



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 383 OF 2016 (OS)

BENJAMIN KIPKORIR CHESIRE.....APPLICANT

VERSUS

KIPCHIRCHIR CHUMBA.....RESPONDENT

RULING

The application herein is dated 19th December, 2016 wherein the applicant seeks orders that pending the hearing and determination of the originating summons there be an order of injunction to prevent the respondent from evicting the applicant from land reference number Plateau/Plateau Block 2 (Uasin Gishu)/63 or in any way dealing with the land.

The application is based on grounds that the applicant has been on land reference Plateau/Plateau Block 2(Uasin Gishu)/63 since 2002. That the occupation of land reference Plateau/Plateau Block 2(Uasin Gishu)/63 has been without the consent of the previous registered owner and the current registered owner. The occupation of the land by the applicant has been open and uninterrupted. That the respondent is the current registered owner of the land but he has never been in possession thereof. That the previous registered owner Rose Jebor Kipngok has not been on the land since 2002. That the applicant has been in adverse possession of the land since 2002 to date. The respondent became the registered owner of the land 4.4.2016 prior thereto the land was registered in the name of Rose Jebor Kipngok. The respondent's and the previous owner's title to land reference Plateau/Plateau Block 2(Uasin Gishu)/63 has been extinguished. There is need to preserve the land and the prevailing status on the land register and possession. The previous registered owner Rose Jebor Kipngok title had been extinguished prior to transfer to the current registered owner the respondent. The applicant will suffer irreparable loss if the orders sought is not granted.

In the supporting affidavit of Benjamin Kipkorir Chesire, applicant states that he has been on land reference number Plateau/Plateau Block 2(Uasin Gishu)/63 since 2002. That he entered into land reference Plateau/Plateau Block 2 (Uasin Gishu)/63 as a trespasser. That he entered into land reference Plateau/Plateau Block 2(Uasin Gishu)/63 when the registered owner was Rose Jebor Kipngok. That he has been on uninterrupted and exclusive possession of land reference Plateau/Plateau Block 2 (Uasin Gishu)/63 for more than 14 years. That his occupation of land reference Plateau/Plateau Block 2(Uasin Gishu)/63 has been open, uninterrupted and adverse to the registered owner's title. That he has acquired title to the suit land through adverse possession having entered into possession in 2002 and remained on the land continuously as a trespasser. That he has substantially developed the land since he moved into possession thereon.

The respondent's title to land reference number Plateau/Plateau Block 2(Uasin Gishu)/63 has been extinguished by operation of law under the Limitation of Actions Act and that his occupation of land reference Plateau/Plateau Block 2(Uasin Gishu)/63 has been without the permission of the previous and

current registered owners continuous and exclusive. There is danger that the respondent may evict him from the suit land during the pendency of the suit.

The respondent may also dispose the land and or have it charged to his detriment. That in the event that he is evicted or the land is sold and or charged he stands to suffer irreparable loss. The respondent and the previous registered owner Rose Jebor Kipngok have never been on the suit land since he took possession of the same in 2002. The respondent may adversely deal with the suit land to his detriment.

The respondent, Kipchirchir Chumba filed a replying affidavit whose import is that the respondent is the registered legal proprietor of the suit land and that the applicant is guilty of non-disclosure of material facts in particular existence of another suit over the suit land vide Eldoret ELC No. 691 of 2012, Kiplagat Kotut Vs Rose Jebor Kipngok which matter was determined in favour of the defendant who was by then the registered proprietor of the suit land.

The judgment debtor in Eldoret ELC No. 691 of 2012 who is also the nephew of the applicant lodged an appeal in the Court of Appeal vide Eldoret Civil Suit No. 31 of 2015 and equally lost. The applicant has never been in occupation of the suit land but it is his nephew Kiplagat Kotut who was in possession of the suit land by virtue of sale agreement dated 31st January, 2000 which agreement was nullified by this Honourable Court in Eldoret ELC No. 691 of 2012 vide judgment dated 27th November, 2014. The judgment of this Honourable Court in Eldoret ELC No. 691 of 2012 is valid has never been varied or set aside in the foregoing. The contents of paragraphs 3 and 4 of the originating summons and paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 supporting affidavit of Benjamin Kipkorir Chesire both sworn on 19th December, 2016 are deliberately misleading and amounts to perjury.

That he is informed by his advocate on record, which information he verily believes to be true and correct that the applicant herein ought to have made an application for enjoinder in ELC Civil Suit No. 691 of 2012 if he had any genuine interest in the suit land. There is no explanation offered as to why joinder was not sought during the pendency of Eldoret ELC No. 691 of 2012 since 2011 or at the very least at the appellate stage. This Honourable Court has already made its findings on the issues herein and the applicant is attempting to re-open the same through the backdoor. That it is obvious that the present suit is calculated at circumventing the decree of the Honourable Court in Eldoret ELC No. 691 of 2012 and amounts to total abuse of court process. That the suit herein is aimed at fostering trespass.

That without prejudice to the foregoing, the applicant's entry into the suit land, if any, which is vehemently denied, is purely by virtue of sale agreement dated 31st January, 2000 which has hence been nullified by this Honourable Court and judgment debtor and his servants and employees have been ordered to vacate by this Honourable Court. That it is obvious that the present suit is calculated at circumventing the decree in Eldoret ELC No. 691 of 2012 and amounts to total abuse of court process.

Rose Jebor Kipngok filed an affidavit in support of the respondent stating that she transferred the suit land to the respondent upon the judgment debtor failing to comply with the terms of the conditional stay. The judgment debtor has now filed another suit seeking to enforce the agreement that was declared null and void. She states that the decree in Environment and Land Court No. 691 of 2012 has been enforced.

The applicant submits that he has on the suit land for more than 12 years and that the suit land has been registered for more than 12 years. The plaintiff has not obtained permission from the current and previous registered owners. His occupation has been continuous and exclusive. His occupation has been open. The applicant argues that he is likely to suffer irreparable harm if the injunction is not granted. He prays that the court preserves the prevailing situation. The applicant argues that the balance of convenience tilts towards granting the orders as he is in occupation.

The defendant on his part argues that this application is misconceived as the judgment debtor in Eldoret Environment and Land Court No. 691 of 2012 was in actual possession of the suit property before the orders of eviction were issued by the court in that matter. The Court of Appeal also dismissed the appeal by the judgment debtor. The defendant argues that the plaintiff has never been in occupation.

I have considered the application, supporting affidavit, replying affidavit and rival submissions and do find that the suit property Plateau/Plateau Block 2/(Uasin Gishu)/63 has been subject to litigation in Eldoret Environment and Land Court Case No. 691 of 2012. In his judgment of 27.11.2014, the Honorable Judge Munyao directed that the plaintiff in the matter vacates the land in question within 30 days. The plaintiff filed an application for stay of execution which was given on condition that he deposits security whose value would be Kshs.1,600,000.00. The Court of Appeal in Civil Appeal No. 31 of 2015 ordered that the judgment debtor in No. 691 of 2012 was to be evicted.

However, two cases have sprung up in respect of the said parcel of land. It is very clear in the proceedings in 691 of 2012 that Mr. Kiplagat Kotut has been in possession of the suit land. In fact, the court has held that Mr. Kiplagat Kotut vacates the parcel of land and therefore, for the applicant herein to succeed, he has to apply for the review of the judgment of the court. In light of the proceedings in 691 of 2012, I do find that the applicant has not established a prima facie case with a likelihood of success. On the issue of irreparable harm, if injunction is not granted, I do find that the plaintiff has not demonstrated that he is in possession as he could not have been in possession for 14 years at the same time with Kiplagat Kotut who also claimed that he was in possession for 14 years.

On the two grounds above, the application cannot succeed. The application is therefore, dismissed with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF AUGUST, 2017.

A. OMBWAYO

JUDGE