



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 10 OF 2021

JOSEPH KIPTOO BUNEL.....PLAINTIFF

VERSUS

WILLINGTON KOECH.....DEFENDANT

RULING

The Application

1. The application dated **12/3/2020** and filed in court on the same date has been bought under **Sections 1A, 1B, 3, 3A, & 63(e)** of the **Civil Procedure Act, Order 40 rules 2 and 4** of the **Civil Procedure Rules** and **Articles 40 & 159** of the **Constitution of Kenya**. The defendant seeks orders of injunction restraining the defendant and anyone claiming under him from in any manner whatsoever interfering with the plaintiff's quiet use, possession and/or interest in the suit land which is referred to as **Waitaluk/Kapkoi Block 1 (Toro)/288** pending the hearing and determination of the suit and that costs be provided for.

2. The application is supported by the plaintiff's sworn affidavit dated **29/1/2021**. The grounds on which the application is premised are that the plaintiff is the proprietor of the suit land which the defendant has trespassed on and hived off a portion thereof, fenced it off and prevented the plaintiff from utilizing it. In the affidavit in support it is stated that the defendant is the plaintiff's son who stays elsewhere with his mother known as *Beatrice Walela* on a **2 acre** portion of land that the plaintiff gave to the said Beatrice and her children.

The Response

3. The defendant filed his sworn replying affidavit dated **22/2/2021** on **24/8/2020**. He deposes that the suit land is ancestral land that belonged to their late grandfather, of whose estate the plaintiff is a mere administrator in which capacity he has been registered as proprietor of the land, holding the land in trust for all beneficiaries to the estate; that the defendant has been living on part of the land until **31/12/2020** when the plaintiff sold the said portion and promised to show him an alternative land to live on; that the applicant failed to show him the alternative land; that for lack of any alternative the defendant simply settled on another part of the main parcel; that the land being their ancestral home the defendant is entitled to a share thereof.

Submissions

4. The defendant filed his written submissions on **18/3/2021**. The plaintiff filed his submissions on **11/3/2021**.

Determination

5. I have considered this application, the response and the filed submissions.

6. The issue that arises is whether the defendant should be enjoined from interfering with the suit land pending the hearing of the suit which seeks orders of eviction and injunction against the defendant.

7. The defendant's response to the claim by the plaintiff that the defendant's mother, the defendant and his siblings have been bought for land by the plaintiff on which to reside was that there is no evidence to support the claim.

8. It has not been disputed by the plaintiff that the defendant used to live on a portion of the land subject matter of this suit which the plaintiff sold to a third party, thus displacing the defendant.

9. The conditions for the grant of an interim injunction are well laid out in the case of **Giella Vs Cassman Brown 1973 EA 358**: the court

must be satisfied that the applicant has a prima facie case and that he stands to suffer loss that would not be compensated for by way of damages if the orders sought are not granted; if the court is in doubt over the two conditions herein before stated then it should rule on the application on a balance of convenience.

10. The plaintiff's submission that he has proved that he is the registered owner of the suit land has been met with the defendant's retort that he is registered as such only as a trustee on behalf of the beneficiaries of the estate of the defendant's late grandfather, and that the defendant should not be ordered to vacate the suit land on the ground that he has a share in that estate. To this the plaintiff does not lack a reply: he states a quickly that there is nothing on the land register to show that the land is ancestral land and that he holds it in trust for others including the defendant, and that his interest as a registered owner should not be defeated. He states that there is no compulsion upon a parent to give his children land, and that allowing a child to take a parent's land would erode sanctity of title.

11. The plaintiff relies on the case of **Edward Kipkosgei Chemurbii & another Vs Charles K Kosgei & Another [2014] eKLR** and **Marigi Muriuki Vs Richard Marigi Muriuki & 2 Others [1997] eKLR**.

12. The defendant avers that he was born and raised on the suit land by his parents. He avers that upon sale of the portion he lived on the plaintiff promised to allocate him another portion to reside on. The plaintiff's stance is that he has already given the defendant and his mother and siblings land to reside on.

13. The defendant avers that there was material non-disclosure that should cause this court to vacate its orders issued pending the determination of the instant application. The fact said not to have been disclosed is that the defendant has lived on the suit land all his life.

14. The defendant also avers that the plaintiff has not demonstrated that he honoured the agreement to purchase two acres of land for his mother, to which the defendant could have moved upon vacating the suit land.

15. The defendant relies on the case of **Geoffrey Kinja V Gilbert Kabeere M'Mbijiwe & Another [2015] eKLR** and **Brinks-Mat Ltd Vs Elcombe 1988 3 ALL E.R. 188** regarding the plaintiff's non-disclosure of facts.

16. I find it correct for the defendant to state that the application if granted would lead to his eviction from a place he has called home for a long time since this has not been disputed by the plaintiff.

17. The relationship between the plaintiff and the defendant's grandfather is subject to evidence, as is the allegation that the plaintiff has purchased land and settled the defendant's mother and siblings thereon.

18. Even at this interlocutory stage it can be discerned that the defendant simply moved from one part of the suit land and settled on another part thereof once the plaintiff sold the part he had been residing on. The issue of whether the plaintiff holds the land in trust and whether the defendant is a beneficiary of such a trust, if it exists, are to be determined at the main trial.

19. In the face of the matters disclosed by the defendant and which are not denied by the plaintiff in the application, this court would find issuing an order having the effect of evicting the defendant from the land without having heard him substantively on his defence to be quite drastic notwithstanding the fact of registration of the suit land in the plaintiff's name.

20. The plaintiff is the registered owner of the suit land. The rights of a registered owner are protected by the **Land Registration Act**. However, the fact remains that unregistered interests may encumber registered land when proved. In this case they have not yet been proved.

21. It is this court's view the plaintiff has established a *prima facie* case. However it is not so clear that, the defendant being his biological son and not a stranger who has wandered from outside the family into the suit land, he would suffer any loss that would not be capable of being compensated for by way of damages in the long run.

Conclusion.

22. Consequently, I find that as only one condition of the two established by the authority of **Giella (supra)** has been demonstrated to exist it would be safer for this court to deny the order of injunction sought and order that the suit be fixed for hearing on an expeditious basis.

23. The upshot of the foregoing is that the plaintiff's application dated **29/1/2021** is dismissed with costs. The parties shall comply with the rules, the plaintiff within **21 days** and the defendant within **21 days** after the land date of the plaintiff's compliance period stated. The instant suit shall be heard on the **16th November 2021** on which date the parties shall all avail their witnesses in court.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 3rd day of June, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.