



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 192 of 2013

NGAMATE WANDONGU.....PLAINTIFF

VS

ESTHER NJOKI KIBUNJA.....DEFENDANT

(Application for injunction; principles upon which the court will consider an application for injunction; applicant being the registered owner of the suit land; defendant alleged to be a trespasser; defendant in response stating that she has been on the suit land in excess of 12 years; no defence and no counterclaim filed by the defendant; prima facie case; no competing claim by defendant; application for injunction allowed)

RULING

I have before me a motion dated 10 April 2013 filed by the plaintiff. It is an application brought under the provisions of Order 40 rule 1, 2, 2A (1) and 3 of the Civil Procedure Rules, 2010, and Section 3A of the Civil Procedure Act (CAP 21) Laws of Kenya and "all other enabling provisions of the law".

The substantive prayer in the application is an order of injunction to restrain the defendant from utilizing or in any other way dealing with the land parcel Kapsaret/ Kapsaret Block 1 (Yamumbi) /94 until the hearing and determination of this suit. The application is founded upon the grounds that the plaintiff is the registered proprietor of the suit land; that the defendant has unlawfully ploughed the same; that the plaintiff intends to subdivide the land; that unless restrained the defendant will continue interfering and cause the plaintiff irreparable damage.

I must point out that there was a lot of casualness in the drafting of the application and of the plaint. The prayers in the application start from a number 6 and go upto 10 and the grounds start from a ground No. 4. The prayers in the plaint start from prayer (c). I think it is important for counsels to develop at the minimum a sort of neatness in the way their pleadings and applications are drafted and presented. Be as it may there is no doubt that it is an application for injunction and the same is opposed by the defendant who has filed a replying affidavit.

This being an application for injunction, I stand guided by the principles laid down in the case of **Giella v Cassman Brown (1973) EA 358**. In the said case, the court of appeal stated that before allowing an application for injunction, the court needs to be satisfied that there is a prima facie case with a probability of success; that the applicant stands to suffer irreparable loss which may not be compensated by an award of damages and if in doubt decide the application on a balance of convenience.

In order to determine whether the plaintiff has laid out a prima facie case, an assessment must inevitably be made of his case, as pleaded, and as buttressed by the supporting material in the supporting affidavit. Where a response has been filed by the respondent, such response must be factored in when considering whether a prima facie case has been laid out.

The starting point is the plaintiff's pleadings. This suit was commenced by way of plaint filed alongside this application. It is pleaded in the plaint that the plaintiff is the registered proprietor of the land parcel Kapsaret/ Kapsaret Block 1 (Yamumbi)/ 94 measuring 1.214 Ha. It is further pleaded that the plaintiff has without any colour of right trespassed into the said land despite being asked not to do so. The plaintiff's prayers in the plaint are for an order of injunction to restrain the defendant from entering on, or in any other way, interfere with the plaintiff's use and enjoyment of the property. I am assuming that this prayer in the plaint is for a permanent injunction although that prayer as drafted only asks for an injunction.

In the affidavit in support of the application, the plaintiff has more or less repeated the averments in the plaint and has displayed the certificate of title which shows that he became registered as proprietor on 30 November 1995. It is also deponed that sometimes in the year 2009 the plaintiff placed a caretaker on the suit land. Early in the year 2013 he sent surveyors to go and sub-divide the suit land but the defendant chased them away claiming that she has a right to cultivate the land. The plaintiff went to the land and advised the defendant to stop intermeddling with the same, but was later surprised to find out that the defendant had cultivated the land. It is then that he opted to file this suit.

The defendant upon being served entered appearance and filed a replying affidavit to the subject application. So far, the defendant has not filed a statement of defence.

In her replying affidavit, the respondent has stated that she is the bona fide owner of the suit land having bought the same for a consideration of Kshs. 45,000/= on 30th December 1993 from Yamumbi Co-operative Society. She has deponed that unknown to her, the plaintiff secretly went to the lands office and caused himself to be registered as the proprietor of the suit land by replacing the title and ownership in the year 2004. She has averred that after she purchased the land, she took possession and has been cultivating the land from 1993 to date. She has denied ever threatening a surveyor as none ever visited the land and has stated that all she did was plant a maize crop on the land as she has done every year. She has deponed that she is in effective occupation of the land and that the application to stop her from being on the land is now overtaken by events. She has asked that this application be dismissed with costs.

The application was canvassed before me on 24 April 2013. Mr. J.K. Korir, learned counsel for the applicant urged me to allow the application and restrain the defendant. He asserted that the plaintiff is the registered owner and his proprietary interests ought to be protected. He pointed out that in line with Section 26 of the Land Registration Act, (Act No. 3 of 2012), the certificate of title is prima facie evidence of ownership. He averred that the fact that the defendant has ploughed the land does not defeat the rights of the plaintiff as registered owner. On the allegation that the defendant bought the land from Yamumbi Co-operative Society, counsel pointed out that no sale agreement had been annexed.

On the other hand, Mr. R.R. Mwetich, learned counsel for the defendant, urged me to dismiss the application. He asserted that the defendant is the bona fide owner of the land and has been in occupation since 1993 without interruption. He stated that the plaintiff obtained the suit land by fraud, a conclusion that the defendant derived, after conducting a search of the suit land. Counsel stated that the search shows that there was a replacement of the title deed which was fraudulent. He contended that the sanctity of a title is subject to challenge. He also argued that the defendant was in possession of the suit land and an injunction cannot issue against her. He also contended that the balance of convenience tilts in favour of the defendant who is in possession and that granting the injunction will compromise the entire suit. He stated that the defendant has been in uninterrupted possession for over 20 years and has therefore acquired the land through the doctrine of adverse possession. He averred that the defendant will raise a counterclaim to this effect.

In reply, Mr. Korir asserted that the replacement of a title cannot be said to be evidence of fraud.

I have considered the application, the affidavits in support and in opposition, and the submissions of counsel. There is no doubt that the plaintiff is the registered proprietor of the suit land. As registered proprietor, he is vested with all proprietary rights including the right of exclusive possession. These rights are elaborated in sections 25 and 26 of the Land Registration Act, (Act No. 3 of 2012) which provide as follows:

S. 25. (1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

S. 26. (1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It will be seen from the above two provisions that the Certificate of title is to be taken as prima facie evidence of ownership. However, as correctly pointed out by Mr. Mwetich, it does not mean that title can never be challenged. It can be challenged as set out in Section 26 (1) (a) and (b). The grounds for challenging title are fraud, misrepresentation, illegality, or where the title is acquired unprocedurally or through a corrupt scheme.

It will be seen that the rights of a proprietor are only subject to leases, charges or such other encumbrances shown in the register, to trusts and to the overriding interests expressed in Section 28. One of the overriding interests noted in Section 28 (h) are the rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

It has been argued by the defendant that the plaintiff acquired title by way of fraud. Counsel pointed out to the re-issue of the certificate of title in the year 2004 and asserted that that was evidence of fraud. I have looked at the search certificate annexed to the replying affidavit of the defendant. The same shows that the title deed was replaced in the year 2004. I do not think a replacement of a title deed is evidence of fraud where the replacement is to the same person who is the registered proprietor unless there is further evidence to the contrary.

The defendant so far has not filed a defence and therefore there are no pleadings touching on fraud before me. I do not see, at least from the material before me, how it can be said that the plaintiff acquired title by way of fraud.

It has also been argued by Mr. Mwetich that the defendant has been in occupation of the suit land for a period in excess of 20 years and therefore she has acquired rights over the suit land by prescription. As I stated earlier, one of the overriding interests noted in Section 28 (h) are the rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. I cannot tell with certainty at this stage of the proceedings whether the defendant has been in uninterrupted possession of the suit land for 20 years. Be as it may, if the defendant thought that she has acquired the land through prescription, it was incumbent upon her to assert that right by filing defence and

counterclaim or file a separate suit for adverse possession. So far none has been filed and although counsel has stated from the bar that one will be filed, I am unable to make the conclusive assumption that such will be filed. In the same vein, I am unable to gauge the strength of the plaintiff's case vis-à-vis that of the case of the defendant because the defendant has not filed any pleadings upon which she may also demonstrate a prima facie case of her own, that would disentitle the plaintiff from the injunction sought.

The upshot is that I am persuaded that the plaintiff has demonstrated a *prima facie* case with a probability of success. Mr. Mwetich argued that since the defendant is in possession and occupation of the land, and that she has ploughed the same, then the application for injunction has been overtaken by events. I am not agreeable to this argument. It cannot be argued that all that a trespasser needs to do is to enter land and by virtue of that entry then an injunction to prevent such trespasser from further occupation of the land cannot issue. An injunction can and will issue, against a trespasser who is in occupation of land, to prevent further acts of trespass unless such person can demonstrate a sustainable competing right which would entitle him to remain on the land. I had earlier stated that the defendant has not filed any counterclaim and has not therefore demonstrated any such competing right to the land which would entitle her to continue remaining on the land.

The upshot of the foregoing is that I am persuaded that the application for injunction is merited. I therefore allow this application for injunction and order the defendant and/or her servants/agents to desist from entering into the land parcel Kapsaret/ Kapsaret Block1 (Yamumbi) 94 or in any other way dealing with the same pending the final determination of this suit. The plaintiff shall have the costs of this application.

It is so ordered.

DATED and DELIVERED THIS 8TH DAY OF MAY 2013

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT & LAND COURT AT ELDORET

Delivered in the presence of:-

Mr. H.K. Ngeno holding brief for Mr. Mwetich of Ms Manani Lilan & Co. for the defendant/respondent.

N/A for Ms J.K. Korir for the plaintiff/applicant.