



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 117 of 2011

KIPRONO KIBOGY.....1ST PLAINTIFF

CHEMWENO CHERONO.....2ND PLAINTIFF

VERSUS

ANDREW KIPTOO.....DEFENDANT

RULING

In their plaint dated 11th July, 2011 the plaintiffs seek the following main orders of the court:

- (a) A permanent injunction restraining the defendant, among others, from dealing and or interfering in any way with the plaintiffs' quiet possession, use and or enjoyment and to stop any unlawful ploughing, planting and or to do any acts inconsistent with the plaintiffs' rights as the registered owners of land parcel number Mosop/lelboinet/425 (hereinafter "the suit land".)**
- (b) An order compelling the defendant to uproot the Eucalyptus trees planted on the suit land.**
- (c) Damages**

The foundation of the plaintiffs' claim is that they are the joint owners of the suit land and in or about June, 2010, the defendant without any colour of right or justifiable cause trespassed upon five (5) acres of the suit land by planting eucalyptus trees upon two (2) acres thereof.

Simultaneously with the plaint, the plaintiffs filed the application now before me. The application has been brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 1, 2 and 9 of the Civil Procedure Rules. The application seeks the same injunctive orders pending the hearing of the suit.

The application is based on the following main grounds:-

- (a) That the plaintiffs are the owners of the suit land.**
- (b) That the defendant has encroached, trespassed onto and wasted the suit land.**
- (c) That the suit land will be rendered infertile due to the defendant's acts.**
- (d) That it is in the interests of justice that the orders sought be granted.**

The application is further supported by the 1st plaintiff's affidavit. The affidavits elaborate the

above grounds. The application is opposed and there is a replying affidavit sworn by the defendant. It is deponed, *inter alia*, that for over 15 years the 2nd plaintiff and his two sons have been leasing 4 – 8 acres of the suit land to the defendant and sometime in March 2010 even before the expiry of the existing lease, the 2nd plaintiff and his two sons offered a further 4 acres to the defendant for lease for 8 years w.e.f for December, 2012; that the only issue in contest was the planting of eucalyptus trees on the suit land which the 2nd plaintiffs objected to which issue was referred to the local chief and his elders who resolved that no more eucalyptus trees be planted on the suit land and that the defendant's occupation of the suit land is with the consent of the 2nd plaintiff.

When the application came up for hearing before me on 16th May, 2012 counsel agreed to file written submissions which were duly in place by 11th July, 2012. In the said submissions, counsel reiterated the averments in their clients' respective affidavits.

I have considered the application, the affidavits filed, both for and against the application and the submissions of counsel. Having done so, I take the following view of the matter. The principles for the grant of both prohibitory and mandatory injunctions are well settled. With respect to the former the pre-requisites were laid down in the case of **Giella -Vs- Cassman Brown & Company Limited [1973] E.A. 358**. These are as follows:-

- 1) An applicant must show a prima facie case with a probability of success at the trial.**
- 2) An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.**
- 3) If the court is in doubt it should decide the application on a balance of convenience.**

The affidavit evidence adduced before the court demonstrates that the defendant is already using part of the suit land which was leased to him in terms of a lease arrangement between him and the sons of the 2nd plaintiff. In the premises, it would appear that the prohibitory injunction sought by the plaintiffs is not available to them.

With regard to the mandatory injunction sought, the guiding principles were crystallized in the case of **Locabail International Finance Limited -Vs- Agriexport and others [1986] IALL ER 901**. In that case it was stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than was required for a prohibitory injunction.”

Those principles have been applied by our courts. (See **Kenya Breweries Limited -Vs- Okeyo [2002] E.A. 109** and **Maison Limited -Vs- Yaya Towers Limited [HCC 2225 of 1992][UR]**.)

In addition being an equitable remedy, an application for a mandatory injunction will not be granted where it appears inequitable to do so.

On the affidavit evidence availed to the court, I am not persuaded that the plaintiffs' case is incontrovertible. It is significant that the plaintiffs have not filed a supplementary or further affidavit in response to the averments made by the defendant in his replying affidavit. The defendant has deponed that he is not a trespasser upon the suit premises but was allowed thereon by the 2nd plaintiff and his two sons. He has further deponed that the 2nd plaintiff's concerns were in respect of the planting of eucalyptus trees and not to the *lease per se* and as directed by the chief and his elders he will not plant further trees upon the suit land. It cannot therefore be said that the defendant is attempting to steal a

match from the plaintiffs or that he is trying to obtain a position of advantage which he obtained through a planned and blatant unlawful act.

I cannot also say that the mandatory injunction sought is directed at a simple and summary act which can easily be remedied. Besides, the plaintiffs have also claimed for damages in their plaint which prayer, if successful at the trial, will adequately compensate the plaintiffs should they succeed in the end.

In the premises I am not persuaded that the plaintiffs have demonstrated any of the circumstances discussed in the **Locabail International Case**. A case for a mandatory injunction has therefore not been made out at this stage.

The upshot is that this application is declined. In view of the prayers sought by the plaintiffs I direct that the parties urgently prepare this suit for hearing.

Costs shall be in the cause.
Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 5TH DAY OF SEPTEMBER, 2012**

**F. AZANGALALA
JUDGE**

Read in the presence of:

Mr. Barasa H/B for Ms. Mutai for the Applicant

**F. AZANGALALA
JUDGE**

5TH SEPTEMBER, 2012