



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 152 OF 2016

KENNEDY KHISA KUNDU.....DEFENDANT

VERSUS

JOHN KUNDU KHISA.....PLAINTIFF

R U L I N G

1. The application dated **19/10/2015** seeks an order of injunction to restrain the defendant from executing the decree in **Kitale High Court Civil Suit No. 43 of 2007** - on a portion of **Chepkorok Farm** identified only as **Land Parcel Number 53D**, pending the hearing and determination of this suit.
2. The grounds on which the application is brought are that **Plot Number 53D** has never been part of the dispute between the parties yet the defendant wants to take it away from the plaintiff without any justification; that the plot is bigger than **Plot Number 50**; that the defendant was awarded **Plot Number 50** yet the decree does not warrant that action of deprivation; that that action is contrary to **Article 40 of the Constitution**; and that there is no evidence that both parcels occupy the same place. The plaintiff avers that the taking away of **Plot No. 50** would ensure in the eviction of the plaintiff.
3. The defendant's defence to this application is contained in his sworn affidavit dated 7/12/2016. He states that he bought two parcels of land from two different persons which were later consolidated and referred to as **No. 53D** by the Department of Surveys in the year 2010. Part of this consolidated land measuring **39 x 85 feet** had been, prior to the consolidation, the subject matter of **High Court Civil Suit No. 43 of 2007** between the plaintiff and the defendant herein. He therefore avers that the subject matter of this suit and of **HCCC No. 43 of 2007** remains the same albeit with a different reference number which was obtained recently. He attributes the consolidation and the issuance of a new reference number by the Kitale District Surveyor to misinformation by an unnamed source. However, it is very clear that the plaintiff herein is the sole beneficiary of the alleged consolidation, if it occurred.
4. In a further supporting affidavit sworn by the plaintiff on 25/9/2017, it is curious that the plaintiff insists that the decree and the eviction order in **HCCC No. 43 of 2007** referred to parcel No. 50 "*and no more*", and without any one pursuing him in that specific regard, flees from the fact of any involvement "*with the Department of Survey in the year 2010 or at all*". He then cites the contents of an affidavit filed by defendant in the year 2010 which averred that the defendant had no dispute with the plaintiff over any plot named "*53D*". He reiterates that parcel No. 53D and parcel No. 50 do not refer to one and the same plot.
5. The issues that arise in respect of the current application are as follows:-

(1) Has the plaintiff demonstrated that he has a prima facie case with probability of success?

(2) Would the plaintiff suffer any irreparable injury if the orders sought were declined?

(1) Whether there is a prima facie case.

6. The plaintiff has concentrated all his effort in showing the **Plot No. 53D** is not the same as **Plot No. 50**. However, he has not brought any evidence by way of maps or appropriate documentation that can help the court to establish this fact with simplicity for the purposes of the instant application. He avers that he bought **Plot No. 53D** from one **Gabriel Wanyama Wachosi**. This is a fact conveyed to the court by mere implication and by the exhibition of an alleged sale agreement dated 19/1/2010; The statement in paragraph 7 of the supporting affidavit dated 19/10/2016 does not expressly state that he bought the land. The court is left to inference of the sale only. This is unusual for a litigant who is urging the merits of a claim that **Plot No. 53D** is different from **Plot No. 50**. He also exhibits a copy of a Clearance Certificate for plot **No. 53D** purportedly issued by **Chepkorok Farm** on **27/10/2010**.

7. Notably these documents all bear dates subsequent to the dates on which the decree and eviction order in **HCCC No. 43 of 2007** were given. The decree and eviction order refer to **Plot No. 50** as the subject matter of that suit; from which the plaintiff herein was to remove himself or be evicted.

8. The plaintiff has averred in his supporting affidavit that the defendant has no Deed Plan or Area Survey Map that the defendant is entitled to **Plot No. 53D**, that the defendant has not shown any mutation at all to show that **Plot No. 53D** and **50** are superimposed, or any document to show the particular portion where **Plot No. 53D** is.

9. The plaintiff, strangely still, has by way of the above shifted the burden of proof upon the defendant, contrary to what would be expected of a litigant who has preceded the other to court and who is seeking the safety of its injunctive orders.

10. The plaintiff has on the other hand given a very clear narrative or rather what appears to be one, showing how **Plot No. 50** ended up being assigned **Reference No. "53D"**.

11. As I have said before in this ruling the plaintiff's response was to deny any involvement with the Department of Surveys while in fact no one had accused him of that. I find the plaintiff's averments in his affidavits quite evasive and focusing on matters which are quite peripheral to the main issue while not providing any credible evidence to support his claim.

12. In an application of this nature, more often than not it is the pleadings and evidence provided by a person in the plaintiff's position which are on trial at the interlocutory stage, to verify whether upon that serious scrutiny the plaintiff's documents present a *prima facie* case.

13. It is unusual that the plaintiff would commence his case and application by attempting to show the court how the defendant, who incidentally has not even by that time filed any response, or became aware of the suit, has failed to demonstrate that he has a good defence. That is putting the court before the horse. The examination of the defendant's defence must always be conducted after they are filed in response to the plaintiff's case. In order not to prejudice the main trial it is necessary to avoid further comment at this point. It suffices to state that the plaintiff has not shown that he has a *prima facie* case with probability of success.

(2) Has the plaintiff demonstrated that he would suffer irreparable injury that may not be compensated by way of damages?

14. In my view, the presence of a decree and an eviction order against the plaintiff goes a long way to show that a dispute between the plaintiff and the defendant concerning some land had been resolved by a competent court at the time they were made. In the absence of the plaintiff's clear delineation of the boundaries of **Plot No. 50** and **Plot No. 53D**, the defendant's averments which are crystal clear, are very

strong compared to the plaintiff's obfuscation statements in his supporting affidavits.

15. The bottom line remains this; the plaintiff must remove himself, or be evicted in default, from *some* premises which he was occupying *at the time* the decree and the eviction orders were made. He does not acknowledge in this suit the location, the size, or the documentation of the premises that were the subject matter of **HCCC No. 43 of 2007** which case he does not deny exists. He does not deny the existence of a decree or the eviction order in that suit. If he had drawn a clear distinction by way of clear evidence in his supporting affidavits, and this court perchance, found that he was on different premises from those that were the subject of **HCCC No. 43 of 2007**, or that the two plots had no relation at all, this court may have considered the probability of irreparable damage. In the current situation the mere allegation as to difference in size and number of the **Plot No. 50** and **53D** does not aid the plaintiff at all.

16. In summary I find that the plaintiff has not established that he has a *prima facie* case with probability of success or that he has demonstrated that he would suffer any irreparable injury.

17. I must not stop there. The third option provided in the case of **Giella -vs- Cassman Brown 1973 EA 358** is that the court must, if in doubt, rule on the balance of convenience. However, the invocation of that last option of balance of convenience is not a bounty from which all kinds of litigants must drink as of right. The court has discretion to determine, from the nature of their pleadings, which litigant deserves orders primarily on a balance of convenience even after failing the other two tests set out in the case of **Giella -vs- Cassman Brown**. Where a litigant may have splendidly set out the facts of his case with maximum candour and yet failed to satisfy the two tests then it is meet for the court to exercise its discretion based on the balance of convenience if only merely to preserve the subject matter of the suit. However, where a litigant approaches the court with an economy of facts which the court perceives, from the general circumstances of the case to be meant to deliberately conceal the clear picture which, if otherwise illumined by that litigant's own honest pleading, may disentitle him from the court's favourable exercise of discretion, the court is upon taking note of that situation not obliged to rule in his favour on a balance of convenience.

18. This court has already expressed its serious doubts as to the extent of candour evinced by the plaintiff's affidavit and in its view, he is not therefore entitled to any orders based on the balance of convenience. For the above reasons, this court finds that the plaintiff's application dated **19/10/2015** is unmerited, and the application is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this **13th** day of **November, 2017**.

MWANGI NJOROGE

JUDGE

13/11/2017

Coram:

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Oketch holding brief for Mokua for Appliant

COURT

Ruling read in open court in the presence of counsel for the plaintiff.

MWANGI NJOROGE

JUDGE

13/11/2017