



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 94 OF 2019

MARGARET NJAMBI KAMAU.....PLAINTIFF/RESPONDENT

VERSUS

JOHN MWATHA KAMAU.....1ST DEFENDANT/APPLICANT

LIKE KANUSU MWALATI.....2ND DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 22nd July 2019 by the plaintiff/applicant seeking for orders of injunction against the defendants by themselves and their agents from evicting the applicant from land parcel known as UASIN GISHU/NGENYLEL SETTLEMENT SCHEME/1199 pending the determination of this suit.

Counsel agreed to canvass the application vide written submissions. Counsel for the applicant gave a brief background to the case and submitted that the applicant has been in peaceful occupation of the suit land since 1987 which is a period of more than 32 years which occupation has been with the consent of the respondents and the previous owners.

That the respondents have threatened to forcefully evict the applicant from the suit land. Counsel submitted on the threshold for grant for injunctions as per the Giella casman Brown case. Counsel cited the case of Bryan **Chebii Kipkoech v Barnabas Tuitoek Bargarioria & another [2019] eKLR** where the court held that being in possession alone establishes a prima facie case and the existence of the prima facie case in favour of the applicant the court ought to grant a temporary injunction since in the event of success, and the injunction has not been granted the applicant would suffer irreparable injury.

Counsel also submitted that the applicant has satisfied the ingredients of grant of injunction and that the balance of convenience lies in favour of the plaintiff. It was Counsel's further submission that in the above case the court stated that:

"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."

Counsel therefore urged the court to grant the orders as prayed.

DEFENDANT'S WRITTEN SUBMISSION

Counsel for the defendant gave a brief background to the suit and opposed the plaintiff/ applicant's application for injunction and cited the

provisions of order 40 (1) of the Civil Procedure Rules. Counsel also cited the principles for grant of injunction where a party must establish a prima facie case and that if the order is not granted such party will suffer irreparable harm and finally that if the court is in doubt then it would rule on a balance of convenience.

On the issue of establishment of a prima facie case Counsel submitted that under paragraph.B of the grounds upon which this application is based, the applicant alleged that she in occupation of the suit land by consent of both the current and previous registered owner which is not disputed by the respondents. That the applicant however has failed to disclose to the court that 2nd Respondent has written a demand letter to the Applicant requiring her to vacate the suit land which is attached to the affidavit.

Counsel therefore submitted that the applicant has not established a prima facie case with a probability of success. Further that the applicant has not proved that she will suffer any irreparable harm not capable of being compensated by damages and therefore the balance of convenience lies in favour of the respondent

Analysis and Determination

I have considered the application and the issue is whether being in possession is prima facie evidence of a case with likelihood of success. Each case of possession must be looked at on its own merits. It is not a blanket principle that if a person is in occupation, then the court should find that a prima facie case has been established. The court cannot be used to deodorize illegal or unprocedural occupation of a person's land. In certain cases being in possession alone would be deemed as establishing a prima facie case. But as I have stated above each case must be determined on its unique circumstances.

The circumstances of this case are that the applicant would like the court to sanitize her occupation and grant an injunction. The conduct of the applicant from the correspondence are telling and are an afterthought. I find that the applicant has not established a prima facie case with a probability of success.

The issue as to whether she has the consent of the 1st respondent or not is a matter that will be determined during the trial. This court observes that the existence of a prima facie case in favor of the respondents and therefore it would not be necessary to grant temporary injunction. *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 is 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 or she has a *Prima Facie* case in his or her favor.

I find that the plaintiff would not suffer any injury if the order of injunction is not granted and therefore dismiss the application with costs to the respondents. The best the plaintiff can do is to fast track the hearing of this case.

DATED and DELIVERED at ELDORET this 18TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Mitei holding brief for Miss.Kenei for Plaintiff and in the absence of Mr.Wambomba for Defendant.

Ms. Towett - Court Assistant