



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE NO. 138 OF 2010

STEPHEN KIBIWOT CHERUIYOT PLAINTIFF

VERSUS

DR. CHOGE BARTUIYOT DEFENDANT

R U L I N G

The application by the plaintiff dated 7th October, 2010 is essentially for a temporary injunction to restrain the defendant, his agents, servants from further constructing, wasting or dealing in any other way with land parcel No. **Eldoret Municipality Block 12/324** pending the hearing and determination of this suit.

The grounds for the application are contained in the body of the appropriate chamber summons and are fortified by the facts contained in the plaintiff's supporting affidavit dated 7th October, 2010 and a further affidavit dated 8th November, 2010.

The defendant opposes the application on the basis of the facts contained in his replying affidavit dated 18th October, 2010 and a further affidavit dated 15th November, 2010.

Order 39 Rule 1 (now Order 40 rule 1) provides for the grant of temporary injunction in suits where it is proved that any property subject of the suit is in danger of being wasted, damaged or alienated by any party to the suit.

Herein, the subject property is a parcel of land known as Eldoret Municipality Block 12/324 being claimed by both the plaintiff and the defendant.

The issue arising for determination at this juncture is whether a temporary injunction should issue against the defendant as prayed by the plaintiff.

In the main suit the plaintiff is praying for a permanent injunction and an order of eviction against the defendant.

Basically, the conditions for the grant of a temporary injunction were clearly set out in the case of **Giella Vs. Cassman Brown (1973) EA 358.** While applying the case in its decision of the 12th November, 2010 in the case of **Charter House Investment Ltd. Vs. Simon K. Sang & Others Civil Appeal No. 315 of 2004** at Eldoret the Court of Appeal observed that;

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where

irreparable injury is to result to the applicant. It is a matter of sound judicial discretion in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties.”

The conditions set out in the Giella case (supra) are that;-

- (a) The applicant must demonstrate a prima facie case with a probability of success or***
- (b) The applicant must show that he/she stands to suffer irreparable damage which cannot be compensated for by an award of damages or***
- (c) If the court is in doubt, it will decide the matter on the balance of convenience.***

With regard to the first and most important condition, it is contended in the statement of claim that the plaintiff is the sole registered owner of the suit property but was taken aback when he found the defendant erecting a structure thereon without authority from himself (plaintiff). The plaintiff further contended that the defendant has no colour of right over the property but has interfered with and entered into occupation thereof.

In his supporting affidavit, the plaintiff has annexed a copy of a certificate of lease (Annexure marked “SK 1”) dated 29th March, 2010 and a certificate of search (annexure “SC 2”) dated 16th September, 2010 to establish his ownership of the suit property.

Also annexed to the supporting affidavit is a letter of allotment dated 4th August 1995 (Annexure marked “SK 3”) a payment receipt dated 18th August, 2009 (Annexure marked “SK 4”) and a lease dated 7th December, 2009.

In his defence, the defendant denies the plaintiff’s alleged ownership of the said property and contends that the title held by the plaintiff is fake, illegal and irregular.

In asserting his ownership of the property, the defendant annexed to his replying affidavit a certificate of lease dated 14th August, 2009 issued in his own name respecting the same property i.e. annexure marked DCB ‘1’. He contends that he purchased the property from the then registered proprietor Charles Kiprotich Tanui. The sale agreement is marked annexure DCB 2 and is dated 6th May, 2009. The certificate of lease issued to the said vendor is dated 29th May, 2008 and marked as annexure “DCB 3.”

Also exhibited by the defendant are a search certificate dated 18th June, 2009 showing that the property belonged to the vendor Charles Kiprotich Tanui (Annexed marked “DCB 7”), a transfer of lease marked annexure “DCB 8” and a letter of consent dated 13th August, 2009 and marked as annexure “DCB 10.”

From all the foregoing annexures exhibited by both the plaintiff and the defendant and all the averments contained in the pleadings, as well as the affidavits in support of and opposition to the application, it is apparent that the actual ownership of the suit property as between the plaintiff and the defendant cannot be fully and properly adjudicated at this juncture. This has to await a full trial of the case. Each party is claiming ownership of the property. The defendant appears to be in occupation of the property and has already commenced erecting a structure thereon. He claims that the plaintiff’s title documents are invalid and were obtained fraudulently and irregularly. Similarly, the plaintiff claims that the defendant’s title documents are invalid and were fraudulently and irregularly obtained. Allegations of fraud would require more than affidavit evidence to prove.

In the circumstances, it is difficult for this court to hold that the plaintiff has established a prima facie case with a probability of success. This is not to say that the defendant’s defence is any better.

As to the second condition necessary for the grant of a temporary injunction, the subject matter of the suit is a parcel of land under a leasehold availed by the Government of Kenya. In fact the commissioner

of lands ought to have been joined as a party to the suit to take responsibility for the issuance of two title documents respecting the same parcel of land to two different persons assuming that both documents are valid. Be that as it may, the loss of a leasehold interest in land may easily be compensated by an award of damages.

The third condition for the grant of a temporary injunction is the balance of convenience. Herein, the balance of convenience seems to tilt in favour of both parties given that the actual and proper ownership of the suit property is yet to be proved. It would in the circumstances be just and fair to maintain the current status quo pending the hearing and final determination of the suit. In that regard both the plaintiff and the defendant are hereby restrained from interfering with the suit property by way of construction or further construction thereon or by any other way which may lead to the wasting of or dealing in the property.

The costs of the application will be in the cause.

Ordered accordingly.

J.R. KARANJA
JUDGE

(Delivered and signed this 9th day of February, 2011 in the presence of Mr. Yego and Mr. Limo)
Court; Leave to appeal granted to defendant/respondent as applied.

J.R. KARANJA
JUDGE