



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO 111 OF 2020 (OS)

ELPHAS KIPCHUMBA BOR.....PLAINTIFF/APPLICANT

VERSUS

GILBERT EMANUEL KIBET.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 3rd December 2020 by the plaintiff/applicant seeking for the following orders.

- a) Spent
- b) Spent
- c) THAT there be temporary orders of injunction restraining the Defendant/Respondent by himself, his servants or agents or any other person whatsoever acting on his behalf from entering into, leasing out, selling, constructing, demarcating, developing or in any other way dealing or interfering with the Plaintiff/Applicant parcel of land known as NANDI/ KIPKAREN/SALIENT/559 pending the hearing and determination of this Suit.
- d) Costs be provided for in any event be borne by the Defendants/Respondents.

Counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant relied on the supporting affidavit by the applicant together with the grounds on the face of the application. It was the applicant's case that he purchased the whole parcel of land measuring 2.88 Ha at a consideration of Kshs. 360,000/ from the respondent herein vide a sale agreement dated 24th July 2006 which consideration was paid in full.

Counsel submitted that the Respondent has on various dates between the month of May 2020 to date without justification trespassed into the Applicant's land, pulled down the fence and began construction of some structures thereon and further threatened to evict the Applicant and his family.

It was the applicant's case that he is apprehensive that the Respondent may enter into, lease out, sell, construct, demarcate, develop the suit parcel of land during the pendency of the suit. Further that the applicant has been living peacefully on the suit land for a period of 14 years.

The applicant annexed a copy of the sale agreement, copy of Title Deed Green Card, Search Certificate & Payment Receipt, and a copy of payment cheque and urged the court to allow the application as prayed.

DEFENDANT/RESPONDENT'S SUBMISSIONS

Counsel for the respondent relied on the replying affidavit of the defendant and faulted the application as an abuse of the court process hence should be dismissed with costs. Counsel submitted that the applicant has not met the threshold for grant of injunctions as per the *Giella Casma Brown Case*.

It was counsel's submission that the defendant has shown that the applicant frustrated the completion of the sale agreement by defaulting on the contractual agreement hence is not deserving of the orders sought and relied on the case of **Kenya Breweries Limited & another v**

Washington O. Okeyo [2002]eKLR quoted with approval in the case of **John Edward Ouko Vs National Industrial Credit Bank Ltd [2013] Eklr**

“It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party.”

Counsel submitted that both parties use the suit land for grazing their cattle. Counsel further stated that no prima facie case has been established and therefore the application should be dismissed with costs to the defendant.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the applicant has met the threshold for grant of temporary injunction. In determining and application for injunction it is imperative to consider whether the Applicant has satisfied the requirements for the grant of temporary injunction as laid down in the case of **Giella v Cassman Brown and co. Ltd (1973) EA 358** . The applicant must establish a prima facie case and the likelihood of substantial loss. If the court is in doubt it will rule on a balance of convenience.

The respondent averred that the acreage sold to the Applicant was not the same as what is in the ground. It is also averred by the Respondent that the suit land is only utilized by both parties as a grazing ground for their cattle and that the Applicant does not reside on the land.

The evidence on record indicate that the plaintiff entered into a sale agreement which was annexed and that the applicant paid the full purchase price and took possession. The applicant further produced a copy of the Green card, official search and the sale agreement to show ownership of the suit land. This is prima facie that the plaintiff has a triable case with a probability of success. The applicant also stated that due to the persistent threats by the respondent he is apprehensive that the respondent will cause harm and loss to the applicant.

In the case of **Exclusive Estates Ltd Vs Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004** the court held that:-

‘A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter’

The grant of the temporary injunctions is to preserve the substratum of the case which is paramount when the threshold is met.

I have considered the application, the submission by counsel and the relevant authorities and come to the conclusion that the applicant has established a prima facie case against the defendant and therefore the application for injunction is allowed.

I note that this is a matter that the parties can sit and agree to a settlement or go through the Court Annexed Mediation as the issue in contention can be resolved amicably.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE, 2021

M. A. ODENY

JUDGE