REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 38 OF 2019 (OS)

BRYAN CHEBII KIPKOECH...................................APPLICANT

VERSUS

BARNABAS TUITOEK BARGORIA...........1ST RESPONDENT

DAVID KIMUTAI BARGORIA....................2ND RESPONDENT

RULING

Bryan Chebii Kipkoech ***(hereinafter referred to as the applicant)*** has come to court against **Barnabas Tuitoek Bargoria** and **David Kimutai Bargoria** praying for an order that pending the hearing and determination of the main suit, there be an order of injunction restraining the respondents by themselves, their agents or employees from evicting the applicant from those parcels of land known as UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/463 and UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/464 or in any way dealing with the aforesaid parcels of land.

That pending the hearing and the determination of the originating summons, there be an order of inhibition restraining the Land Registrar, Uasin Gishu from dealing with the suit lands known as UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/463 and UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/464. That Eldoret Chief Magistrate ELC No. 33 of 2019 be transferred to this Honourable Court for hearing and final determination and be consolidated with this matter.

The application is based on grounds that the applicant has been in peaceful occupation of the suitlands, UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/463 and UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/464 since 2003 and 2000 respectively to-date. That the applicant's occupation of the suitlands has been without the consent of the previous and the current registered owners, the respondents herein and that the occupation of the suit lands by the applicant has been open and uninterrupted. That the 1st respondent who is also the 2nd respondent's father is the current registered owner of that parcel of land known as UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/464.

The 1st respondent has not been in occupation of the said parcel of land since 2000 to date which period is now more than 19 years. That the 2nd respondent is the current registered owner of that parcel of land known as UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/463 having acquired registration from the 1st respondent on 1st September, 2017 but he has never been in possession thereof.

That the 2nd respondent has not been in occupation of the said parcel of land since 2003 to date which period is now more than 16 years. That the respondents' and the previous owner's titles to the suitlands have been extinguished by operation of law. The respondents' titles to the suitlands have been extinguished by dint of adverse possession.

That the respondents have now threatened to forcefully evict the applicant from the suitlands. That the applicant herein reported the said incident at Kaptagat Police Station vide No. 15/26/2/2019. That there is need to preserve the lands and the prevailing status quo on the land register and possession.

That the issues raised and prayers being sought in Eldoret Chief Magistrate ELC No. 33 of 2019 are substantially in issue in these proceedings. That the plaintiffs who are the respondents herein in Eldoret Chief Magistrate ELC No. 33 of 2019 are seeking for the eviction of the applicant herein who on the other hand in these proceedings is seeking for registration of the suit properties having acquired the same through adverse possession.

That it is only fair that the two matters are consolidated and save on judicial time, resources and avoid a situation where this Honorable Court and the subordinate court arriving at conflicting decisions over the same matter. The Eldoret Chief Magistrate ELC No. 33 of 2019 is scheduled for hearing on 15th March, 2019. That the application herein has been brought in good faith and without undue delay. That the respondents shall suffer no prejudice if the prayers sought are granted. That the applicant will suffer substantial and irreparable loss if the orders sought are not granted. That it is in the best interest of justice that the prayers sought are granted.

In respect of title Number UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/463. The 1st respondent state that he acquired title to the property in 1993 after purchasing from one Petronila Chepkemoi Rotich in 1991. He granted a licence to Ngetich to occupy the same. He does not state when he granted the licence.

Mr. Ngetich vacated in 2015 to allow his children to take possession. However, he cannot take over the property because the applicant is in possession. In 2017, he transferred the property to the 2nd respondent to hold in trust for the siblings. He states that the applicant took over the property in 2015. The 2nd respondent wrote to the applicant to vacate but has not vacated. In respect of UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/464, he states that he acquired the property in 1993 and title was issued on 11.9.2001. He granted a license to the applicant to occupy the land. That he is in occupation with his consent. The affidavit of the second respondents reiterates the import of the statements made by the first respondent.

The principles of injunctions are to be found in the case of ***Giella vs*** ***Cassman Brown Co. Ltd 1973] EA 358***, where it was held that in order to grant the injunction as prayed the court must be satisfied that,

a. ***The applicant had established a prima facie case with probability of success;***

b. ***The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and***

c. ***If the court was in doubt, the application would be determined on a balance of convenience.***

With reference to the establishment of a prima facie case**,** Lord Diplock in the case of ***American Cyanamid vs Ethicon Limited*** ***[1975] AC 396*** **stated thus,**

> **"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief."**

I have considered the application and do find that the applicant is in possession of the suit properties. Being in possession alone establishes a prima facie case. The only remaining issue is whether he has the consent of the 1st respondent or not which should go on trial. There is no written evidence of a license. I do find that the applicant has established a prima facie case with probability of success.

This court observes that the existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. ***Prima Facie*** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a ***Prima Facie*** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. The plaintiff has demonstrated that he is in possession of the land.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that ***irreparable injury*** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. On irreparable loss, I do find that the plaintiff has invested in the property as per the valuation reports and therefore, if injunction is not granted, he is likely to be evicted and property destroyed.

The court should issue an injunction where the ***balance of convenience*** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of ***balance of convenience*** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the ***balance of inconvenience*** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

In this case, the balance of convenience favors the grant of injunction as the plaintiff is in possession. He will be highly inconvenienced if injunction is not granted. On the other hand, the defendants have never utilized the lands for more than 12 years.

I do grant an order of injunction restraining the respondents by themselves, their agents or employees from evicting the applicant from those parcels of land known as UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/463 and UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/464 or in any way dealing with the aforesaid parcels of land. Orders accordingly.

Dated and delivered at Eldoret this 14th day of May, 2019.

A. OMBWAYO

JUDGE