



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 109 OF 2017

RONAX KIPROTICH KIMUNGEN..... 1ST PLAINTIFF

WILFRED LESHWARI KIMUNGEN..... 2ND PLAINTIFF

VERSUS

JACOB AGUYA NGURULE..... DEFENDANT

RULING

1. By Notice of Motion dated 13th March 2017 the plaintiffs seek an injunction to restrain the defendant by himself, his servants and or agents from trespassing into, wasting, dealing with, alienating, disposing of or in any way interfering with the suit land known as No. Nakuru/Mariashoni/981 pending hearing and determination of this suit. The application is supported by an affidavit sworn by the 1st plaintiff. The defendant opposed the application through a replying affidavit sworn by himself and through notice of preliminary objection dated 20th April 2017.

2. Directions were given that the application and the preliminary objection be heard together through written submissions. Parties duly filed and exchanged submissions. I have considered the application, affidavits filed, the preliminary objection and the submissions.

3. The applicants' case is that the 1st plaintiff is the owner of the parcel of land known as Nakuru/Mariashoni/981 (hereinafter "the suit property") and that he has been in occupation thereof since 1997. They further state the suit property has no title document since it is within Mau Forest and since the government stopped issuance of titles in the said area. They accuse the defendant of invading the land on 8th March 2017 and felling trees. They annexed a copy of a letter from the local assistant chief to support the 1st plaintiff's claim to ownership as well as some photos to show the alleged felling of trees.

4. The defendant's objection as stated in the preliminary objection is that the suit property does not exist in law, that the suit property is situated in Mau Forest which is government land which the plaintiffs cannot possibly have title to, that the plaintiffs have admitted that they do not have title to the suit property, that the plaintiffs have no interest capable of being protected by the court, that the plaintiffs have no locus and that the suit is an abuse of the court process.

5. In the replying affidavit the defendant reiterates that the suit property does not exist legally and therefore the 1st plaintiff cannot own it, that the 1st plaintiff is in his twenties and it cannot therefore be true that he has been in occupation of the suit property since 1997 and that it is not true that the defendant invaded the suit property and felled trees as alleged. He pointed out that the photos which were annexed by the plaintiffs have a date stamp of 3rd January 2012 yet is alleged that the invasion took place on 8th March 2017.

6. I will deal with the preliminary objection first. As pleaded, the objection is aimed at the application and not the suit. For a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

7. A perusal of the preliminary objection herein reveals that it dwells largely on matters of fact such as the location of the suit property, whether the plaintiffs have a title document and whether the plaintiffs have an interest capable of being protected. All these are matters that can only be resolved at the trial. They do not reveal any pure point of law. In the circumstances, the preliminary objection is dismissed with costs to the plaintiffs.

8. Regarding the application for injunction, the applicants must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance

of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR.**

9. The 1st plaintiff claims that he owns the suit property. While he admits that he has no title document, he has not provided any evidence to show how he came to own the suit property. The letter written by the assistant chief cannot possibly such evidence. In the absence of evidence of ownership, the plaintiffs' claim to title is an uphill task, one that certainly cannot pass the test of demonstrating a prima facie case.

10. The plaintiffs accuse the defendant of invading the suit property on 8th March 2017 and felling trees. I however note that the photographs which have been annexed to support this contention bear a date of the year 2012, some five years before the date of the alleged invasion. In the circumstances, I find it difficult to accept the allegation that the defendant invaded the suit property on 8th March 2017 and felled trees. All in all, I am not persuaded that the plaintiffs have a prima facie case. The application must fail.

11. In the end, I make the following orders:

a) Preliminary objection dated 20th April 2017 is dismissed with costs to the plaintiffs.

b) Notice of Motion dated 13th March 2017 is dismissed with costs to the defendant.

12. Ruling in this matter was to be delivered on 6th March 2019 but was delayed since I proceeded on a lengthy medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 18th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

No appearance for the defendant/respondent

Court Assistants: Beatrice & Lotkomo