



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 367 OF 2016

NELSON KIPLANGAT NGENO.....PLAINTIFF

VERSUS

FRANCIS KIRUI alias PAULO KIRUI.....1ST DEFENDANT

ROSE CHEPNGETICH BETT.....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 6th September 2016. The following orders are sought in the application:

1. ...

2. ...

3. *THAT the Honourable Court be pleased to stop and injunct the respondents by themselves, their servants, employees and or authorized agents from trespassing on the applicants land parcel title nos. LR No. Nakuru/Baraget Settlement Scheme/449 and LR No. Nakuru/Baraget Settlement Scheme/1796 constructing, ploughing, disposing off, dealing and or interfering with the applicant's peaceful and quiet possession and use of the same in any way whatsoever pending the hearing and determination of this suit.*

4. *THAT the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he is the registered proprietor of the parcel of land known as Nakuru/Baraget Settlement Scheme/449 (hereinafter "the suit property") which was allocated to him in the year 1999. He added that upon allocation, he took possession and resides on the land with his family. That upon title deeds being issued in the year 2005, he noted that although his land measures 6 acres on the ground, the title deed issued to him indicated less acreage. That sometime in May 2016 and July 2016, the respondents lodged a complaint against him with the police and later invaded the suit property on 14th August 2016. He added that he is in possession of his land which measures about 6 acres and he awaits for rectification of the title once a caveat imposed on land transactions in the area by the government is lifted.

3. The defendants opposed the application through a replying affidavit sworn by the 1st defendant. He deposed that the plaintiff is indeed the registered owner of the suit property while the 2nd defendant is his wife is the registered owner of the parcel of land known as Nakuru/Baraget Settlement Scheme/1796. The two parcels are adjacent to each other. He added that the 2nd defendant and he have been in possession of Nakuru/Baraget Settlement Scheme/1796 since 1999 when it was allocated to the 2nd defendant. He further confirmed that title deeds were issued in the year 2005 but disputed the applicant's claim that he has been in occupation of 6 acres.

4. The application was canvassed through written submissions. I have carefully considered the application, the affidavits filed and the submissions. The law relating to interlocutory injunctions is settled. An applicant seeking such an order must satisfy the test in **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358**. For the application to succeed, he must establish a *prima facie* case with a probability of success. Even if he establishes a *prima facie* case, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant must surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

5. There is no dispute that the applicant is the registered proprietor of the suit property while the 2nd defendant is the registered proprietor of an adjacent parcel of land known as Nakuru/Baraget Settlement Scheme/1796. The annexed copy of the title deed in respect of the suit property shows that it measures 1.20 hectares which translates to 2.96 acres while the title deed in respect of Nakuru/Baraget Settlement Scheme/1796 reflects 1.41 hectares which translates to 3.48 acres. That notwithstanding, the plaintiff maintains that his land is 6 acres.

Basically, his stance by implication is that he also owns virtually the whole of the land occupied by Nakuru/Baraget Settlement Scheme/1796. That is a serious allegation. To the extent that the 2nd defendant is a registered proprietor the applicant has to contend with the privileges that the law accords a registered proprietor under **Section 25** of the **Land Registration Act** as well as the duty cast upon this court under **Section 26** of the said **Act** to recognize the 2nd defendant as the absolute and indefeasible owner of Nakuru/Baraget Settlement Scheme/1796. The two sections provide:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

6. The relief sought by the applicant is an equitable one. Equity as is well known follows the law. In view of the fact that the parties have their respective titles and in view of the clear provisions of under **Sections 25** and **26** of the **Land Registration Act**, I am not persuaded that the applicant has a prima facie case.

7. In the end, Notice of Motion dated 6th September 2016 is dismissed with costs to the defendants.

8. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 7th day of May 2020.

D. O. OHUNGO

JUDGE