



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C NO. 595 OF 2013

SIMON TIANTA OLOLTAPORI PLAINTIFF

VERSUS

EUNICE SAMOE DEFENDANT

RULING

1. The Plaintiff vide a plaint dated **18th November, 2013** seeks the cancellation of the 1st Defendant's title being **CIS Mara/Lemek/3789**; an order of eviction of the Defendants and their families from the suit property and an injunction restraining the Defendants from entering remaining, subdividing, transferring, cultivating, erecting structures or interfering with the Plaintiff's quite possession and enjoyment of the suit land.
2. Simultaneously with the plaint, the plaintiff filed a Notice of Motion application under Certificate of Urgency seeking interlocutory injunction against the defendants restraining them from entering, selling, demarcating, transferring, alienating, or in any other manner, whatsoever dealing with parcel No. **CIS Mara/Lemek/3272** pending the hearing and determination of this suit.
3. The application is premised on the grounds set out on the face of the application and the supporting affidavit sworn by **Simon Tianta Ololtapori** on **18th November, 2013**. The Defendants opposed the application and filed a replying affidavit sworn by **Eunice Samoei** on **30th April, 2014**.
4. On **19th November, 2013** the application came up for hearing exparte. Upon considering the submission by **Ms. Wanjiru**, learned counsel for the plaintiff, I directed that **HCCC No. 108 of 2011** which she alleged concerned the same subject matter and parties as the current suit be placed before me for perusal. The matter was then set down for inter parties hearing.
5. The plaintiff's case is that he is the registered proprietor of parcel no. CIS Mara/Lemek/1758 which borders parcel no. CIS Mara/Lemek/1749 registered in favour of the 2nd Defendant. That sometime in 2009, the 2nd Defendant hived off a portion of the plaintiff's parcel and amalgamated it with his land. Subsequently, the parcel of land was subdivided to form CIS Mara/Lemek/3272-3274. CIS Mara/Lemek/3272 was further subdivided to create CIS Mara/Lemek/3789 which parcel was transferred to the 1st Defendant.
6. The plaintiff avers that on **13th May, 2011** he filed a suit against the 1st Defendant and one Josephat Samoei. At the time he was unaware that the suit land had subsequently been transferred to the 1st defendant. He thus seeks consolidation of the two suits.

7. He further contends that the actions of the defendants are illegal and unjustifiable and shall deprive him of his property. He is apprehensive that the 1st Defendant may further dispose of the suit land to third parties and thus defeating his claim. He therefore prays that the court grant the interlocutory injunction pending the full hearing and determination of this case.

8. For their part, the defendants through the replying affidavit dated **30th April, 2014** deny to have at any one time excised any portion of the Plaintiff's parcel of land. The 1st Defendant states that she is the registered proprietor of land known as CIS Mara/Lemek/3789. She purchased the parcel from the 2nd Defendant herein. The parcel was a resultant of a subdivision of a larger parcel known as CIS Mara/Lemek/1749 which gave rise to various portions including CIS Mara/Lemek/3272. A further subdivision of CIS Mara/Lemek/3272 resulted to several titles including CIS Mara/Lemek/3789. She avers that the plaintiff's case revolves around a non-existent title and therefore the orders sought are in futility.

9. The defendants aver that the plaintiff's case is based on forged mutations forms as the same have not been registered nor do they contain the presentation book numbers. Further the deponent states that the plaintiff is abusing the court process by preferring two cases involving the same parties and subject matter.

10. The 1st defendant avers that she is an innocent purchaser for value in respect to her property and that she reserves the right to deal with it as she wishes. She further states that the suit is inept, ambiguous, and an abuse of the court process and the Notice of Motion is incompetent and should be dismissed.

11. On **5th May, 2014** the learned Counsel **Mr. Kurgat**, for the Plaintiff and **Mr. Karanja**, for the defendants argued the application in support of their respective positions.

12. **Mr. Kurgat** submitted that the present suit and HCCC 108 of 2011 involves the same subject matter and similar parties. In the former suit the plaintiff sued one Josephat Samoei who is in occupation of the suit land, whilst in the present suit he sues the registered owner. It was his view that court ought to consolidate the two suits.

13. In reply, **Mr. Karanja** submitted that there was no point of filing a fresh suit since the HCCC 108 of 2011 had not been disposed of. In his view, the plaintiff ought to have applied for an amendment in order to capture his whole case rather than filing multiple suits. Further counsel submitted that proceeding with the application offends **Section 6** of the **Civil Procedure Act** which provides that a court shall not proceed with the trial of a suit in which a matter in issue is also directly and substantially in issue in a previously instituted suit.

14. In respect to the interlocutory application for an injunction counsel submitted that the plaintiff is the proprietor of CIS Mara/Lemek/1758 which borders the 1st Defendant's land which was originally CIS Mara/Lemek/1759 and owned by the 2nd Defendant. He further states that CIS Mara/Lemek/1758 was amended to include an excision. According to counsel, the 1st defendant's land is a result of a subdivision of the original parcel No CIS Mara/Lemek/1759 to create CIS Mara/Lemek/3272 and further subdivision of CIS Mara/Lemek/3279 resulting to parcel No CIS Mara/Lemek/3789. He contends that this portion was illegally and without the plaintiff's consent hived off from his parcel of land.

15. In his submissions, **Mr. Karanja** argued that the Notice of Motion refers to parcel no. CIS Mara/Lemek/3272 and not CIS Mara/Lemek/3789. The latter parcel of land is only mentioned in the supporting affidavit. According to counsel this is a substantial error and goes to the root of the application because if the orders are issued against parcel no. CIS Mara/Lemek/3789 it will gravely affect the rights of the 1st defendant since he relied on the grounds on the face of the application in his reply.

16. Further counsel submitted on the discrepancies in the titles filed in HCCC 108 of 2011 and in the present case. He contends the title in the former suit was issued on **3rd March, 2009** in respect to 50.86 hectares of land whilst in the present suit the title annexed to the application refers to a title issued on **8th October, 2013** measuring 79.0 hectares. It was his submissions that the mutations forms relied on by the plaintiff were not presented for registration and the same are a forgery. As such counsel contended that

the plaintiff had not established a prima facie case.

17. In a short reply to the defendants' submissions, **Mr. Kurgat** stated that the discrepancies in the two titles is because of an amendment to the title which was effected under **Section 142 (1) (c)** of the **Registered Land Act Cap 300**. He also stated that from his application for amendments, it is clear that the plaintiff is challenging CIS Mara/Lemek/3789 and urged the court to take into considerations Order 1A, 1B, and 3A of the Civil Procedure Act and Article 159 of the Constitution.

18. I have reviewed the evidence and material placed before the court by the parties and I find the issues for determination as follows:

- a) **whether the amendments proposed go to the root of the case;**
- b) **whether HCCC 108 of 2011 ought to be consolidated with the present case or stayed;**
- c) **whether the plaintiff has established a prima facie case to entitle the court to issue the order of injunction sought against the defendants;**

19. In my view, it is not in dispute that this Court has general power to amend proceedings as envisaged not only in **Section 100** of the **Civil Procedure Act** but also under **Order 8 Rule 5**. That rule in part provides as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

20. My understanding of the objection raised by counsel for the defendants was whether the error sought to be corrected goes to the root of the application. He argues that if the amendment is allowed it will get his clients by surprise as they relied on the grounds on the face of the application in their reply. I however do not entirely believe this is an honest assertion because the parties herein have previously engaged each other in respect to the same dispute. It was first addressed by the Land Registrar and subsequently referred to the Land Disputes Tribunal. To my mind therefore there is no prejudice that will be occasioned against the Defendants. Contrary, amending the Notice of Motion which forms part of the proceedings shall assist both parties to this suit to canvass the real issues in question. I therefore allow the amendments as proposed by counsel for the Applicant.

21. The second issue for determination is in respect to multiplicity of suits. Counsel for the plaintiff prays that HCCC 108 of 2011 and the present suit be consolidated. Counsel for the Defendants is of the view that the plaintiff was gambling with judicial process by filling multiple suits and therefore an abuse of the court process. In my view, the essence of joinder of parties is to avoid a situation where multiplicity of suits are filed when all the issues can be determined in one suit. I do hold that the present case raises similar issues to HCCC 108 OF 2011 but I have also noted that the first defendant in the current suit is not a party in HCCC No. 108 of 2011. To allow all parties have their day in court I order that **HCCC 108 of 2011** and **ELC 595 of 2013** be consolidated. **ELC 595 of 2013** shall be the lead file and the 2nd Defendant in HCC 108 of 2011 will now become the 3rd Defendant.

22. The question that follows is whether this court should grant the injunction prayed for. The conditions for the grant of injunction were well laid down in the case of **Giella vs Cassman Brown & Co. Limited (1973) EA**. The applicant must demonstrate that he has a prima facie case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages. If the court is in doubt it will decide the application on a balance of convenience.

23. I feel this application shall be determined by weighing the relative strength of the parties cases. In **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510, Lord

Diplock observed that

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

24. I share the same sentiments more so because both parties have made out affidavits on a prima facie ownership of the suit property. Both parties have annexed copies of mutation forms in support of the different positions. It is therefore difficult for the court to determine the authenticity of the two sets of mutations forms. I however take note that the copies of mutations forms annexed by the plaintiffs do not contain the date they were received for registration and or the Presentation book number. I cannot therefore establish which set of forms precede the other and whether the document filed by the plaintiff was the last copy that was registered. As the mutation forms annexed by the defendants contains this crucial information the balance of convenience tilts in their favour.

25. Further, the parcel of land which the plaintiff seeks an injunction against the defendants from any further dealings is registered in favour of the 1st Defendant. **Mr. Kurgat** in his oral submissions intimated that one Josephat Samoei (the defendant in HCCC 108 of 2011) is still in occupation of the suit land. As such an interlocutory injunction at this stage would amount to evicting Mr. Samoei from the suit land.

26. For the above reasons the plaintiff's application fails and the same is hereby dismissed with costs to the defendants.

Dated, signed and delivered in open Court at Nakuru this 4th day of July 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Kurgat for the plaintiffs

Mr Karanja for Defendant

Emmanuel Maelo : Court Clerk.

L N WAITHAKA

JUDGE