



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 11 of 2012

JOHN SERGON:.....PLAINTIFF

VERSUS

RICHARD NAGGY AENGWO:.....1ST DEFENDANT

ESTHER CHEBII KIPROP:.....2ND DEFENDANT

RULING

In his plaint lodged on 30th January, 2012 the plaintiff seeks the following main orders of the court:-

(a) A declaration that he is entitled to exclusive enjoyment and use of land parcel number Kabarnet Municipality/228 (hereinafter “the suit land”);

(b) Removal of the caution from the suit land; and

(c) An injunction;

The foundation of the plaintiff's claim is that he is the sole registered owner of the suit land and is therefore entitled to exclusive use and occupation thereof and the 1st defendant has trespassed thereon and commenced construction of a temporary structure thereon whilst the 2nd defendant has placed a caution against the register of the suit land claiming a beneficiary's interest. Yet both have no legally enforceable claims over the suit property and their acts are therefore illegal and a violation of the plaintiff's rights over the same.

Simultaneously with the plaint the plaintiff lodged a chamber summons expressed to have been brought under sections 3, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 2 of the Civil Procedure Rules. He seeks one primary order, namely, that an injunction restraining the defendants from trespassing upon, carrying out construction and or occupying or in any other way dealing with the suit land pending the hearing and determination of this suit.

The application is based on the main grounds that the plaintiff is the registered owner of the suit land and is entitled to exclusive use thereof yet the 1st defendant has trespassed thereon and is carrying out construction of a temporary structure. In the premises, the plaintiff contends that he stands to suffer irreparable loss.

The application is further supported by an affidavit sworn by the plaintiff. The affidavit is an elaboration of the averments in the plaint and the grounds for the application.

The plaintiff appeared ex-parte before **Mshila J** on 8th February, 2012 who, on being satisfied with the prima facie merits of the application, granted a temporary injunction restraining the 1st defendant from continuing with the construction on the suit land pending hearing of the application *inter partes*. When served, the defendants filed replying affidavits and a joint written statement of defence. The gist of the apposition is that the suit piece of land was allocated to the husband of the 2nd defendant way back in 1995 as an unsurveyed residential Plot No. B in Kabarnet Town which allocation was accepted by the deceased and the consideration thereof duly paid. All rates due to the local authority have been paid but in 2010, one **Winnie J. Cherotich** impersonated the 2nd defendant's daughter, **Winnie Kiprop**, and purported to sell the suit property to one **Peter Sergon Cheptumo** thereby provoking a complaint by the 2nd defendant to the police which culminated in the said **Winnie Cherotich** admitting her lack of capacity to sell the suit land. Somehow however, the property was subsequently registered in the name of the plaintiff but the clerk to the local authority confirmed that the suit land had been allocated to the deceased. With that assurance, the 2nd defendant sold the suit land to the 1st defendant which sale has been converted to a lease arrangement in view of the uncertainty of ownership of the suit land.

In the premises the 1st defendant contends that he is not a trespasser upon the suit land as he has the authority of the 1st defendant.

When the application came up before me for hearing on 11th July, 2012 counsel agreed to file written submissions which were finally in place by 10th October, 2012. The submissions were a further elaboration of the parties' stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed both for and against the application and the said submissions. Having done so, I take the following view of the matter. For the applicant to succeed, he had to establish the conditions set in **Giella -Vs- Cassman Brown & Company Limited (1973) EA 358**. The principles 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 will decide the application on a balance of convenience.**

The affidavit evidence adduced before the court demonstrates that the suit land is undoubtedly registered in the name of the plaintiff. But that registration, appears steeped in controversy. I say so, because the 2nd defendant has demonstrated that the same land was allocated to her deceased husband who duly accepted the allocation and paid the requisite consideration and other fees. The deceased was never informed of any change in the allocation and the local authority confirmed to the 2nd defendant that the suit land had indeed been allocated to the deceased.

In the premises, the 2nd defendant, as the widow of the allottee, may not strictly be described as a trespasser over her deceased husband's property. It is my *prima facie* view that in that capacity she had basis upon which to enter into the lease arrangement with the 1st defendant. That being my, *prima facie*, view of the matter, the 1st defendant cannot also strictly be described as a trespasser as he is on the suit land on the authority of the widow of the deceased allottee.

It is illustrative that the plaintiff did not react to the replying affidavits of the defendants yet his title to the suit land is seriously challenged in those documents.

In the premises, I find and hold that the plaintiff has not demonstrated a prima facie case with the probability of success that the defendants are trespassers. There is however a clear dispute over the ownership of the suit land and it is in the interests of all parties that the character of the suit property be preserved pending the hearing of this suit. That being my view of the matter, I order that, pending the hearing and determination of this suit, the parties be and are hereby restrained from carrying out further construction or additional development on the suit land.

The said order is made on condition that the plaintiff shall file an undertaking as to damages within the next five days.

Costs shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 7TH DAY OF NOVEMBER, 2012.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Kipnyekwei for the Respondents.

**F. AZANGALALA
JUDGE**

7TH NOVEMBER, 2012