



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 179 OF 2015

VINCENT KIAY KIPKONYOR.....PLAINTIFF

VERSUS

MOSES KIAY KIPYEGO.....DEFENDANT

RULING

This ruling is in respect of an application dated 25th January 2018 brought by way of notice of motion by the plaintiff/applicant seeking for the following orders:

a) Spent.

b) THAT this Honourable Court do issue an order of temporary injunction against the defendant himself, or through his agents, servants, employees or through his wife, one from constructing a water pump house and/or doing anything that is detrimental to the suit property herein Nandi/Kaptel/415 pending hearing and determination of this application inter parties.

c) THAT this Honourable Court do issue an order of temporary injunction against the defendant himself, or through his agents, servants, employees or through his wife, one from constructing a water pump house and/or doing anything that is detrimental to the suit property herein Nandi/Kaptel/415 pending hearing and determination of the main suit.

d) That this Honourable court do define the status quo as per the orders issued on the 26th day of October, 2015.

e) THAT costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions which they filed. This matter was brought under certificate of urgency and the court certified the same as urgent and granted orders 1 & 2 of the application in the interim pending inter partes hearing. It was Counsel's submission that the defendant was served with the application through his advocate but never responded to the instant application. He submitted that the issues for determination are whether the application meets the threshold for grant of injunctive orders.

Counsel cited the case of *Giella V. Cassman Brown and Co. Lt d* (1993) EA, which enunciated the principles for grant of injunctions

He submitted that the plaintiff is the absolute registered owner of the suit property Nandi/Kaptel/415 which he bought in 1974 and that he has exhibited a copy of his title deed as prima facie evidence that he is the owner of the suit land.

Mr. Mitei Counsel for the applicant further submitted that the plaintiff utilizes the said land for grazing his cattle and has planted trees on another part of the suit land. He stated that the defendant has not shown any evidence to establish the interest that he has on the suit land and that the defendant has trespassed on the suit land through his wife who intends to build a permanent water pump house.

Lastly on the issue of irreparable loss, Counsel submitted that if the injunction is not granted, then the applicant will suffer irreparable loss since the water pump house is permanent and the plaintiff's cattle will no longer have anywhere to graze due to the disturbances in the area. He stated that the balance of convenience tilts in favour of the applicant who has suffered great loss as a result of the defendant's acts. Counsel therefore urged the court to grant the orders as prayed.

The defendant's Counsel filed written submissions in response to the application but neither filed a replying affidavit nor grounds of opposition. He submitted that the plaintiff and the defendant are brothers and that the plaintiff holds the land in trust for the defendant therefore his ownership is not absolute as averred. He cited several cases in support of his position that the plaintiff has not met the threshold for grant of injunction. He therefore urged the court to dismiss the application with costs to the defendant.

Analysis and determination

It should be noted that when the plaintiff filed this case in 2015, he contemporaneously filed an application for injunction dated 22nd June 2015. The court heard the application and ordered that the status quo be maintained until the hearing and determination of the suit. The court later gave directions that the parties do comply with order 11 within 30 days on 5/11/15.

Counsel for the plaintiff later informed the court that they were negotiating the matter and were likely to record a consent to settle the matter therefore a mention date was granted by the court on 17/5/17.

Counsel later filed this application under certificate of urgency seeking for the same orders for injunction which had earlier been issued. I find that the application as it is an abuse of the court process as a similar order had been sought for and granted. If the plaintiff was aggrieved then he should have filed an application for contempt of court and not a similar application.

Having said that, I therefore vacate the interim orders earlier granted in this application as there is already an order of status quo to be maintained pending the hearing and determination of this suit. The application dated 25th January 2018 is hereby dismissed with no orders as to costs. Parties to try an out of court settlement as they are brothers.

Dated and delivered at Eldoret this 24th day of July, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Wanyonyi holding brief for Mr. Mutei for Plaintiff/Applicant and in the absence of defendant/Respondent (Mr. Choge).

Mr. Koech: Court Assistant.