



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 69 OF 2018

LUMBEI COMPANY LIMITED.....PLAINTIFF

VERSUS

JOHANA KIBET KOMEN.....1ST DEFENDANT

MUSA K. MAIYO.....2ND DEFENDANT

RULING

Lumbei Company Ltd has sued Johana Kibet Maiyo claiming to be the lawfully registered owner of the suit property being LR NO 498/376. The plaintiff claims to have been allocated the property on the 1st of November 1992 and was issued with the title deed and has dutifully been paying land rent and land rates.

The plaintiff states that in the year 2006 some suspicious characters had been seen on the property and that in 2014 some quack surveyors were seen subdividing the property and the plaintiff made inquiries at the office of the director of survey and indeed established that there was FR NO 500/103 dated 18th may 2010 purporting to subdivide the suit property into 7 plots Nos. 554, 556, 557, 558, 559, and 560 to 9 be known as Eldama Ravine 1/554 to 560 but the plaintiff managed to stop the process of subdivision through the office of the director of survey.

The plaintiff claims that the process of subdivision is tainted with fraud. And prays that the court declares that the plaintiff is the lawful proprietor of the suit property. He further prays for an order of eviction of the defendants from the parcel of land known as L. R. 498/376 Eldama Ravine.

The plaintiff prays further for a permanent injunction against the defendants from trespassing entering subdividing, allocating, occupying, selling, leasing, charging, transferring, fencing, erecting any structures or dealing in any way with the suit land.

In the application accompanying the suit dated 4th May 2014, the plaintiff prays for a temporary order of injunction against the defendants from trespassing entering subdividing allocating, occupying, selling, leasing, charging, transferring, fencing, erecting any structures or dealing in any way with the plaintiff's piece of land known as L. R. 498/376 Eldama ravine pending hearing and determination of the main suit. in terms of the above prayer.

The gist of the replying affidavit of Johana Kibet Komen is that he purchased land being plots Nos. E.F.G curved out of the Suitland from the plaintiff who is the registered proprietor of the same and has been enjoying open quiet and peaceful possession and occupation and therefore knows her very well and has constructed several structures thereon and is now constructing permanent structures.

I have considered the pleadings, application, supporting affidavit, replying affidavit and further affidavit and do find that the 1st defendant allege to have purchased a plot within the disputed parcel of land. He has taken possession and erected structures thereon. However, the property has not been transferred to the 1st defendant.

It is clear from the available evidence that the suit land is registered in the names of the plaintiff company. It is also clear that the 1st defendant is in occupation of the suit land and that is why among the remedies sought by the plaintiff is the eviction of the defendant therefrom.

An application for temporary injunction has to be determined in line with the now settled principles set out in the *locus classicus* case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A. 358** which are:

1. The applicant must show a prima facie case with a probability of success.

2. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages, and

3. If in doubt, the Court will decide the application on the balance of convenience.

The Court of Appeal in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125**. defined a prima facie case as follows: -

“ is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1963 3 ALL E.R 772**, it was held that a party approaching the Court for such an order must do so with clean hands because, being a discretionary remedy, it will not be granted to a party who has himself not done equity. It was held further that the Court will take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

Taking into account those broad principles, this Court is mindful of the fact that the plaintiff is registered as the owner of the suit land and is therefore entitled to all the rights and privileges that are protected by **Sections 24 and 25 of the Land Registration Act** which are similar to **Section 27 and 28 of the repealed Registered Land Act** under which the title to the suit land was issued.

However, such registration is subject to the overriding interests protected by **Section 28 of the Land Registration Act** or **Section 30 of the repealed Registered Land Act**. Such rights include those that have been acquired or are in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

I do find that granting the order sought in terms of a temporary injunction will be tantamount to an eviction and therefore is not available. In the interest of justice, the court orders that the property be preserved in terms that the County Land Registrar be and is hereby restrained from entering any transaction in the register of the suit property until hearing and determination of the suit. The matter is transferred to the Chief Magistrate's Court, Nakuru to be consolidated with Nakuru CMCC No. 1174 of 2015. Orders accordingly.

Dated and delivered at Eldoret this 29th day of November, 2018.

A. OMBWAYO

JUDGE