.....PLAINTIFF/APPLICANT

VERSUS

SALINA CHEPKURUI.....1ST DEFENDANT/RESPONDENT

KIPTARUS K. ARAP BETT.....2ND DEFENDANT/RESPONDENT

RULING

In his Notice of Motion dated and filed on 1st March 2012, the Plaintiff/Applicant seeks an order of injunction to restrain the Defendants/Respondents from ploughing, digging, cutting trees, constructing any structures or in any other manner interfering with or wasting land Title Number NAKURU/BARAGET SETTLEMENT SCHEME/1615 until hearing and determination of this suit.

The Notice of Motion was based upon the grounds on the face thereof, and the Applicant's Supporting Affidavit sworn on the 1st March 2012. The Applicant's case is that he is the registered proprietor of the land, and that the Defendants/Respondents are trespassers on the land, and that unless they are restrained, he is likely to suffer irreparable loss for which the Defendants would be unable to compensate him.

On their part, the Defendant/Respondents say in the Replying Affidavit of Salina Chepkurui, the 1st Defendant/Respondent sworn and filed on 22nd March 2012, and her Further Affidavit sworn and filed on 16th April 2012, that the suit land has not yet been demarcated and that the Applicant's Title Deed, like many others floating in the area are fake or forged titles. Thus Defendant/Respondents contends that the suit land is allocated jointly to her and her fellow Defendant, the 2nd Defendant.

From the Further Affidavit in particular, the Defendants are persons who have been settled on the Baraget Extension Settlement Scheme and that the areas were demarcated by Government into three-acre parcels for a total of 318 parcels. The squatters including the Respondent were permitted by the area Government officials to settle on the respective allotted parcels, pending the issue of title. Under this arrangement the Respondents are allottees of Plot 1615. They do not know how the plaintiff came by the Title Deed to the Plot.

Strangely, the Applicant has not deemed it fit to respond to the 1st Defendant's Replying Affidavit or Further Affidavit. In other words, apart from having a Title Deed to the plot, the plaintiff has not found it fit to respond to the Defendant's contentions. In the result, on the facts, there is no material to support the Applicant's quest for an interlocutory injunction.

On procedural law, the Applicant sought a permanent injunction against the Respondents. However in his Notice of Motion, he sought a temporary injunction. A party is forbidden under Order 2 rule 6(1) of the Civil Procedure Rules from departing from his pleadings unless first amended. The Notice of Motion is therefore incompetent and does not lie.

On the law and precedent, the Applicant has not established a prima facie case with a probability of success. He has been challenged that his title may be a forgery. He has not found it fit to dispel that challenge with an explanation as to how he got the title. It is not enough to rely on unauthenticated

correspondence from Government officials that they have examined the plaintiff's documents and found them in order – without clearly indicating what the documents are. Without a proper and satisfactory explanation the balance would be with the Defendants.

In the circumstances therefore, I would conclude that the Applicant has not established a prima facie case with a probability of success, and the balance lies with the Defendants.

I therefore dismiss with costs the Applicant's Notice of Motion dated and filed on 1st March 2012.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of December, 2012

M. J. ANYARA EMUKULE

JUDGE