



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 106 OF 2016

WILLIAM ARUSEI.....PLAINTIFF/APPLICANT

VERSUS

SHEM LAGAT.....DEFENDANT/RESPONDENT

RULING

APPLICANT'S CASE

The application before court is dated 16.6.2016 wherein the applicant seeks a temporary injunction against the defendant restraining him by himself or through his servants or agent from trespassing onto, encroaching into, erecting structures or carrying on any other development on plot No. 52 of Lessos Trading Center, the suit plot of land pending hearing and determination of the suit.

The application is based on grounds that at all times material to this matter, the Plaintiff is the lawful owner of the suit plot land being plot No. 52 of Lessos Trading Centre having bought the said plot way back in 1975 and took occupation thereof in 1976, and he has a physical plan developed in 2006 evidencing his lawful proprietorship thereof.

The Defendant herein has since encroached onto, trespassed into; and established structures on part of the said plot of land belonging to the Plaintiff without color of right. Even with the pendency of the suit the Respondent has begun erecting further permanent structures on the suit land subsequent to the service of summons upon him. The said actions of the Defendant are unwarranted wrongful, illegal and unlawful and therefore ought to be stopped and the Defendant restrained forthwith. The Plaintiff stands to suffer irreparable loss and damage owing to the Defendant actions which are greatly detrimental to his interests and proprietary rights.

In the supporting affidavit, the Plaintiff states that he is the lawful owner of the suit plot being plot No. 52 of Lessos Trading Centre measuring approximately fifty by hundred (50x100) feet having acquired it legally way back in 1975 and having taken occupation thereof in 197. He has a physical plan developed in 2006 evidencing his proprietorship over the suit land plot.

The Defendant has encroached onto and trespassed into the land where he has erected certain structures on part of the said plot without his consent and or approval and without any colour of right.

The said actions of the Defendant are unwarranted and wrongful as well as illegal and unlawful since they are intended to deprive him, the lawful owner thereof, of peaceful enjoyment of his property. That he stands to suffer great irreparable loss and damage unless the Defendants actions are stopped forthwith.

The Defendant illegal actions which are greatly detrimental to his proprietary rights and interest over the

suit plot of land and only the orders of this court as prayed herein can guarantee justice and fairness.

RESPONDENT'S CASE

Shem Lagat filed a replying affidavit stating that he does not oppose that the Plaintiff's parcel of land is No. 52, however he is opposed to the allegations that the same measuring 50x100. The said parcels of land were subdivided by the original owner one Mr. Kimengich Arap Katam into 40 x 100 feet for three plots and the last one NO. 54 measures (50 x 100) as the parcel of land that was remaining was too small and therefore given (50 x100) feet. His parcel of land is plot No. 51 measuring (40 x 100) feet of Lessos Trading Centre. The said parcel of land I bought from Mr. Kimegich Arap Katam way back in 1976.

He later constructed semi-permanent houses which he rented out as shops way back in the late 1977.

They have lived with the plaintiff/applicant as neighbors peacefully until when he started building, when he claimed that his parcel of land was measuring (50 x 100) and that he had encroached into his parcel of land. The said parcels of lands were sold as straight strips and therefore there was no way that he would have encroached into plot NO. 51 only on the side of the road.

He brought this issue to the attention of the area chief who referred me to the Lessos Centre Committee members who then called a meeting but the plaintiff/applicant never attended. From the meeting, it was clear that the parcel of land plot N051 was genuinely his and he had not encroached to plot No. 52. If he had encroached into the applicant's property then he should have raised the issue in the year 1978 to 1979 when he constructed a semi-permanent structure on my property of land.

Further, he would have raised the issue three years ago when he constructed a permanent building on his plot. He states further that this application has been brought by malice as the plaintiff has poorly planned his plot as he left his portion un used on the side of plot No.53.

The plaintiff/applicant never proceeded to get relevant approval while building as it has been seen/ discovered that the plaintiff did leave a sizeable amount of land from the plot No. 53 thus indicating that his parcel of land had been encroached by myself and that since the year 1976 1 have had a quiet possession of the parcel of land and therefore he has not encroached the applicants plot. That he sought approval from the relevant authorities before starting construction.

He also sought for approval from the ministry of Public Health who even went forward to measure his parcel of land. Upon application for approval the county Government indicated that 20 feet will be deducted from their plots for the purpose of putting up a road and therefore our plots have been reduced to (40 x 80) feet.

It cannot be possible that he has encroached the plaintiff/ applicant property yet he built on his property in the year 1978. The plaintiff has never raised any issues and he even connected electricity to his plot by using the boundary beacons to connect electricity poles.

The plaintiff has on several occasions been requested to meet with the county officials for purpose of resolving this issue but he has always refused. Survey map relied by the plaintiff was rejected by residents of Lessos when it showed that the smallest parcel of land in Lessos area measures (50 x 100) feet yet there were plots measuring less than that Thus the same is not relevant.

ANALYSIS AND DETERMINATION

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 defendant has demonstrated that he has been utilizing the land from time immemorial and therefore there is need to determine the boundary of the two plots.

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. I do find the plaintiff has not demonstrated any irreparable injury likely to be suffered.

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.

I have considered the application and replying affidavit and do find that the defendant is in occupation of the disputed area and therefore the Plaintiff's application ought to be determined on a balance of probability as the case revolves on is basically a boundary dispute between plot No. 51 and plot No. 52 and partly plot No. 53. The balance of probabilities tilts towards Maintaining status quo which is that no further developments to be undertaken on, and that no person to be evicted from, the suit property until hearing and determination of the suit. Costs in the cause. Orders accordingly.

Dated and delivered at Eldoret this 9th day of February, 2018.

A.OMBWAYO

JUDGE