



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE NO. 103 OF 2007

JACKSON A. ARAP CHUMO.....PLAINTIFF

VERSUS

WILLIAM MALAKWEN CHERUIYOT.....1ST
DEFENDANT

SAMWEL KIPTOO RONGOEI2ND DEFENDANT

DANIEL KUNGU ONYAGO.....3RD DEFENDANT

DAVID ODHIAMBO.....4TH DEFENDANT

SOLOMON FUTWA.....5TH DEFENDANT

SEDRIC WEINE.....6TH DEFENDANT

VINCENT ODHIAMBO.....7TH DEFENDANT

WILLY MBITHI8TH
DEFENDANT

MBUGUA THUO.....9TH DEFENDANT

DAMARIS IMINZA MWILITZA.....10TH
DEFENDANT

SCOLASTIC WANGARE GATHURU.....11TH
DEFENDANT

MARGARET WANJIRU GATENGU.....12TH
DEFENDANT

ROSE MUMBU KANYALI13TH
DEFENDANT

R U L I N G

This is the Plaintiff's/Applicant's Chamber Summons taken out pursuant to the provisions of order 39 rule 2 and sections 3, 3A and 63(e) of the Civil Procedure Rules and all enabling provisions of the Law.

The plaintiff prays that the defendants by themselves and by anyone else be restrained by way of a temporary injunction from interfering with the plaintiff's parcel of land known as **Eldoret Municipality/Block 20 (Kapyiemit)195**. That application is brought on the grounds that the land above is registered in the Plaintiff/Applicant's name as a sole proprietor and the defendants have no colour of right yet they have encroached on the said land and such encroachment is unwarranted. In the supporting affidavit sworn by the applicant it is deposed that the applicant is the registered absolute proprietor of the suit land and the forceful entry of the defendants on his land is detrimental to him as he is denied quiet possession of his land.

The third defendant/respondent in his Replying Affidavit stated that he bought a ¼ acre of the suit land on 03.02.2004 from the 1st defendant and he and his family of two wives and nine children reside on the land. He described himself as a bonafide purchaser who must not be made homeless. He adds that while he does not wish to deprive the plaintiff of the use of his land he the third defendant must not be restrained from using the land until such time as the 1st defendant finds him an alternative plot.

The 1st and 2nd defendants/respondents filed grounds of opposition and they were that the Plaintiff/Applicant does not have a prima facie case with a probability of success and damages would be an adequate remedy.

The 2nd respondent was in occupation and that he had acquired rights under section 30(g) of the Registered Land Act and the plaintiff is guilty of laches. The 1st defendant/respondent asserted hereditary beneficial interest in the suit land. The other grounds of opposition were that the Plaintiff/Applicant was guilty of unclean hands and that no undertaking for damages had been given and that the application had been brought under the wrong provisions of the law.

The 4th defendant/respondent similarly filed grounds of opposition which were that the application lacks merit and is superfluous and that the orders sought are not enforceable. That the suit and application are incompetent and the applicant has no cause of action. That the applicant had come to court with unclean hands and that no undertaking for damages had been given. There was nothing filed for the 5th to the 12th

defendants.

At the hearing it was submitted for the applicant that he was the sole proprietor of the suit land and a copy of the title was produced and so the respondents must be restrained from interfering with the quiet possession of the suit land by the applicants.

For the 1st and 2nd respondents it was argued that the further affidavit filed on 5/6/2007 without the leave of the court must be struck out. Further it was submitted that the applicant had not explained how he acquired title over the suit land or how the respondents came to be on his land; that although he held the title he did not have ownership and possession of the suit land; that the title was fraudulently obtained and respondents were in occupation and have overriding interests. It was finally submitted that the applicant did not show what prejudice he was suffering and so the application must be dismissed.

The third respondent opposed the application on the grounds that he bought his ¼ acre of the suit land from the 1st defendant during 2004 and he is in occupation.

For the 4th defendant reliance was placed on the filed grounds of opposition.

After a full consideration of this application the affidavits and annexures I come to the following considered finding. Firstly there is no evidence that the applicant's further affidavit dated 5th June 2007 and filed in court on the same date was so filed after obtaining the mandatory leave of the court. Accordingly I strike out that further affidavit from the record.

The applicant will succeed in his application if he satisfies the principles set out in the case of **GIELLA – VS- CASSMAN BROWN & CO. LTD. (1973)EA 358** which are that he must show that he has a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant may otherwise suffer injury which cannot be adequately compensated by an award of damages and thirdly if the court be in doubt then the application will be decided on a balance of convenience.

The applicant has exhibited a copy of title to the suit land. Prima facie that is evidence that he is the absolute owner of that land. The respondents on their part state that they got on to the suit land by purchase of part of the suit land from the 1st defendant who states that he claims a right of ownership of the suit land. The first respondent did not show court how he became owner of that land. In his own admission he claimed ownership by transmission from his late aunt. He did not produce the Grant of representation to himself which he got confirmed so as to enable him deal with a deceased person's land. His claims to ownership are unsubstantiated and contrary to those of the applicant who has title.

The defendants/respondents who appeared (2nd to 4th) claimed to have entered the suit land through purchase from 1st defendant. They did not undertake searches to show that the 1st defendant had land that he could sell to them. At this interlocutory stage I am not required to make any definitive findings as that is for the trial court. Suffice it to say that the respondents have nothing at this stage to show that they have earned the court's protection. However, it is the onus of the applicant to satisfy court that he has a prima facie case with a probability of success at trial. I am satisfied that he has so shown. However, the prayer sought is couched in such a manner as to amount to a mandatory injunction and such mandatory injunction is not sought in the plaint.

To grant the injunction sought would amount to evicting the respondents from the suit land at this interlocutory stage. That is not allowed. The applicant easily admitted that the respondents are on the suit land. The respondents state that they entered the suit land, some of them in the year 2004 and have developed homes therein. In these circumstances I make the following orders;-

1. An injunction will issue to all the respondents restraining them from any further developments of the respective portions each one of them occupies until the suit herein is heard and determined.
2. The 1st respondent is restrained from any further subdivisions and sale of the suit land until the suit is herein heard and determined.
3. The 1st respondent is restrained from any further use of the suit land until the suit herein is heard and determined.
4. The parties herein will visit the suit land in the presence of their counsel and/or in person for those who act in person on a convenient date to be agreed between the parties with a view to ascertaining the status quo and which status quo shall be maintained until the suit herein is heard and determined. There shall be a mention in one month's time to record such status quo in court.
5. The main suit shall be fixed for hearing on priority basis.
6. Costs shall be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF DECEMBER 2010.

P.M. MWILU

JUDGE

In the presence of;

P.M. MWILU

JUDGE