



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L CASE NO. 14 OF 2021(OS)

SHABAN KIPLAGAT KIPRONO.....APPLICANT

VERSUS

FLORENCE CHEPKOR

(the legal representative of the estate of APPOLO OHANGA MBANDA.....RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion dated 10th June, 2021 in which the Plaintiff/Applicant seeks the following orders:-
 - (a) Spent
 - (b) Spent
 - (c) Temporary injunction restraining the Respondent/Defendant from among others in any manner dealing with title NO. ELDORET MUNICIPALITY BLOCK 21 KINGONGO/639 pending inter-partes hearing and the determination of this application.
 - (d) IN THE ALTERNATIVE status quo be maintained pending the disposal of this suit which is to the effect that the Respondent/Defendant is now in possession of the suit land.
 - (e) Costs of the application to be provided for.
2. The Applicant claims to have been residing on LR No.ELDORET MUNICIPALITY BLOCK 21 KINGONGO/639 (Suit Property) with his family from 1998. Since then, the Applicant alleges that he and his family have been tilling the suit property continuously until 1st March, 2021 when the Defendant/Respondent in the company of Chief of Kibulgeny Location and a contingent of Police Officers from Baharinin Police Station evicted him from the suit property without any court order.
3. The Applicant states that soon after he entered the suit property, he fenced it with Kie-apple fence which overgrew to an extent that the O.C.S Baharini Police Station asked him to cut down the Kie-apple fence on the grounds that it was acting as a hide out for criminals. He immediately cut down the Kie-apple fence and replaced it with one of posts and barbed wire.
4. When the Applicant was evicted, he did not immediately know who was behind the eviction. He undertook investigations which revealed that the person behind the eviction was the Respondent who was the administratrix of the Estate of the late Appollo Ohanga Mbanda, the registered owner of the suit property.
5. The Applicant states that the following his eviction, he discovered that one of his two houses had been burned down. The Applicant states that he has discovered that the Respondent has obtained confirmation of grant in Eldoret. High Court Succession Cause No.84 of 2000 in which the suit property has been listed as one of the properties of the Estate of the deceased who is the registered owner of the suit property.
6. The Applicant argues that the Respondent may dispose of the suit property during the pendency of this suit and that therefore there is need to preserve the same as the case goes on. The Applicant contends that the deceased and his wife were aware of his occupation of the suit property with his family.
7. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 18th June, 2021. The Respondent states that

she is the wife of Appollo Ohanga Mbanda (deceased) who is the registered owner of the suit property. She has since obtained a grant in respect of the estate of the deceased. The said grant has since been confirmed.

8. The deceased acquired the suit property while he was working in Eldoret. The suit property was registered in the name of the deceased in 1996. The deceased and the Respondent cleared the suit property and fenced it with cedar posts and barbed wire. They then planted Kie-apple fence round it. This is because people were passing through the middle of the land. the Applicant and her family took control of the suit property where they used to cultivate maize every year until 1999 when the deceased passed on.

9. The Respondent's family relocated to Kakamega but they would occasionally come to the suit property to check on it. Each time they came, they found that unknown persons had uprooted the cedar posts. When the Respondent enquired from neighbours about those who were behind the uprooting of the cedar posts and destruction of the barbed wire fence and the cutting down of the Kie-apple fence, she was directed to the house of an old lady whom she warned not to interfere with the suit property.

10. In the year 2020, the Respondent visited the suit property and found that all the posts had been uprooted and there was maize which had been planted. The Respondent confronted the woman behind the planting who was apologetic. There was also a newly built structure which the woman said had given to Muslims to use as Madrasa. The woman mobilised people who chased the Respondent and her people. The incident was reported to Baharini Police Station who advised her to go ahead and plough the suit property which she did and is growing maize on it.

11. The Respondent states that the Applicant is not being candid. The Applicant has stated what is not true in his affidavit. The Applicant contends that the suit property had been fallow as from the year 2010 and the structures which the Applicant alleges have been on the land were actually put up in the year 2020.

12. The Respondent attached photos from google map which show the state of the suit property for each year until 2020 when a structure which appears to be new was put up. The Respondent states that the Applicant has filed another case being Eldoret ELC Case No.329 of 2017 in which he is also claiming adverse possession of LR NO.ELDORET MUNICIPALITY BLOCK 21/INGONGO/3309.

13. The parties were directed to dispose of the application by way of written submissions. The Applicant filed his submissions dated 6th July, 2021. The Respondent filed her submissions dated 17th September, 2021. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of an injunction.

14. The principles for grant of an interlocutory injunction were well stated in the celebrated case of **Giella =vs= Cassman Brown & Co.Ltd [1973] EA 358**. Firstly, an Applicant must demonstrate that he has a Prima facie case. Secondly, an injunction will not be granted unless the Applicant will suffer damage which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

15. In the case of **Mrao Ltd =vs= First American Bank of Kenya Ltd & 2 others [2003] eKLR**, a Prima facie case was defined in the following terms;-

"..... it is a case in which on the material presented to the court, a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter."

16. In the case of **Nguruman Limited =vs= Jan Bonde Nielsen & 2 others [2014] eKLR**, the Court of Appeal stated as follows:-

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of the prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed."

17. I have carefully examined the materials placed before me in light of the three cases cited hereinabove. The Applicants claim to have entered the suit property in 1998. Contrary to the Applicant's allegations, the Respondent has annexed google maps which show that the suit property was fallow as from 2010 upto 2020 when a new structure was put on the suit property. In the circumstances, I find that the Applicant has not demonstrated that he has a *prima facie* case with likelihood of success.

18. The Applicant has already been evicted from the suit property. As the Applicant concedes, it is the Respondent who is firmly in the control of the suit property. If the Applicant finally convinces the court that he had acquired the suit property by way of adverse possession, he will always get the land and by any chance if the Respondent would have sold it, its value will be ascertained and the Applicant will be compensated. The purpose of an injunction is to restrain what has not happened but it cannot be sought where the thing sought to be restrained has already happened as in this case where the Applicant has already been evicted.

19. As was correctly observed by the Court of Appeal in the Nguruman Ltd case (Supra), it must be remembered that it is a serious thing to restrain a registered proprietor of property over what is undeniably his unless there are justifiable grounds to do so. In the instant case, there is no justification to restrain the Respondent from dealing with a property which belongs to her.

20. Even if the court were to entertain any doubts, still the balance of convenience tilts in favour of the Respondent who is now set to be the

registered owner of the suit property by way of transmission and who had already taken possession even before the present suit was filed. In the circumstances, I find no merit in the Applicant's application which is hereby dismissed with costs to the Respondent

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF OCTOBER, 2021.

E.O. OBAGA

JUDGE

IN THE VIRTUAL PRESENCE OF;-

MR. ODUOR FOR RESPONDENT

COURT ASSISTANT – MERCY

E.O. OBAGA

JUDGE