REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO.78 OF 2007

BENJAMIN ANDOLA ANDAI ==========PLAINTIFF

V E R S U S

REUBEN KIPKOECH KIGET} ==========1ST DEFENDANT

JOSEPH K. KOECH } ========:::::::========2ND DEFENDANT

R U L I N G

The application before me was instituted by a Chamber Summons expressed as having been made pursuant to Order 39 Rules 1, 2, 3 and 7 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

The plaintiff/applicant is asking this court to issue an injunction to restrain the defendants from selling, alienating, cultivating, tilling or using the suit land for any other purposes, until the suit was heard and determined. The plaintiff also asks that the caution which had been placed against the title to the suit land, by the 2nd defendant, be lifted.

It is clear that the suit property is that piece of land whose title is **WAITALUK/KAPKOI/BLOCK 1/KIB0RMOS/18.**

According to the plaintiff, the said suit property measures about 12.3 hectares, and is situated in Kitale.

When the application came up for hearing, the 1st defendant did not attend court, nor had he filed either a Defence or a replying affidavit. However, as the plaintiff demonstrated to the court that he had served the 1st defendant, the application proceeded to hearing even though the 1st defendant was not in court.

The plaintiff's story is that on 2/11/2002, he and the 1st defendant signed an agreement for sale. By the said agreement, the said defendant was to sell to the plaintiff, the entire suit property.

Having executed the agreement for sale, the plaintiff paid to the 1st defendant the full purchase price, amounting to Kshs. 5, 100, 000/=. Thereafter, the plaintiff says that he begun to utilize the suit property.

Meanwhile, the plaintiff was given the original documents of title, so that he could arrange to transfer it to himself.

But in or about March 2007, the plaintiff discovered that the 1st defendant had sold a portion of the suit property to the 2nd defendant. That defendant had then taken steps to register a caution against the title, thus making it impossible for the plaintiff to transfer the suit property to himself.

Furthermore, when the plaintiff begun preparations for the cultivation of the suit property, he found that the 2nd defendant had encroached on the suit property. It was for that reason that the plaintiff asked the court to stop the 2nd defendant from cultivating, planting on, or in any way interfering with the management of the suit property.

In answer to the application, the 2nd defendant has pointed out that he was in occupation of 7 acres of land, which he bought from the 1st defendant.

The Acting Chief of Waitaluk Location did write a note dated 9/7/2007, stating that the 2nd defendant was resident on 7 acres of land, which was part of ***WAITALUK/KAPKOI/KIBORMOS BLOCK 1/18.*** According to the Chief, the said piece of land was located in the Central Division of Trans-Nzoia West. The Chief also said that the 2nd defendant had been in occupation of that piece of land since 1996.

In the light of the contents of that letter from the Chief, the plaintiff asserted that the land occupied by the 2nd defendant was different from the suit property. The reason for so saying was that ***WAITALUK/KAPKOI/BLOCK 1/KIBORMOS/18*** was not the same property as that comprised in the title described was **WAITALUK/KAPKOI/ KIBORMOS BLOCK 1/18.**

Without the benefit of further evidence on the issue, the court is unable to make a finding as to whether or not the two title numbers refer to one and the same property. However, on a prima facie basis, as the plaintiff is complaining about the 2nd defendant's occupation of part of the suit property; and as the Chief has indicated that the 2nd defendant was in occupation of ***WAILTALUK/KAPKOI/KIBORMOS BLOCK 1/18*** , I find that it is more probable than not that the property occupied by the 2nd defendant was one and the same as the suit property. That decision is further informed by the plaintiff's averment, in paragraph 6 of the Plaint, that the 1st defendant had indeed sold to the 2nd defendant, parts of the very same parcel of land as the one which the plaintiff bought from the 1st defendant.

Thirdly, if the land which the 2nd defendant was occupying was different from the suit property, there would be no need for the plaintiff seeking to have the said defendant restrained therefrom.

One of the grounds upon which the plaintiff founded his application was that the 1st defendant violated the contract between him and the plaintiff, by purporting to "***again"*** sell a portion of the suit property to the 2nd defendant.

Having given due consideration to the material placed before me, and whilst bearing in mind the fact that this ruling is on an interlocutory application, I note that the 2nd defendant had executed two agreements for sale, dated 1/2/1996 and 5/3/2001 respectively. Those agreements were for the sale of a total of 7 acres of land, which was to be curved out of the 30 acres comprised in the suit property.

On the face of the material presently before the court, it would appear that the 2nd defendant was first in time, in buying the portion of land which he is currently occupying.

That being the position, as I see it, for now, the plaintiff would have to prove that he has a superior claim of right over the 2nd defendant. As at this moment, I hold that the plaintiff has not demonstrated any such superior claim of right. Therefore, I am unable to accept the plaintiff's invitation, to find that the 2nd defendant was a trespasser on the suit property. I am also unable to accept the plaintiff's assertion, that

the 2nd defendant's possession of the 7 acres, which are a part of the suit property, is unlawful.

The twin issues as to ownership and legitimate possession of the suit property, will only be capable of being determined by the court after the parties lead further evidence on their respective cases.

In ***HASHAM LALJI PROPERTIES LTD Vs KIPCHONGE KEINO, ELDORET HCCC NO. 8/06***, the Hon. Ibrahim J. observed as follows;

"***The Defendant was already in possession at the time the suit was commenced. As stated above, the date of entry and taking of possession by the Defendant is a heavily contested issue that will have to be determined in a fully – fledged trial. What the plaintiff seeks substantially is a mandatory injunction in removing or evicting the Defendant from the suit premises and allowing them it to enter upon and take possession of the same."***

In this case, the plaintiff emphasized that he was not seeking any mandatory injunction. He said that he was only seeking prohibitive injunctions.

In my considered view, although the reliefs sought are worded in prohibitive words, if the same were granted, they would have the effect of mandatory injunctions. I say so because the 2nd defendant is already in possession of 7 acres, of the suit property. He is using the said portion of land. Therefore, if he were to be "restrained from trespassing" on that portion of the land, the 2nd defendant would have to vacate the same.

In the case of ***REBECCA JERONO JOGOM V WILLIAM NGENY & ANOTHER, KITALE HCCC NO.31 OF 2001***, the **Hon Karanja J.** held, inter alia, as follows;

"***In the light of their annexetures, their claim cannot be dismissed before they are heard. Granting the injunction against them will mean removing them from the land where they have been leaving for the last 6 or so years. All the parties herein should be given an opportunity to establish their claims in court by calling evidence. At this point in time, I cannot say that one party has a stronger case than the other."***

In the same vein, I find that the 2nd defendant's claim to possession and ownership of the 7 acres he is occupying is, at the very least, arguable.

He says that he has been in occupation of the 7 acres since 1996, which would imply that he has been there for about eleven (11) years.

My learned sister, Hon. Karanja J. did hold, in the case of ***REBECCA J. JOGOM V WILLIAM NGENY & ANOTHER*** (above-cited), that;

"***Where a party is in actual occupation of the suit property then the balance of convenience always tilts in his/her favour."***

The plaintiff urged me not to derive any guidance from that decision because it was made by a court of concurrent jurisdiction.

To my mind, the fact that a decision was made by a court of concurrent jurisdiction is not at all a reason enough to warrant it being disregarded. I believe that such decisions ought to be deemed as persuasive, unless the party criticizing it is able to give good reasons to justify a departure therefrom.

In this case, the plaintiff did not assign any good reason to warrant a disregard of the authority in issue.

In any event, the 2nd defendant has been in occupation of the suit property for a considerable length of time. In the circumstances, if the plaintiff wished to have the court hold that the said defendant was a

trespasser, who should be "restrained from trespassing" on the suit land, he should have proved that the 2nd defendant's claim of an overriding interest in the suit property were misguided. As at the moment, I find that the plaintiff has failed to discharge that onus.

I say so because although the 2nd defendant is accused of having encroached on the suit property, it appears that he had been on it for many years before the plaintiff. The word "***encroach"*** is defined as follows by the "***Oxford Advanced Learner's Dictionary".***

" ***(i) to begin to affect or use up too much of somebody's time, rights, personal life etc (2) to slowly begin to cover more and more of an area."***

If the 2nd defendant is able to prove, as he has asserted, that he has been in occupation of the 7 acres which form part of the suit property, since 1996, it would be interesting to see how the plaintiff (who bought the suit property in November 2002), would show that the 2nd defendant had encroached on the subject matter of the suit. In other words, the plaintiff would have to show that it was possible to encroach on that which one had occupied from the outset.

In my considered opinion, the plaintiff has failed to prove that he has a prima facie case with a probability of success, as against the 2nd defendant. He has also failed to prove that unless the orders sought were granted, he would suffer irreparable loss.

However, as against the 1st defendant, the application is uncontroverted. Therefore, I do hereby issue an injunction to restrain the 1st defendant from transferring or alienating the suit property until the suit is heard and determined.

As regards costs, the 1st defendant will pay to the plaintiff, the costs of the application. However, the plaintiff will pay costs to the 2nd defendant, as the application against that defendant is unsuccessful.

Finally, the status quo as between the plaintiff and the 2nd defendant is to be maintained until the suit is heard and determined, although each party is hereby given liberty to apply.

Dated and Delivered at Kitale this 30th day of October, 2007.

FRED A. OCHIENG

JUDGE