



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 21 OF 2020

JULIUS CHEMKENEYI KORING'URA....1ST PLAINTIFF

ABRAHAM LIPAPUS.....2ND PLAINTIFF

VERSUS

SAMUEL KIBOI SIMATWA.....DEFENDANT

RULING

1. By a Notice of Motion dated **18/3/2020** and filed in court on **19/3/2020** and brought under **Sections 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act and Order 40 Rule 2 and 4(1) of the Civil Procedure Rules**, the plaintiffs seek the following orders against the defendant:

(1) ...spent

(2) ...spent

(3) That pending the hearing and determination of this suit this honourable court be pleased to issue a temporary injunction to restrain the defendant, his servants, agents or any other person whatsoever from entering, dealing, leasing, charging, carrying out any operations, and/or in any other way interfering with the plaintiffs' interest in land title No. Trans-Nzoia/Zea/12 and 13.

(4) That costs of this application be provided for.

2. The application is supported by the 2 separate affidavits of the plaintiffs both sworn on **18/3/2020**. The grounds upon which the application is based on are that in **2002** the 1st plaintiff had purchased and took possession of **Plot No 6 Zea Settlement Scheme** from a third party who had been allegedly allocated land by the **Agricultural Development Corporation**; that the 2nd plaintiff was allocated **Plot No. 6 Zea Settlement Scheme** by the ADC in **1996** which he permitted the 1st plaintiff to use; that through a letter dated **19/2/2020** by *Esther Chege & Co advocates* the defendant demanded that the 1st plaintiff do vacate plots alleged to be referred to as **Trans Nzoia/Zea/12 and 13** and cede them to the defendant; that the land reference numbers refer to the two parcels owned by the plaintiffs respectively; that upon a search at the land registry the plaintiffs found that the suit lands were registered in the defendant's name on **27/6/2019**; that the plaintiffs believe the registration to be illegal and liable to cancellation. The defendant is said to have reported to the police who have been seeking their arrest for criminal offences. It is urged that unless the orders sought are issued the defendant may continue with his acts of interfering with the suit land.

3. The defendant filed a sworn replying affidavit dated **1/3/2020**. His response to the application is that he bought the two plots from two original allottees who were allotted the land vide letters of allotment dated **9/11/2017**; that prior to the purchase the plots were under the use of those original allottees; that he attempted to take possession in **2018** and met resistance from the plaintiffs; that he has been issued with title deeds to the suit plots and that the plaintiffs have not substantiated the claim of illegal registration and they have no structures on the suit lands and the photographs annexed to the supporting affidavits are meant to give a false impression that the plaintiffs are in occupation.

4. The plaintiffs filed their submissions on **16/6/2020**. The defendant filed his submissions on **15/7/2020**. I have considered the application, the response and the filed submissions.

5. The issues that arise in the instant application are as follows:

(1) Whether an injunction should issue against the respondent as prayed;

(2) What orders should issue?

6. The conditions for the grant of an interim injunction were set out in the case of **Giella Vs Cassman Brown 1973 EA 358**. They are that the applicant must establish a *prima facie* case and also that he must show that he would suffer loss that can not be compensated for by way of damages. If on any occasion the court is in doubt in regard to any of the above two conditions then it may rule on the application on a balance of convenience.

7. As to whether the applicants who are the plaintiffs herein have established a *prima facie* case I note that the survey report attached to their affidavit states that the fence around the plots looks aged and that the 1st plaintiff is currently utilizing the land. The defendant has failed to substantiate in what manner the photographs attached to the supporting affidavits are not corresponding with the land on the ground and has thus failed to prove to this court that the photographs are calculated to give a false impression of occupation. In any event the backbone of the allegation by the defendant that the plaintiffs have not been in occupation of the land is premised on the absence of any structures of the defendants on the suit land. In this court's view possession of land may be proved notwithstanding the absence of structures on the land. Possession may take many forms including mere cultivation and possession by agent. That notwithstanding it is important to note that the surveyor's report alleges the existence of a kind of a structure on **plot No. 5** which is alleged to serve both plots. The argument raised by the defendant based on lack of possession is therefore not conclusive and can not be accepted wholesale at this stage. In any event the defendant himself has averred in his sworn reply that when he attempted to take possession of the land the plaintiffs prevented him from doing so. This implies that physical control over the land was with plaintiffs.

8. Further the plaintiff's claim is based on the fact that despite their acquisition of the suit plots long ago by way of purchase or direct allocation as the case may be the defendant effected registration of the land in his name only recently and that that registration is illegal and liable to be cancelled. They allege forgery. These are allegations that can not be substantiated at this stage but at the substantive hearing.

9. It is noteworthy that the defendant relies on the provisions of the Land Registration Act to claim that he is the absolute owner of the suit land. The impression is that he believes that his title is indefeasible. However on many an occasion the courts have held that when the title of a registered proprietor is under challenge it is not sufficient for that proprietor to simply wave the title deed to the court and claim indefeasibility of registered title. He must demonstrate that the title was legally and regularly acquired. That demonstration can only occur in the setting of an *inter partes* hearing where the plaintiffs lay before their court the evidence of alleged illegality and the defendant is accorded an opportunity to counter that evidence by his own evidence.

10. In this court's view it is not possible to give the defendant's title a clean bill of health at the present juncture without a hearing. It is also clear that failure to grant the interim injunction order sought may subject the plaintiffs to a certain eviction prior to the hearing and determination of this suit, that is, before their claim is heard. **Article 50 of the Constitution of Kenya 2010** provides that:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body.”

11. In the circumstances, the plaintiffs having proved that they have been having some physical control over the land as well as documents they believe to be valid, they have established a *prima facie* case.

12. As to whether the plaintiffs would suffer loss that may not be capable of redress by way of damages, this court is of the view that that has not been established. However this court is of the view that it is necessary to exercise abundant caution and preserve the suit land from any interference by the defendant and that can only be done by the grant of an interim injunction as prayed in the application.

13. In the circumstances I grant the application dated in terms of **prayer No. 3** thereof. The costs of the application shall be in the cause. The plaintiffs and the defendant shall comply with **Order 11 of the Civil Procedure Rules** within **14 days** and **28 days** respectively from the date hereof, with the time frames running **concurrently** and with the plaintiff commencing such compliance, and both parties shall appear before this court for the **allocation of a hearing date** for the main suit on the **27/10/2020**.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 24th day of September, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.