



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 281 OF 2017

BENJAMIN CHELIMO.....PLAINTIFF

VERSUS

PHILIP CHEMWENO.....RESPONDENT

RULING

This is the ruling in respect of an application dated 31st July 2017 brought by way of notice of motion by the plaintiff/applicant herein for orders:

a. Spent

b. That an ex parte order of temporary injunction do issue restraining the defendant/respondent by himself, his servants or agents from further encroaching onto, erecting a structure or in any other way interfering with the plaintiff/applicant's right to land parcel Plot No. 37 located within Chebara Trading Center in Elgeyo Marakwet County pending the hearing and determination of this application inter partes.

c. That an ex parte order of temporary injunction do issue restraining the defendant/respondent by himself, his servants or agents from further encroaching onto, erecting a structure or in any other way interfering with the plaintiff/applicant's right to land parcel Plot No. 37 located within Chebara Trading Center in Elgeyo Marakwet County pending the hearing and determination of this suit.

d. Costs be provided for.

This matter was brought under certificate of urgency when the same was certified as urgent and the court granted interim orders of injunction and ordered the applicant to serve the application for inter partes hearing.

Counsel later agreed to canvass the application by way of written submissions within 14 days. Plaintiff's Counsel relied on the grounds on the face of the application together with the supporting affidavit of the applicant. It was Counsel's submission that the plaintiff purchased that parcel of land earlier known as PROVISIONAL PLOT NO. 94 but later renamed Plot No. 37 LOCATED WITHIN CHEBARA TRADING CENTRE IN ELGEYO MARAKWET COUNTY. He further submitted that the defendant has unlawfully infringed on the Applicant's right to the suit land by unlawfully constructing permanent structures thereby blocking the front view of the applicant's shops.

Counsel further submitted that the plaintiff /applicant has established a prima facie case against the defendant as he is the bona fide owner of PROVISIONAL PLOT NO. 37 which is not claimed by the Respondent and that the proceedings before the County Council confirmed that the Respondent's family land is situate on the other side of the road. Counsel therefore prayed for temporary injunctive orders against the defendant.

THE DEFENDANT'S WRITTEN SUBMISSION

Counsel for the defendant filed his submissions and relied on the supporting affidavit of the respondent. It was his submission that the plaintiffs Chebara Trading Centre plot No. 37 and/or Chebara market plot No. 94 as per the purchase agreement dated 26-6-1997 is different from and have no link with the parcel of land No. Moiben/ Chebara/130 which belongs to the estate the late grandfather of the defendant.

Counsel further submitted that the parcel of land No. Moiben/ Chebara/130 borders parcels of land No. Moiben/Chebara/131,124,145,127,144 and the Kapsowar -Iten-Eldoret road and shares no common boundary with either the plaintiffs Chebara trading centre plot No. 37 and/or Chebara market plot No. 94.

Counsel for the defendant also submitted that the defendant has been in occupation, possession and doing developments in the registered land title No. MOIBEN/CHEBARA/130 approximate area 2.6 hectares in the name of the defendant's grandfather YANO KANDA (deceased) who was the registered proprietor since 27-7-1972 to date.

Counsel finally submitted that the plaintiff has no proprietary rights on the suit land and has not established a prima facie case against the defendant. He prayed that the application be

dismissed with costs as the parcel No. Moiben/Chebara/130 is registered in the name of a deceased person and the defendant/respondent has no capacity to be sued in respect of such land and the alleged Chebara trading centre/market plot No. 37 or 94 the subject matter of this suit.

Analysis and determination

The application before me is for grant of temporary injunction which principles to be considered are well settled. The plaintiff must establish a prima facie case with a probability of success, that he will suffer loss not capable of being compensated by way of damages and if the court is in doubt then it should decide on a balance of convenience.

The plaintiff has stated that he bought the suit land and has produced a sale agreement to establish the same. The plaintiff has further annexed recommendations from the Elgeyo Marakwet County government stating that the plaintiff is the rightful owner of the suit plot and if the defendant has any claim then he should pursue it with the Ministry of Roads.

Further the defendant claimed that the suit land is different from the one he is claiming. If it is different then an order of injunction will not affect him in any way. The defendant is blowing hot and cold in his averments, on one hand he is stating that he has not encroached on the suit land and on the other he states the land belongs to the estate of their late grandfather. This inconsistency casts doubt on the averments by the defendant.

The plaintiff has also been paying rates to the County government of which he annexed receipts to prove the same. The defendant has not shown any tangible evidence to dispute that plaintiff has a prima facie case to warrant the grant of the orders sought.

I have considered the pleadings, the supporting documentation together with Counsel's submission and find that the plaintiff/applicant has established a prima facie case against the defendant with a probability of success. I will not delve into the other limbs having been satisfied on the 1st limb.

The upshot is that the plaintiff's application dated 31st July 2017 is hereby allowed as prayed.

The parties to comply with Order 11 within 30 days and fix the main suit for hearing.

Dated and delivered at Eldoret this 13th day of March, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Omusundi holding brief for Mr. Nyikwei for Plaintiff and Mr. Mathai holding brief for Mr. Cheptarus for defendant.

Mr. Koech: Court Assistant.