



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 19 of 2006

PATRICK NGUMBAO MWENI:.....PLAINTIFF

VERSUS

HELLEN JEPKOSKEI KIPLAGAT & 2 OTHERS:.....DEFENDANTS

RULING

The 1st and 3rd defendants/applicants in their application filed on 7th February, 2007 seeks two main prayers:-

“(b) The plaintiff, his servants and/or agents be and are hereby restrained by means of a temporary injunction from cutting/felling trees damaging, wasting, transporting or in any other means dealing with trees situate at L.R No.23100/9 pending the hearing and determination of this suit.

(c) The O.C.S. Tarakwa police station be authorized to oversee the compliance with this order.

(d) Costs be provided for.”

A bit of background of the suit will be in order. The 1st defendant **HELLEN JEPKOSKEI KIPLAGAT** was the initial registered owner of the suit property which is an agricultural land measuring about 62.92 acres. Apparently she charged the title with Agricultural Finance Corporation for a loan. She however defaulted in repaying the loan and the Agricultural Finance Corporation instructed Gillette Traders, a firm of Auctioneers to sell the land by way of public Auction. This was done and the plaintiff/Respondent **PATRICK NGUMBAO MWENI** purported to have bought the land. By then only trees were standing on the land. He bought it for Shs.5 million and paid 25% deposit on the fall of the hammer. Eventually he paid the balance and the corporation transferred the land to him. However in February, 2006 the 3rd defendant entered the land intending to cut the trees thereon. The plaintiff therefore filed this suit seeking a permanent injunction against all the three defendants from entering into the land or cutting the trees. He simultaneously filed an application seeking for a temporary injunction against the defendants until the suit is heard and determined. Interim orders were granted.

The 3rd defendant **LALWI KIPLAGAT** who was said to, in conjunction of 1st defendant colluded to have the 3rd defendant a **MR. OMARE** cut down the trees in the farm, did not file any defence. The 1st and 3rd defendants filed a joint defence denying the plaintiffs claim. The 1st defendant alleged she was still the owner of the land and that there was no sale by way of Public Auction, and if there was any, it

was illegal. The 3rd defendant stated that before the purported sale agreement he had purchased the trees on the land from the 1st defendant.

As stated above only interim orders were granted *ex parte* for the plaintiff's application. However thereafter the parties appeared before the court severally and intimidated to court that they were settling the dispute out of court. At one stage they told the court that they had settled the matter and only issue of costs was remaining before they recorded a consent. However instead of recording the consent the 1st and 3rd defendants brought this application.

It was deponed by the 3rd defendant and submitted by his counsel Mr. Chemitei that the plaintiff has started felling down the trees in the land in dispute. The plaintiff had obtained an injunction against the defendant from cutting the trees and the defendant have been obeying it. However the plaintiff is using that order to cut down the trees and if he is not stopped by an injunctive order then the suit will be rendered nugatory. Mr. Chemitei further said that there is a dispute over the purported sale by way of Public Auction. The sale if any was illegal.

Application was opposed. Plaintiff swore an affidavit pointing out that at one stage the defendants wanted to record a consent to compromise the suit. He said he is now the registered owner of the land and the 3rd defendant is therefore a trespasser. It was further submitted that the defendants had not brought any counterclaim to the plaintiff's suit and merely asked the court to dismiss it. The prayer for injunction is therefore brought in vacuum.

I have carefully considered the application, affidavits annexures and the submissions by both counsels. I am also alive to the principals set in the case of **GIELLA –VS- CASMAN BROWN & CO. LTD (1973) E.A at page 358** on the issue of granting temporary orders of injunction. I find that the applicant has failed to satisfy those principals. Indeed the plaintiff in his suit sought to restrain the defendants from cutting down trees. He stated that he had bought the land in a public auction. The 1st and 3rd defendants in their defence denied liability. The 1st defendant took issue with the purported sale by way of Public Auction. However there is no counterclaim raised in their defence. There is no prayer to declare the sale illegal and confirm the 1st defendant as still the registered owner of the land. They only sought the plaintiff's case to be dismissed. If it is ruled so, they did not say what would happen to his averment that he is the owner of the land. He has in fact in his replying affidavit annexed a copy of the title which shows that he is the registered owner of the land. There is no prayer to have that registration cancelled. The 3rd defendant has not even raised a prayer that he be declared as the owners of the trees and he be allowed to harvest them. I totally agree with counsel for the plaintiff that an injunction order cannot be given in a vacuum. One must show that he has made a claim. It is imperative for the defendant/applicant to show what their claim was. In fact from the tone of the application and the supporting affidavit it is apparent that it is brought by the 3rd Defendant alone and not in conjunction with the 1st defendant who claims to own the land. The 3rd defendant's claim to have bought trees from the 1st Defendant. In essence he has no claim against the plaintiff and even if the trees are cut his claim lies against the 1st defendant who is not a party to this application. There is therefore no substantial claim against the plaintiff by the 1st defendant and one cannot therefore say he has established any *prima facie* case. As to any loss which may be occasioned if this application is not granted the applicant knows clearly the value of the trees he claims to have bought. He has not deponed that the respondent is a pauper who cannot be able to pay the costs of those trees put at Shs.600,000/=. He managed to pay Shs. 5 million for the land and as such he can as well be able to pay the value of the trees. The loss which the applicant may suffer therefore is not irreparable. Damages can atone for any loss he may suffer.

Respondent has deponed he is the registered owner of the land. Though the 1st defendant in her defence takes issue of the auction sale she has not bothered to enjoin the Agriculture Finance Corporation who authorized the sale and executed transfer documents and the auctioneers as parties to the suit. She therefore cannot be heard to cry foul and yet fail to bring on board those she thinks acted against her interest.

The land is now registered in the names of the respondent as shown in the annexures in the replying affidavit. The balance of convince therefore tilts in his favour.

The upshot of the above therefore is that I find no merit in the application. The same is dismissed with costs.

Dated and Delivered at Eldoret this 20th day of February,2007

KABURU BAUNI

JUDGE

Delivered in the presence of:-

C/C - David

for Applicant

for Respondent