



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 16 of 2005

JABER MAHSEN ALI.....1ST PLAINTIFF

CHELUGOI MOHSEN ALI..... 2ND PLAINTIFF/APPLICANTS

=VERSUS=

PRISCILLAH BOIT.....1ST DEFENDANT

JAMES C. BOIT.....2nd DEFENDANT/RESPONDENTS

RULING

The Plaintiffs filed this suit on 24th February, 2005 against the Defendants seeking inter alia, an eviction order against the Defendants, their servants and or agents from further occupying the Plaintiff’s parcel of land L.R. No. Uasin Gishu/Sosiani/28. The Plaintiffs contend that they are the registered owners of the suit premises.

In the suit the Plaintiffs state at Paragraph 6 that the Defendants jointly and without any colour of right unlawfully encroached into the Plaintiffs’ said property.

The Defendants upon being served with the Summons and Plaint filed their joint statement of Defence. It was contended by the Defendants that the Plaintiffs obtained title by transmission from the previous registered owner one Aziza Chepkemboi who allegedly had sold the entire parcel of land in 1972 to one Paul Kipkorir Boit now deceased and gave possession to him and his family. The Defendants claimed that the Defendant’s possession and occupation of the suit property has been open, continuous and uninterrupted as of right and to the exclusion of and adverse to the Plaintiffs and the previous registered owner, Aziza Chepkemboi.

On 19th July, 2005, the parties through their Counsel filed agreed issues for purposes of the trial and which were for determination by the Court. The agreed issues are dated 19th July, 2005 and duly executed by the Counsel on record. The Plaintiff filed their list of documents on 3rd July, 2006. The Defendants filed theirs on 20th September 2006. The suit was for all practical reasons ready for trial.

However, on 28th November 2006, the Plaintiffs filed the present application under the provisions of inter alia order 39 of the Civil Procedure Rules seeking an order :

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That a temporary injunction do issue restraining the Defendants from trespassing onto, entering, encroaching or any way interfering with the Plaintiff's use, possession and ownership of all that parcel of land known as Uasin Gishu/Sosiani Settlement Scheme/28 measuring 19.5 hectares pending the hearing of this application inter-partes and pending the hearing and determination of the suit''.

In the said application the Plaintiffs contend that the Defendants have trespassed on the land, cut down trees, and destroyed fence and encroached onto 5 acres of the land. The Plaintiffs claim that this happened on 15/08/2006. In their affidavit, the Plaintiffs claim that the Defendants also completely destroyed the Plaintiffs' 4 bed-roomed house, a two roomed kitchen, 1 roomed worker's house, store and dairy shed beyond recognition and put up gal sheet made structures in place. The Plaintiffs also contend that the Defendants took three milking cows belonging to the Plaintiff and have converted the proceeds from the dairy products illegally and had them sold. The Plaintiffs also state that the Defendant has ploughed 5 acres of their land and completely destroyed a bore hole on the said land.

When the application came before this Court at an ex-parte stage on 27th November 2006, I granted limited interim orders restraining any destruction of buildings and structures and the cutting of trees.

The Defendants in opposition to the application filed a Replying Affidavit sworn by the Second Defendant. In the said affidavit he deponed that:-

- He is a son and a co-Administrator of the Estate of Paul Kipkorir Boit.
- Prior to his death, the late Paul Kipkorir Boit purchased the suit property from the late previous owner Aziza Chepkemboi in 1972.
- Since then they have been in actual occupation, use and possession of the entire parcel of land and have carried out permanent developments thereon including building residential houses, fencing, planting trees and carrying on farming activities thereon.
- The late Aziza Chepkemboi sold the parcel of land to his father, moved out and never reclaimed possession and that none of her family including the Plaintiffs have been in actual occupation of any part of the suit land.

The Defendants with leave of the Court filed an Amended Defence and Counter claim. In the counter claim the Defendants seek the following orders:-

- a) That the Plaintiffs' suit be dismissed
- b) The Court finds that land parcel number Uasin Gishu/Sosian Settlement Scheme/28 is the property of the late Paul K. Boit and his estate by reason of purchase, and adverse possession.
- c) The Plaintiffs' registration is cancelled, the register be rectified and the suit land be registered in the names of the Defendants as the Administrators of the Estate of Paul K. Boit.
- d) That a temporary order of injunction be issued pending the hearing of this suit and thereafter a permanent injunction restraining the Plaintiffs from encroaching or entering the land, electing, conveying or in any way interfering with the Defendants' developments, possession, use and occupation of the suit property.
- e) Costs of the suit and counter claim.

I have considered the application, the rival affidavits, the pleadings and the submissions by Counsel.

In the Plaintiff, the Plaintiffs pleaded that the encroachment of the suit property was on 13.01.2004, over one year before the suit was filed. The main and substantive prayer in the suit is for an eviction order.

From my interpretation, the eviction order is in respect of the entire suit and not 5 acres of land as stated in the application.

In the application filed on 28th November 2006, a period of one year and 9 months from the date of filing suit, the Plaintiffs claim that the Defendants on 15/08/2006 trespassed on the land and carried various acts of destruction. I have already referred to the alleged acts of destruction which if true would be massive and wanton and would also amount to malicious damage to property which is a criminal offence.

I have carefully looked at the copies of photographs annexed to the application. I see no evidence of destruction of buildings, structures, etc as alleged. It also cannot be true that the Defendants encroached or trespassed upon 5 areas of the land on 15/08/2006. The Plaintiffs are bound by the Plaint on which their cause of action is founded. Their cause of action arose on 13/01/2004 when alleged the Defendants occupied and took possession of the suit property. The eviction order is in respect of the entire land and not 5 acres. If the Defendants did indeed trespass onto the land on 15/08/2006, then I do not see why the Plaintiff filed the suit on 24th February, 2005 in the first place. I am not convinced by the allegations that any trespass took place or commenced on 15/08/2006. With regard to the destruction of the houses, developments and structures, the Plaintiffs do not state whether the matter was reported to the police and if the Defendants were ever charged with malicious damage to property. The described acts of destruction appear to be massive and if true must have led to heavy losses and damage. I note that the Plaintiffs did not seek to amend their Plaint to include a prayer for damages even after the Court granted leave to the Defendant to amend their Defence.

On a balance of probability, I do not find any acts of “new” trespass if any, took place on 15/08/2006 or any destruction of property took place on the said date. I am of the view at this stage that the Defendants were in occupation of the entire suit premises as at the date of filing the suit. The pleadings in this suit closed and quite wisely the Counsel for the parties agreed on the true issues in dispute in the suit and filed the list on 19th July, 2005.

In the light of the foregoing, I am of the view that the present application is an after-thought and intended to pre-empt the fair trial of this suit. It is also an abuse of the Court Process as the parties had agreed that there were triable issues as disclosed by the agreed issues identified by their advocates on record. It would also be an abuse of the Court process for the Plaintiffs to make statements on oath which when they know are untrue or cannot prove them. This is particularly so, if the allegations are that Defendants have carried out acts which constitute serious criminal offences.

I therefore, find that the Plaintiffs have not established a case to warrant the grant of the orders sought. To grant the said orders would amount to eviction of the Defendants before the trial and determination of the suit.

The application is dismissed with costs to the Defendants. The interim orders are hereby discharged and lifted. The suit to proceed to trial and heard on its merits.

DATED AT ELDORET THIS 22ND DAY OF OCTOBER 2007.

M.K. IBRAHIM,

JUDGE.