



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ENVIRONMENT AND LAND CASE NO.140 OF 2021

(FORMERLY ELDORET ELCC CASE NO.226 OF 2017)

JOSEPH KIPLAGAT KOGO.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH KIPSANGA BOR.....1ST DEFENDANT/APPLICANT

LEAH TUM.....2ND DEFENDANT/ APPLICANT

RULING

1. Vide a Notice of Motion application dated 29.7 2020, the Defendants / Applicants sought for orders as follows;

i) Spent.

ii) THAT this Honourable court be pleased to issue a temporary injunction restraining the plaintiff and/or his servants , employees, agents and/or any person claiming through him from evicting the 1st and 2nd defendants , ploughing ,selling, sub diving ,transferring and/or in ay way interfering with the 1st and 2nd Defendants use occupation and possession of the parcel of land known as NANDI/CHEMELILSCHEME/657 pending the hearing and determination *interpartes* and thereafter pending hearing and determination of the main suit.

iii) THAT this Honourable court be pleased to enjoin(sic) Erastus Kipkurui Yego and Chairperson Chemelil squatters as the 3rd and 4th Defendants respectively.

iv) THAT this Honourable court be pleased to grant leave to the Defendants to amend, the Defence and counterclaim dated 19.7.2017 as per the Draft annexed Amended Defence and counterclaim.

v) THAT the annexed Amended Defence and counterclaim be deemed filed on payment of the requisite court fees.

vi) Costs be Provided for.

2.At the *ex-parte* stage the Honourable court (Hon. Lady Justice Dr.M.A. Odeny) certified the matter urgent and issued and issued a temporary injunction pending hearing and determination of the Application. The Plaintiff/Respondent opposes the application vide a Replying Affidavit deponed on 2.9.2020 and filed on the same day.

3. Parties took direction as to filing of written submissions, the 1 Applicants having filed their submission on 30.11.2020 and the Respondents on 14.1.2021now this ruling;

BACKGROUND

4.The Plaintiff has sued the defendants seeking, interalia, a declaration that the defendants are not entitled to impede his proprietary right of possession and occupation of all that parcel of land known as NANDI/CHEMELIL/657, as well as a prayer for permanent injunction restraining the Defendants by themselves or agents or otherwise howsoever from claiming the suit property. It is the plaintiff's claim that he is the registered proprietor of the suit property and thus is entitled to the prayers in the Complaint, at paragraph 4 of the Complaint the plaintiff pleads that the defendants are in occupation of the suit property.

5.The defendants on their part plead that there are entitled to the suit property having been squatters on the said property since 1997 till when the Government of Kenya allocated the land through Chemelil Settlement Scheme and that they are therefore the bonafide owners and occupiers of the suit property. The defendants have counterclaimed the suit property and have sought for a permanent injunction restraining the plaintiffs. They have sought for a revocation of the title belonging to the plaintiff.

APPLICANTS' SUBMISSION

6. It is the defendants who have moved the court for the orders sought. In support of their application the Defendants submit that they are in occupation of the suit property a fact which the plaintiff has acknowledged in the plaint vide paragraph 4 thereof. That they continue to live on the suit property and had organized themselves as squatters through a group called Chemelil squatters since 2000 and had paid Kshs. 6,000 as survey fees to facilitate subdivision and processing of the title to themselves.

7.That they were shocked to learn that one Mr. Erastus Kipkurui Yego had been allocated the said parcel and had subsequently transferred it to the Plaintiff. They further submit that the plaintiff has threatened them with eviction once the sugarcane has been harvested and the submit that the said Mr.Erastus Kipkurui Yego and the chairman of the Chemelil squatters are necessary parties to the suit and should be joined as 3rd and 4th defendants, the Applicants have placed reliance on the case of **Giella Cassman brown 1973 EA 358** on the principles of grant of a temporary injunction.

8.Further reliance is placed on the case of **Mrao Limited Vs First American Bank of Kenya** on the definition of a prima facie case. The applicants further submit that when there is doubt the balance of convenience should tilt in their favour as they are the occupants of the suit property at the moment. In this regard the applicants place reliance on the case of **Samuel Kamiri Crispoh vs John Njeru Kahihu 2015 eKLR.**

9.With regard to the 2nd limb and 3rd limb of application, it is their prayer to join Mr.Erastus Kipkurui Yego and the Chairman of Chemelil Squatters and to amend the Defence and counterclaim. The applicants submit that both Erastus Kipkurui Yego the initial registered owner of NANDI / CHEMELIL SCHEME/ 657 as well as the chairman of CHEMELIL Squatters are necessary parties and ought to be enjoined as 3rd and 4th Defendant in the suit since they are able to explain how the proposed 3rd defendants come to own the suit property before transferring it to the Plaintiff. In the annexed draft amended Defence and counterclaim the defendants have pleaded fraud against the proposed two defendants as well as sought some reliefs against them.

10. In the supplementary affidavit of the 1st applicant annexure JKB1 is a list of the Chemelil scheme squatters as well as each plot number against the name of the squatter, and at plot number 657 Erastus Kipkurui Yego appears.

11.Finally the applicants submit if the court grants the prayer for the joinder of the two proposed defendants then the Defence and counterclaim ought to be amended to reflect the annexed draft Defence and counterclaim with the two proposed defendants as defendant three and four

RESPONDENTS SUBMISSION.

12.The Plaintiff/Respondent has opposed the application and filed a replying affidavit of Joseph Kiplagat Kogo the plaintiff herein. The respondent disputes the Applicants version of events. Particularly the Respondent indicates that the defendants belonged to Tambul farmers company limited from Kitale who moved to the area recently to acquire land for commercial gain; and that only bona fide squatters were allocated the property and eventually issued with the title. Hence the applicants were not bona fide inhabitants. The Respondent further depones that his property NANDI/CHEMELIL SCHEME/ 657 formerly formed part of L.R.NO 1468 and not L.R.NO 2459.

13.The Respondent however at paragraph 21 of his affidavit states *“that I do not know where L.R.NO.2459 is and the Applicants should be ordered to move out of my land and go to settle on L.R.NO.2459”*

14.The Respondent further confirms that Mr. Erastus Kipkurui Yego was a bona fide allottee and was allocated no 657 and that he purchased the same from the said Mr. Yego. The respondent further submits that he is a bona fide purchaser for value without notice and urges the court to dismiss the application. It is worthwhile to note that the respondent has also annexed a list of ‘allotees’ of CHEMELIL SETTLEMENT SCHEME and at plot number 657 the name of Mr. Erastus Kipkurui Yego appears.

ANALYSIS AND DETERMINATION

15.The Applicants seek 3 substantive prayers for temporary injunction, leave for joinder of two proposed defendants and leave to amend the Defence upon joinder of the proposed defendants in terms of the draft amended Defence and counterclaim.

16. As regards the prayer for the temporary injunction, the Applicants have rightly pointed to the court on the principles for the grant of temporary injunction in the case of GIELLA CASSMAN BROWN. Applying the said principles to the circumstances of this case are that the Applicants’ are in possession of the suit property a fact confirmed by the plaint vide paragraph 4 thereof as well as the paragraph 21 of the Replying Affidavit.

17.Without determining the suit and this being an interlocutory stage, the applicants being in possession of the suit property a fact confirmed by the respondent via his own depositions and averments then it follows that the applicants have established a *prima facie* case as defined in the case of **Mrao Limited** has been made out, and equally the balance of convenience at this stage of the suit will be to preserve the status quo and for those reasons this court grants order number 2 of the Application.

18.It is common ground by both parties that Erastus Kipkurui Yego is a necessary party to resolving this dispute, the prayer for leave to

amend is premised on Order 1 Rule 3,10(2)(4) the said provision of the law give the court discretion to join a necessary party as either a plaintiff or a defendant;

19. However in this case the reliefs sought by the plaintiff are only against the 1 and 2nd defendant and not Mr. Erastus Kipkurui Yego as well the chairman of the Chemelil squatters and therefore proceeding to grant leave to the defendant to join the two proposed defendants as parties to the suit where no relief has been sought against them by the plaintiff would be to place the plaintiff in a hard spot as was observed in the case of **CAROL CONSTRUCTION ENGINEERS LTD V NAOMI CHEPKORIR LANGAT [2019] eKLR** wherein the court in dismissing a similar application observed the hardship that would be rendered to the plaintiff thus;

"it will be wrong for this court to impose upon the plaintiff some persons as defendants when in fact the plaintiff has no issue with such persons."

20. Since the Applicants have a counterclaim against the plaintiff and similarly the said Mr. Yego and the chairman of Chemelil squatters who are not parties to the suit yet and seeing that the proposed defendants are necessary parties to this suit the Applicants are at liberty to introduce the proposed defendants as defendants to the counterclaim and not as co – defendants in the original suit pursuant to the provision of Order 7 rule 8 and 9 of the civil procedure Rules. Prayer no 3 of the application is thus declined.

21. Essentially the third prayer to amend the Defence and counterclaim is related to the prayer to join the proposed defendants. Having declined to join the proposed defendants in the suit, it follows thus the prayer no 4 for leave to amend the Defence and counterclaim in terms of the draft Defence and counterclaim equally fails and is hereby declined. Having disallowed prayer no 4 of the Notice of Motion application dated 29.7.2020, prayer no 5 being derived from prayer no 4 equally fails, the upshot is thus the application is allowed in terms of prayer 2 only, prayers 3,4 and 5 are disallowed.

22. Costs in the cause.

DATED AT KAPSABET THIS 21ST DAY OF OCTOBER 2021.

JUSTICE M. N. MWANYALE

JUDGE OF THE ENVIRONMENT AND LAND COURT