



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CIVIL SUIT NO. 391 OF 2017.

WHITNEY MONGARE OMBUI (Suing as Legal Administrator and Representative of the estate of:

FLORA MIDEVERRI – DECEASED.....PLAINTIFF

VERSUS

PHILEMON KEINO.....DEFENDANT

RULING

This ruling is in respect of an application dated 11th December 2017 brought by way of Notice of Motion by the plaintiff /applicant for orders:

1. Spent

2. That an interim conservatory order do issue ex- parte restricting the defendant/respondent or his agents from entering, trespassing or encroaching onto and making any developments on or in any way intermeddling with all that parcel of land measuring 0.25131 Ha excised from L.R NO.8500 LANGAS FARM pending hearing and determination of this application inter partes.

3. That an interim conservatory order do issue ex- parte restricting the defendant/respondent or his agents from entering, trespassing or encroaching onto and making any developments on or in any way intermeddling with all that parcel of land measuring 0.25131 Ha excised from L.R NO.8500 LANGAS FARM pending hearing and determination of the main suit herein

4. Costs of the application be provided for.

The court granted interim orders and thereafter Counsel agreed to canvass the application by way of written submissions. Plaintiff/applicant's Counsel relied on the supporting affidavit of the applicant and the grounds on the face of the application. It was the applicant's evidence that he is the legal representative of the estate of the late FLORA MIDEVERRI who died on 6th October, 2013 and that the deceased person was the Applicant's wife with whom he had four children.

The applicant further averred that the deceased was the owner of the suit parcel of land having acquired the same through purchase from one MUHIKA NJOROGE on 19th February, 1988. He stated that the Respondent has encroached and/or trespassed on the suit parcel of land and is now laying claim of ownership of the same despite the same belonging to the applicant's deceased wife. It was further his evidence that he made a report at Langas Police Station vide 0B NO.50/27/11/2017 concerning threats he was receiving from the Defendant and/or his agents vide mobile phone NO.0726***** in respect to the suit parcel of land.

It was the applicant's evidence that he has been residing on the suit plot since 1988 and that the allegation that the defendant gained entry vide a court order is false. The applicant attached a death certificate, Limited grant of letters of administration Ad-Litem, letter from the area chief and a Land sale agreement showing that the deceased bought the suit parcel of land from Muhika Njoroge in 1988. Counsel submitted that it is clear that there is a dispute as to the ownership of the suit land which can only be determined by hearing the substantive suit with the preservation of the suit land.

He urged the court to grant the orders as prayed as the applicant has met the threshold for grant of temporary injunctions.

In response to the application Counsel for the respondent opposed the application and relied on the replying affidavit sworn by Philemon Keino the respondent herein .Counsel submitted that both the plaintiff and the defendant claim the suit land through purchase contracts and that the purpose of interim orders is to preserve the property pending the hearing and determination of the suit.

Counsel further submitted that one of the cardinal principles of equity is that "he who comes to equity must come with clean hands." He stated that by the applicant's plaint and supporting affidavit the plaintiff wants the court to believe that he resides and derives his subsistence from the suit land and that the reality however is different as the defendant has shown by photographic evidence, that the land is bear and is only used for cultivation.

Counsel submitted that the application does not meet the threshold for grant of temporary injunctions and therefore should be dismissed with costs. He stated that the purpose of limited grant is limited to collecting and preserving an estate and that there is no confirmed grant which bequeaths the plaintiff the suit property, the temporary grant was obtained solely to institute this suit. Further that the agreement that was used to purchase the suit land has been denounced by the sellers as a forgery. It's also not clear how the plaintiff got access to the plot which has always been cultivated by the defendant.

Counsel also submitted that the defendant should be allowed to continue farming with a caveat, that he should not sell or part with possession during the life of the suit. He urged the court to dismiss the application with costs to the defendant.

Analysis and Determination

The principles for grant of temporary injunctions are well settled as per the **Giella Casman Brown Case**. I need not reinvent the wheel. The issue for determination is as to whether the applicant has met the threshold for grant of temporary injunctions. It is incumbent upon the applicant to establish a prima facie case with a probability of success against the defendant. The applicant has stated that he brings this case as the husband of the deceased wife who was the owner of the land. He has annexed a death certificate, a limited grant a sale agreement and a letter from the chief.

The applicant has not annexed a search certificate to show the status of the suit land to ascertain who the registered owner of the land is. It is his word against the defendant's. He has further not proved that he is in occupation by way of photographs or any developments on site.

The Chief's letter does not indicate which parcel the applicant was residing in as it was just for purposes of filing this suit. It is therefore not clear whether the applicant is in occupation or not. The defendant has annexed a copy of a sale agreement just the way the applicant did but he went further and annexed photos showing some activity on the land but it is also not clear on which land. The defendant also stated that he gained entry to the suit land vide a court order which he neither disclosed the case number nor annexed the order itself.

This is a case where both parties are claiming to be in occupation and the defendant submits that an order for preservation of the suit land be made pending the hearing and determination of the suit. I therefore find that the plaintiff/applicant has not made out a prima facie case against the defendant but order in the interest of justice that the status quo be maintained pending the hearing and determination of this suit. Not transfer or sale of the suit land until the case is heard and determined.

Dated and delivered at Eldoret this 25th day of June, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Ngugi for defendant/Respondent and Mr. Okara for Plaintiff/Applicant.