



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 73 OF 2011

GIDEON MOIBEN TOO PLAINTIFF

VERSUS

BENJAMIN KIBET Alias PHILIP DEFENDANT

RULING

Giella Cassman Brown & Co. Ltd. (1973)EA 358 is the leading decision setting out the conditions for the grant of a temporary injunction. Thus, an applicant must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage if an injunction is not granted. Short of these two factors, the court will decide the application on the balance of convenience. These conditions have stood the test of time and are good law.

This suit is for a declaration order that the plaintiff is the sole registered owner of the suit property No. Nandi/Lolkeringet/55 and for a permanent injunction to restrain the defendant and or his agents/servants from trespassing, pumping water or dealing in any manner that is prejudicial to the plaintiff's rights as the registered proprietor of the suit property. The suit also seeks an eviction order against the defendant.

By a Notice of Motion filed herein on 5th May 2011 and made under order 40 Rules (1) (2) and 3 (3) of the civil procedure rules 2010 and sections 3 and 3A of the Civil Procedure Act the plaintiff seeks a temporary injunction order to restrain the defendant by himself or through his servants/agents or any other persons claiming or acting under his instructions from trespassing, entering into, alienating, pumping water, removing water pipes from the suit property pending the hearing and determination of this suit. The basic ground for the application is that the plaintiff is the absolute registered proprietor of the suit property but the defendant has trespassed into the same without the consent of the plaintiff and constructed a pump house structure apart from removing seven water pipes belonging to the plaintiff.

In his supporting affidavit erroneously described as a replying affidavit, the plaintiff annexed a copy of a title deed dated 4th February 2010 showing that he is the registered proprietor of the suit property measuring 1.1 hectares.

The title deed and a certificate of official search show that the registration was made in the year 2002 but the title deed was issued in the year 2010.

The plaintiff avers that on several occasions, the defendant has been warned against trespassing and interfering with the suit property but all in vain. Even interventions by the provincial administration and land officials have failed to yield any fruit.

Learned counsel, **Mr. Mitei** contended on behalf of the plaintiff that the defendant is a trespasser and has no permission to access the suit property. However, in his replying affidavit filed herein on 26th May 2011, the defendant opposes the application and contends that the application and the plaintiff's pleadings are outright falsehood as the suit property neighbour's a portion of land known as Nandi/Lolkeringet/11 belonging to the defendant's late father and what separates the two is a river.

The defendant avers that the allegations made against him by the plaintiff are not true. He contends that he has neither intervened with the plaintiff's use of his part of the river nor has he removed water pipes as claimed.

The defendant contends that the plaintiff raised a complaint about an imaginary boundary dispute involving the suit property, parcel No. Nandi/Lolkeringet/11 and parcel No. Nandi/Lokeringet/12 and instituted proceedings at the land disputes tribunal against the defendant's mother.

The defendant avers that the panel of elders arrived at a verdict which was adopted as a decree of the court in Kapsabet PMCC. No. 43 of 2010 but being dissatisfied with the verdict, the plaintiff has since filed an application to have it quashed.

The defendant contends that this present case is a duplication of the Land Tribunal case and that there is no boundary dispute since the portion the plaintiff purports to complain about is water catchment area. Learned counsel, **M/S Sang**, argued the defendant opposition to the application by re-affirming the contents of the replying affidavit and contending that there is more than meets the eye in this case. Learned counsel submitted that the decision of the Land Disputes Tribunal is a subject of judicial review proceedings in Eldoret High Court Misc. Appl. No. 62 of 2011 wherein issues raised in this suit have also been raised therein. Further, the alleged construction of a water pump house was done before this application was made. Therefore, there is nothing to injunct as the actions attributed to the defendant cannot be injuncted.

Having considered the arguments by both sides, it is apparent to this court that there is uncertainty as to the actual dispute. Is it the ownership of the suit property or is it the boundary marking and separating the suit property from others? Indeed annexure marked "GMT 3"C" in the plaintiffs supporting affidavit shows that the dispute relates to boundary rather than ownership. This is confirmed by annexures marked "BKK 1a" and "BBK1" in the defendants replying affidavit. The two annexures are the proceedings of the Land Disputes Tribunal and a decree from the Kapsabet Court. It is noteworthy that annexures marked "BKK1(b)" in the defendant's replying affidavit is the order made by the High Court at Eldoret in Misc. Civil Application No. 62 of 2011 which is yet to be decided and which according to the defendant deals with issues similar to those raised in this matter.

With all the foregoing in the background, it is doubtful whether the plaintiff has made out a prima facie case with probability of success. The plaintiff may have acquired a title deed to the suit property but this is challenged on account of fraud in the defence and counterclaim filed herein by the defendant.

These are allegations that the title deed was obtained by fraudulent means. The truthfulness or otherwise of the allegation will have to await a full hearing of this suit.

Given the nature of the dispute between the plaintiff and the defendant it is also doubtful and has not in any event been established that the plaintiff is likely to suffer irreparable injury if a temporary injunction is not granted.

All in all, the plaintiff has failed to satisfy the first two conditions set out in the Giella case (supra) for the grant of a temporary injunction.

As to the balance of convenience, it would not be appropriate to decide the matter on it considering that the dispute essentially relates to boundaries and this may be resolved by re-surveying the suit property and neighbouring parcels of land to determine the exact boundaries.

Otherwise this application is dismissed with costs to the defendant.

J. R. KARANJA
JUDGE

(Delivered and signed this 30th day of June 2011 in the presence of Mr. Mitei and M/S Ledishah)