



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

HCC NO. 51 OF 2008

ISAAC KIPKORIR SORO.....PLAINTIFF

=VERSUS=

ZEPHA ABINIZA KABIRA.....DEFENDANT

RULING

In his plaint filed on 24th April, 2008, the plaintiff seeks the following orders:-

- a). Permanent orders of injunction;
- b). Declaratory orders
- c). Costs

The foundation of the plaintiff's claim is that proceedings in Kapsabet P.M. LDT No. 25 of 2000 were tainted with fraud and illegality. In those proceedings, the ruling of Kapsabet Land Disputes Tribunal awarding 4 acres and 5 acres of land to the defendant and the late Estera **Inyanga** respectively was adopted as a judgment of the Court. Pursuant to that judgment, **L.R. No. Nandi/Kapgangani/78** was subdivided and one of the resultant titles became **Nandi/Kapgangani/2016** (hereinafter "**the suit land**") and was registered in the name of the defendant. The plaintiff has pleaded as particulars of fraud that the said land Disputes Tribunal had no jurisdiction to determine the dispute and that the defendant had no interest in the suit land in view of the provisions of the Land Control Act.

Simultaneously with the plaint, the plaintiff lodged the application now before me. The application has been brought under the provisions of section 3A of the Civil Procedure Act, Orderxxxix Rules 1, 2, 3 and 9 of the Civil Procedure Rules and all enabling provisions of the Law. The application seeks two main orders of the court namely:-

Ø An injunction restraining the defendant among others from transferring, leasing, selling, charging or in any other way dealing with the suit land pending the determination of this suit; and

Ø A stay of assessment of costs and execution in the said Kapsabet LDT case No. 25 of 2000 pending the determination of this suit.

The application is based on the single ground that the defendant in the said Lower Court case has proceeded to obtain title and unless stopped may proceed to charge, sell or lease the same which event will cause the plaintiff serious loss and damage. There is an affidavit in support of the application sworn by the plaintiff which, in the main, elaborates the said ground.

When the defendant was served, he filed a defence and a replying affidavit. The gist of the defendant's response is that he is lawfully registered as proprietor of the suit land pursuant to a decree obtained in the said Lower Court case by consent. In the premises, the defendant contends that the plaintiff's suit has no chance of success. With regard to the stay sought, the defendant contends that the same has been overtaken by events as the costs were assessed way back on 8th May, 2008.

When the application came up before me for hearing on 25th May, 2011, counsel agreed to file written submissions which submissions were duly in place by 5th October, 2011. Those submissions substantiate the parties' stand-points taken in their respective affidavits and pleadings.

I have considered the pleadings, the application, the affidavits filed both for and against the application. I have further given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. With regard to the prayer for a prohibitory injunction, the guiding principles were crystallized in the case of **Gella –vrs Cossman Brown & Company limited [1973] E.A. 358**. The principles are that:-

- v First, an applicant must show a prima facie case with a probability of success at the trial.

- v 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.

- v Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

In this case, the plaintiff seeks an order restraining the defendant, among other people, from transferring, leasing, selling, charging or in any other way dealing with the suit land pending determination of this suit. He has predicated his case on the alleged illegality and fraud in the proceedings before the Land Disputes Tribunal and the Kapsabet Principal Magistrate. The affidavit in support of the application does not impute the defendant with the alleged fraud at all. The particulars of fraud given in the plaint do not in my view, suggest that the defendant was party to any fraudulent transaction involving the suit land. The main challenge against the Land Disputes Tribunal is with respect to its jurisdiction. Even against the tribunal, no fraud is disclosed.

The defendant on his part, contends that the decree which was passed by Kapsabet Principal Magistrate in Land Disputes Tribunal Case No. 25 of 2000 was by consent. He has in fact annexed a copy of the said decree. A perusal of the decree shows that on 23rd February, 2006, in the presence of counsel for the parties, the defendant was awarded four (4) acres of the original title number Nandi/Kapkangani/78. It is significant that the said consent was entered into after the orders given in Eldoret HM. Misc. Civil Application No. 147 of 2000 had been vacated on 21st June, 2000. It is also significant that the said Misc. Civil Application No. 147 of 2000, which sought to challenge the decisions of the tribunal and the Principal Magistrate at Kapsabet, was withdrawn by the plaintiff. His filing of the present proceedings would appear to be an afterthought.

In those premises, the challenge against the title of the defendant would appear, at least *prima facie*, to be quite weak. In the premises, the plaintiff has not demonstrated a *prima facie* case with a probability of success at the trial.

That being my view of the matter, there is no necessity to consider the other two conditions for the grant of an injunction. The plaintiff has not in any event demonstrated that unless the interlocutory injunction is granted, he might suffer irreparable injury which would not be adequately compensated by an award of damages. As I am in no doubt as to the weakness of the plaintiff's case, I do not have to consider the balance of convenience. However, if I were to determine the application on balance of convenience, I would still decline the injunction given the defendant's averment that he has been on the suit land with his family since 1979 to this date. Balance of convenience would tilt in his favour.

With regard to stay of assessment of costs and execution, the defendant has averred that the same has been overtaken by events as the costs were assessed way back on 8th May, 2008. The plaintiff has not filed a subsequent affidavit to challenge that averment. In the circumstances, prayer 2 is also denied.

In the end, the entire application is without merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF NOVEMBER, 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

- (1) Mr. **Nyambegera** holding brief for **Mr. Kiboi** for the applicant and
- (2) Mr. **Mwinamo** for the defendant.

F. AZANGALALA
JUDGE
09/11/2011