REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 105 OF 2017

REV. BENJAMIN KIPWAMBOK SAMOEI (Suing for and

on behalf of AIC Kenya Registered Trustees)**.....PLAINTIFF**

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

COUNTY GOVERNMENT OF NANDI.....2ND DEFENDANT

COUNTY SECRETARY NANDI COUNTY.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 7th March 2017 brought by way of notice of motion by the plaintiff/Applicant for orders:

1. Spent

2. That this Honourable court be pleased to grant orders of temporary injunction against the 3rd and 4th defendants jointly and severally to restrain them, their agents, servants, employees from trespassing, ploughing, planting, encroaching, plucking of tea bushes, leasing and/or doing anything that is prejudicial to the rights of the plaintiff in respect of the suit land Kapsabet/Municipality/363 pending the hearing of the application herein.

3. That this Honourable court be pleased to grant orders of temporary injunction against the 3rd and 4th defendants jointly and severally to restrain them, their agents, servants, employees from trespassing, ploughing, planting, encroaching, plucking of tea bushes, leasing and/or doing anything that is prejudicial to the rights of the plaintiff in respect of the suit land Kapsabet/Municipality/363 pending the hearing and determination of the main suit.

4. That costs of this application be provided for.

The plaintiff/applicant filed this application under certificate of urgency when the court ordered that the application be served within 3 days due to the nature of the urgency.

When the matter came up for hearing on 20th March 2017, Counsel for the plaintiff urged the court to grant interim orders as the defendants had been served but had not filed any response.

Miss Lungu for the 1st and 2nd defendant informed the court that they will not be participating in the application but will do so in the hearing of the main suit. The court therefore excused the participation of the 1st and 2nd defendant as the application did not affect them in any way.

Both Counsel for the plaintiff and the 3rd and 4th defendants tried a discussion in a view to come up with an interim agreement but they were not able to crack it. The Plaintiff's Counsel was of the view that the defendants can be allowed to pluck the tea since they have a contract with Kaimosi Tea factory and the money be deposited in a joint interest earning account but this proposal was rejected by Counsel for the defendant/respondents. Counsel rejected this proposal on the grounds that opening a different account was unconstitutional as all revenue for the County government must be deposited into the county revenue account hence they would be engaging in an illegality.

Counsel therefore agreed to file written submissions and highlight the main points in the application. Counsel for the plaintiff relied on the grounds on the face of the application and the supporting affidavit together with a supplementary affidavit for the applicant.

Mr. Mitei gave brief facts of the plaintiff's case. He stated that the plaintiff's case is over parcel of land known as KAPSABET/MUINICIPALITY/363 measuring approximately 5.071 Ha which is about 12.68 acres situated near Kapsabet Law Courts in Kapsabet Town. It was his submission that within the suit land is AIC Church, Boma and a Church private school. Counsel further submitted that the 3rd defendant has illegally been in possession of a portion of the suit land where they have planted tea bushes. That the plaintiff has demanded that the 3rd defendant stop plucking the tea to no avail.

Counsel submitted that the plaintiff in the year 1991 made an application to be allocated the entire suit land which was done on 22nd July 1992 and was granted a certificate of lease on 9th September 1998.

Mr. Mitei stated that the issues for determination in this case is as to whether the plaintiff has satisfied the principles for grant of injunctions as was laid down in the Giella Casman Brown case. It was further Counsel's submission that the plaintiff has established a prima facie case as he is the registered owner of the suit land and is in occupation apart from the portion which the defendant is illegally occupying and has planted tea bushes.

In response to the averments of the 3rd and 4th defendants Counsel stated that the bone of contention is that before the plaintiff got registered as proprietor of the suit land, they were in possession and ought to have been given first priority. He submitted that the averments are general in nature and that if the defendants are desirous of obtaining the suit land then they should approach the plaintiff for purchase.

Counsel therefore urged the court to allow the application as prayed.

3rd and 4th Defendants Submissions

Counsel for the 3rd and 4th defendants opposed the application and submitted that his clients have been in occupation of the suit land since 1959 and that the 3rd defendant was allocated the suit land by the colonial government for purposes of planting tea. It was further his submission that the 3rd defendant has continued to pluck tea since 1959 to date and has regularized the ownership.

Mr. Magare stated that the plaintiff has never been on the suit land except for a portion of 2 acres in which they trespassed upon the defendant's land. That the annexed certificate of lease confirms that the plaintiff leased the suit land 33 years later when the 3rd defendant had taken occupation.

Counsel also relied on the principles for grant of injunction being that the applicant must establish that he has a prima facie case with a probability of success, that he will suffer irreparable loss which cannot be adequately compenstated by an award of damages and if the court is in doubt, it should decide on a balance of convenience.

It was Counsel's submission that the plaintiff has not met the threshold for grant of injunctions and in the contrary it is the respondents who will suffer irreparable loss as the tea bushes are going to waste as they are not being plucked. He also stated that the balance of convenience tilts in favour of the defendants.

Further that the plaintiff's case is based on fraud allegedly committed in 1992 in which the plaintiff claims that they were allotted the suit land. Counsel submitted that that being so the title was fraudulently obtained and should be cancelled hence no prima facie case has been established with a probability of success.

Mr. Magare argued that the 3rd and 4th defendants have been occupation of the suit land holding it in trust for the people of Nandi County and Kenya at large. He stated that the 3rd defendant annexed various documents and a letter from the Tea Board of Kenya permitting Nandi County Council to deliver tea to the factory being the rightful owners of the land.

Counsel cited the case of **American Cynamid vs Ethicon Limited (1975) AC 396**, where Lord Diplock stated thus:

> ***"……. If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief….."***

Mr. Magare further relied on the case of **Daniel Leura Kalasinga vs James Kayioni Kaikai (2016) eKLR E & L Court Kisii Case No. 367 of 2015**.

> ***"…. The court will not grant an injunction which implementation is not practical as courts will not grant orders in vain, where a party is or has been in possession of a parcel of land the court cannot properly grant an injunction restraining entry or possession of the land as you cannot restrain that which has already occurred……"***

Counsel therefore urged the court to dismiss the application as the plaintiff will not suffer any loss if the status quo is maintained.

Analysis and determination

The issues for determination in this application are as to whether the plaintiff has established a prima facie case with a probability of success against the defendants. Whether the plaintiff will suffer irreparable damage not capable of compensation by way of damages and if the court is in doubt then it should decide on a balance of convenience. These principles for grant of injunction as was enumerated in the case of Giella Casman Brown are the cornerstone for the consideration in such applications.

Apart from the laid down principles the court is alive to the fact that the court must do substantive justice. From the documentary evidence on record I notice that the 3rd defendant has been in occupation of the suit land and has been plucking tea a fact that is admitted by the plaintiff/applicant herein.

It was also admitted by Counsel for the plaintiff when he offered a proposal that the defendant/respondent continues plucking tea with a suggestion that the proceeds be deposited in a joint interest earning account of both counsel which was rejected. In the suit papers it is also evident that the defendant is the one who planted the tea bushes which are now going to waste due to the standoff.

The purpose of interlocutory injunctions is to preserve the substratum of the case so that it does not go to waste or change the characteristics before the full hearing and determination. Courts should also not give orders in vain which cannot be enforced.

The plaintiff claims to have been allocated the suit land in 1992 and granted a certificate of lease in 1998 which was annexed to the supplementary affidavit. The 3rd defendant also claims to be in occupation since 1959. It is the plaintiff's word against the defendants' but from the annexed documentation it is evident that the defendant has been in occupation and has been plucking tea on the said suit land which they had planted. This fact is not in dispute save for the fact that the plaintiff claims that the 3rd defendant has illegally encroached on the plaintiff's land. The 3rd defendant has exhibited a contract for delivery of tea to Kaimosi factory and a letter from Kenya Tea Board. This shows prima facie that they have been in occupation and plucking tea for delivery to Kaimosi factory. The letter dates far back to 1997 before the grant of certificate of lease to the plaintiff.

The question is why the plaintiff has waited for so many years to bring the current complaint against the defendants. When they were allotted the land in 1992 why did they not assert their rights to injunct or evict the defendants from the suit land. I will not dwell of the issue above as this will be handled during the full hearing of the case.

From the evidence on record and the submission of Counsel for the plaintiff it is not clear whether the plaintiff actually seeks for an order of injunction or wants a basis for negotiation with the defendants so as to enter into purchase agreement. This is apparent on the last paragraph of 3.0 of the plaintiff's Counsel's submission which states that **"if the defendants are desirous of obtaining this land they should approach the plaintiff for purchase rather than wasting judicial precious time."**

Even though the plaintiff has exhibited copies of certificate of lease of the suit land, the 3rd and 4th defendants have disputed the process of the acquisition of the certificate of lease in their defence and counterclaim. This is not an open and shut case where the production of ownership documents would be prima facie evidence with a probability of success. The issue of occupation is also important. If a party has proved that he or she is in occupation then it would not be in order to issue an injunction which essentially amounts to an eviction. The court cannot also issue an order that is not capable of being enforced as that will make the court a laughing stock. The issue of occupation is admitted by both parties.

Having said that, I safely find that the plaintiff has not established a prima facie case with a probability of success against the defendants. I would not ordinarily deal with the 2nd limb of the principles when I have found that there is no prima facie case but, in this case, it is the opposite as it is the 3rd defendant who will suffer irreparable loss if the injunction is granted. The defendants' tea has been going to waste as the same was not being plucked due to the interim orders issued in this case.

I am in no doubt that the plaintiff's application has no merit and therefore fails. I order that the status quo before this matter was brought to court be maintained pending the hearing and determination of this case.

The upshot is that the application dated 7th March 2017 is hereby dismissed with no orders as to costs. It would be in the interest of the parties to comply with order 11 and fast track this case for hearing.

Dated and delivered at Eldoret this 19th day of March, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Mutei for Plaintiff/Applicant and Miss Biwott for 3rd and 4th defendants and in the absence of 1st & 2nd defendants.

Mr. Koech: Court Assistant.