



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDROET

ELC NO. 247 OF 2017 (Formerly Nakuru ELC 105 OF 2016)

HARON KIPRUTO KIPLAGAT.....PLAINTIFF

VERSUS

DALTON BETT LAGAT.....1ST DEFENDANT

LUKA KIPKOSGEI KIPLAGAT.....2ND DEFENDANT

HEZRON KIPROTICH LAGAT.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 4th April 2016 brought by way of notice of motion by the plaintiff seeking for orders of injunction. The court had earlier issued interim orders on 4th April 2016.

The matter was initially filed at the High Court in Nakuru but was later transferred to this court for hearing and determination on 29th June 2017. This must have caused the delay in hearing of the application *inter partes*

Counsel agreed to canvass the application by way of written submissions which were filed.

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel for the plaintiff gave a brief background to the case and stated that the Plaintiff is the registered owner of the parcel of land known as Baringo/Ravine102/5, a freehold title measuring approximately 8.3 Hectares situated in Molo within Nakuru County, which he acquired sometimes in 1980.

Counsel relied on the grounds on the face of the application and the supporting affidavit together with the further affidavit filed herein. Counsel stated that sometimes in March 2016, the Defendants who are the Plaintiff's biological sons commenced various acts of waste including clearing the ground, digging the same, uprooting fodder in preparation to plant food crops thereon, which the Plaintiff avers is inconsistent with the use of the land which he uses to rear grade cattle for commercial purposes.

Counsel further submitted that the plaintiff annexed a copy of a title deed for the land to prove ownership and also annexed exhibits on how the applicant acquired the suit land. It was further Counsel's submission that the applicant is entitled to quiet possession of the suit land.

Counsel submitted that the defendants have admitted in the replying affidavit that the applicant is the registered owner of the suit land save for the dispute on the location of the land, its acreage and the date it was acquired. Counsel urged the court to strike out the affidavit for the reason that the same is stated to be sworn on behalf of the 2nd and 3rd Respondents but the authority to do so has not been filed herein.

It was Counsel's further submission that the land is not ancestral land inherited from the defendants' grandfather as alleged by the defendants and that the defendants have never carried out any farming activities on the suit land.

Counsel stated that from the Applicant's pleadings, the Respondents have illegally commenced activities which are inconsistent with the use of the suit land and that the defendants have no right to carry out such activities. Counsel cited a section of a repealed Act. He should have cited the Registration of Land Act of 2012 which has similar provisions on indefeasibility but with a rider that the title must have been acquired legally without fraud or misrepresentation.

Counsel therefore urged the court to grant the orders as prayed as the plaintiff has met the threshold for grant of temporary injunctions to preserve the suit land pending the hearing and determination of the suit

DEFENDANTS/RESPONDENTS' WRITTEN SUBMISSION

The defendants' counsel opposed the application and stated that the applicant has not established a prima facie case against the defendants. Counsel submitted that the defendants are biological sons of the plaintiff who are litigating over a portion of the suit land which they claim they have lived in since their childhood.

It was Counsel's submission that the defendants have been cultivating the suit land and that an injunction or a restraining order cannot stop what has already occurred as the substratum of the suit land does not favour the grant of such orders.

Counsel further submitted that the defendants do not have alternative land and as such the orders sought will occasion an injustice and expose the defendants and their families to untold suffering. Counsel cited the case of Macedonia Resort Club Ltd v Silvans Awili [2016]eKLR where Kibunji J stated that the 'prayer of injunction cannot be issued against the Respondent as he lives on the land with his family since 1946 and cannot be stopped from using that land without viva voce evidence being taken and decision on merit made'.

Counsel also cited the case of f Membley Park Residents Association v The Presbyterian Foundation [2017] eKLR L. Gacheru J stated that;

The Court has considered the facts and circumstances of this case and finds the purpose of injunction is to injunct or prevent an intended action. Injunctions are not issued when an event has already occurred. The Defendant has alleged that the Plaintiffs application is activated by "malice" see the case of Mavoloni Company Ltd Vs Standard Chartered Estate Management Ltd,Civil Application No 266 of 1997

"An injunction cannot be granted once the event intended to be injuncted has been overtaken by events. The applicant must come to court with clean hands." that the Plaintiff/Applicant has failed to establish the threshold for grant of both temporary and mandatory injunction as prayed in the Notice of Motion dated 2nd February 2017.

For the above reasons the Court finds the instant Notice of Motion is not merited. The same is dismissed entirely with costs to the Defendant/Respondent.

Counsel cited the provisions under Registration of Land Act of 2012 and submitted that the provision protects the rights of trust as well as other overriding interest as the land was held in trust for the defendants. It was Counsel's submission that the plaintiff has not met the threshold for grant of injunctions.

Analysis and determination

This is an application for temporary injunction. The principles for grant of temporary injunctions are clear and well settled. The issue for determination is whether the plaintiff herein has established a prima facie case against the defendants, whether the plaintiff will suffer irreparable loss not capable of being compensated by an award of damages and if the court is in doubt then it should decide on a balance of convenience.

This is a case of a father against his sons, but that should not make the rules change due to the biological relationship. The circumstances of each case must be looked at on merit and not on the basis of relationships of the parties. Both parties had alluded to the issue of biological relationship of the parties. That is a more reason why they should have tried alternative dispute resolution instead of dragging each other to court.

I have considered the application, the supporting documentation together with the rival submission of counsel. It is not in dispute that the plaintiff is the registered owner of the suit land. It is also not in dispute that the defendants are the sons of the plaintiff. The plaintiff has further produced documentation showing the process of how he acquired the suit land through allotment by the settlement Fund Trustee.

The defendants claimed that the land is ancestral land which belonged to their grandfather and that the plaintiff held the land in trust for them. The defendants have not produced any evidence to support their claim that the land belonged to their grandfather and that they have been in occupation of the land since childhood.

I will not go to the details of the case as that will be dealt with during the hearing. From the material before me, I find that the plaintiff has established a prima facie case with a probability of success against the defendants. He has proved that he is the registered owner of the suit land.

The upshot is that the application dated 4th April 2016 is hereby allowed with no orders as to costs. This being a family matter I order that the parties should try mediation if they so wish to enable them sort out their differences.

Dated and delivered at Eldoret on this 14th day of February, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Omboto holding brief for Mr. Arusei for the Defendants and in the absence of the Plaintiff/Applicant.

Mr. Koech: Court Assistant.