



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 74 OF 2016

MICAH TENAL.....1ST PLAINTIFF

DAVID KIMAIYO KOGO.....2ND PLAINTIFF

VERSUS

STELLAH JEPLETING.....1ST DEFENDANT

NATHAN KIPRUTO.....2ND DEFENDANT

RULING

The plaintiffs pray for an order of temporary injunction against the respondents restraining them, their agents and/or servants from further encroaching, constructing, trespassing, alienating or dealing in any manner with the 2nd plaintiff's property and interfering with the enjoyment of rights over that parcel of land known as **Soy/Kipsangui Block 5 (Kipsangui)/53**, pending the hearing and determination of the suit.

The application is based on grounds that the 2nd applicant is the beneficial owner of the suit land having purchased the same in 2013 from the 1st plaintiff who in turn had purchased it from the 2nd respondent and that the 2nd applicant is the legitimate owner of the suit land and has been in occupation of the same since 2013 and is entitled to protection by law.

The 1st respondent in collusion with 2nd respondent, without any colour of right whatsoever, has violently and forcefully invaded, trespassed and encroached into the said property and commenced wanton construction and harrowing of the suit land despite the applicant being in occupation.

The 2nd applicant stands to suffer irreparable and substantial loss that cannot be compensated adequately by damages since the defendants' actions have deprived the applicants the right to utilize his parcels of land. The defendants have no rights whatsoever on the 2nd applicants' parcel of land and are out to intimidate, harass and violate his lawful entitlements.

The application is supported by the affidavits of Micah Tenai Kogo, who state that he purchased the parcel of land from the 2nd respondent and assumed possession but later sold it to the 2nd plaintiff who also assumed possession and began utilizing it for agricultural purposes and that the 1st respondent has encroached on the land and is now utilizing it agriculturally and is also constructing on the same, and David Kimaiyo who states that he purchased the suitland from the 1st plaintiff in 2013 and assumed ownership and has utilized the land up to February 2016. However, the 1st defendant has invaded the land violently without any color of right and has caused wanton destruction of property.

The 2nd respondent on his part states that he is the registered owner of all that parcel of land known as Soy/Kipsangui Block 5(Kipsangui)/53. The 1st defendant is his sister and he has allowed her of his own free will to live on and utilize a portion of the said parcel of land which is agricultural land. That in 2012, he entered into agreements with the 1st plaintiff over a portion measuring 0.5 of an acre from his land above, which sale was expressed to be subject to the consent of the Land Control Board being granted and obtained.

That however later, he entered into another agreement with the 1st plaintiff on 26.02.2015 in which the earlier agreements were reviewed and cancelled. That the 1st plaintiff agreed to move to another parcel of land measuring 0.5 acres and he would take over his land and pay ploughing expenses for the year, 2015. The 2nd plaintiff who had allegedly bought the land from the 1st plaintiff was also present and witnessed the agreement. He immediately purchased another parcel of land measuring 0.5 acres for the 1st plaintiff and showed him as had agreed. That as such, he reclaimed back his land and took possession with the agreement of the 1st plaintiff.

That he is also advised by his advocates and he also knows of his own knowledge that their 2012 agreements with the plaintiff were subject to the consent of the Land Control Board being had and obtained, and none having been granted, the agreements became void for all purposes. That the 1st plaintiff has no claim against him or his co-defendant and likewise, the 2nd plaintiff has no claim against him or his sister, the 1st defendant as there is no contract between them.

I have considered the submissions of both counsels and do find that the 2nd defendant/respondent is the registered owner of the suit property. Section 24 (a) of Land Registration (Act No.3 of 2012) provides that:

“The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

The registration of the 2nd defendant/respondent as proprietor of the suit land, gives him absolute proprietorship for the parcel. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject;

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

The 2nd defendant/ respondent has produced the titles deeds and extracts of the register as evidence of ownership and in terms of Section 26 (1) of the Act thus: -

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer, or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The 1st plaintiff to the contrary has an agreement of sale which is inferior to a title deed. The plaintiffs have alleged fraud and particularized the same. I do find that the defendants have superior documents of ownership, however, parties should be heard fully with their witnesses to ascertain the issues as to who is the legal owner of the property and whether the 1st respondent obtained title legally.

Since the court is in doubt, this matter should be decided on balance of convenience which tilts towards maintaining the status quo as the 1st respondent is in possession and is the registered proprietor. However, the 1st respondent is restrained from carrying out any act of construction or wanton wastage of the property. Orders accordingly.

Dated and delivered at Eldoret this 11th day of May, 2018.

A. OMBWAYO

JUDGE