



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 174 OF 2015

STEPHEN KIBOWENPLAINTIFF

VERSUS

RAYMOND RUTO & 8 OTHERSDEFENDANTS

RULING

(Application by persons wishing to be enjoined as defendants; plaintiff filing suit for eviction; applicants stating they are also on the land; cannot in the circumstances oblige plaintiff to seek eviction against persons he believes are not on his land or he does not intend to sue; application dismissed).

1. This suit was commenced by way of plaint filed on 23 June 2015. In the suit, the plaintiff seeks orders inter alia that he be declared to be the legal owner of the land parcel Lembus/Kilombe/157; a permanent injunction to restrain the defendants from the suit property; and orders of eviction to have the defendants evicted from the suit property. His case is that he purchased the suit property, in a public auction held on 27 May 2014. The public auction was held on the instructions of the Agricultural Finance Corporation (AFC) who held a charge over the suit land. Despite the sale, AFC failed to transfer the property to the plaintiff, which action prompted the plaintiff to file a suit, being Nakuru ELC No. 218 of 2014, to compel AFC to transfer the property to him. The case was decided in favour of the plaintiff vide a judgment delivered on 13 May 2015. The plaintiff contends that after the judgment, he learnt of the presence of the defendants in the suit property and his attempts to take possession of the land have been violently resisted by the defendants. It is that which prompted him to file this suit.

2. The defendants filed defence vide which they averred that they are sons and daughters of one Samwel Kipruto Chekaitany who is the beneficial owner of the suit land. They pleaded that the issue of the plaintiff's title is still the subject of litigation in Nakuru ELC No. 218 of 2014.

3. Through an application dated 18 April 2016, two persons, namely Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkaitany, wish to be enjoined in this suit as defendants. They have also applied to have AFC enjoined as defendant. The two persons have also sought to amend their defence and they have annexed a draft defence. The grounds in support of the application inter alia include the reasons that the two applicants are interested parties in Nakuru ELC No. 218 of 2014; that the 2nd applicant is in possession of the suit land together with the original defendants; that the applicants were previously the registered owners of the suit land; that the manner in which the land was sold is still subject to Nakuru ELC No. 218 of 2014; that it is necessary to have the applicants and AFC added as parties for purposes of determining the real questions in controversy; that the 2nd applicant and his descendants who are over 84 have no other known home and derive their livelihood from the suit land.

4. The application is opposed by the plaintiff who swore a replying affidavit. He has deposed inter alia that to his knowledge, only the 6 named defendants are in occupation of the suit land and that it is against them that he chose to assert his rights over the suit land. He has averred that the suit Nakuru ELC No. 218 of 2014 is already finalized in his favour. A preliminary objection was also filed, to the effect that the Supporting Affidavits of the two applicants are defective for the reason that they were sworn at Eldoret on 18 April 2016, while they Commissioner for Oaths signed them in Nakuru, and therefore the same were not sworn before the Commissioner for Oaths.

5. I took in the submissions of Mr. Kibii for the applicants and Mr. Konosi for the plaintiff and I take the following view of the matter.

6. First on the preliminary objection, I see no substance in it. I have looked at the Supporting Affidavit sworn by Jeruto Tapkili Tengekyon. It is said to be sworn at Eldoret on 18 April 2016 before Ogeto Onsongo Peter who has provided his address. Now the quarrel that the respondent has is that the address provided by the Commissioner for Oaths is a Nakuru address yet the affidavit was sworn in Eldoret. I have not been shown any law which prevents a person whose address is in one town from commissioning affidavits in another town. Personally, I see no problem with this. I would probably have given it some more thought if I was given evidence that the deponent never appeared before the Commissioner for Oaths, but none has been provided. I therefore dismiss the preliminary objection.

7. On the substance of the application, the two applicants want to be enjoined to this suit together with AFC. They say that they are in possession of the suit property and that AFC is a necessary party since it is AFC which sold the suit property to the plaintiff/respondent. It will be discerned that the plaintiff has sought orders of eviction against specific individuals. It is those people who he believes are in possession of the land. I cannot force defendants upon the plaintiff unless it is clear that the orders sought cannot be granted in the absence of the proposed defendant/s. The case here is one of possession of property. The plaintiff is of the view that it is the defendants that he has named who are in possession of the land and he now wants them evicted. He states that so far he has no claim over the applicants. Now, if the plaintiff does not wish to pursue any case of possession or eviction against the two applicants, that is up to him. I do not see how I can push the plaintiff to sue persons, who according to him, he has no claim against and who according to him are not in possession of the suit land. I also do not see where AFC comes into these proceedings. AFC already sold the suit land to the plaintiffs. AFC was sued by the plaintiff to transfer the land to the plaintiff herein and that case has already been decided in favour of the plaintiff. The land has already been transferred to the plaintiff who is now the registered proprietor. The case herein is over possession and occupation of the suit land, not in the manner in which AFC sold the land to the plaintiff. If the applicants have a quarrel over this, that to me, is a separate course of action, not tied to the prayers herein. I am not therefore convinced that AFC is a necessary party.

8. For the above reasons, I have no option but to dismiss this application with costs.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of July, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Ms.Chepngetich holding brief for Mr. Konosi for plaintiff/respondent.

Mr. Opar holding brief for Mr. Kibii for applicants.

Court Assistant : Janet.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU