



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 186 OF 2017

GABRIEL S. CHEPKWONY:::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

GIDION N. MBILI:::::::::::::::::::::::::::::::::1STDEFENDANT

AGNES MWENDE MUTUNE:::::::::::::::::2ND DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 27th April, 2017 by the Plaintiff/applicant who sought for the following orders:

- a. That this application be certified as urgent and service of the same be dispensed with in the first instance.
- b. That a temporary injunction be issued against the defendant/ Respondents restraining them by themselves, their servants and /or agents from interfering with, undertaking further development, selling, charging, leasing, cultivating and/or dealing with the suit land being plot Number Eldoret Municipality Block9/2316 formerly PDP No. 17/93/58 SUB-PLOT NO.2 or in any other manner that is detrimental to the plaintiff/applicant pending the hearing and determination of this application *inter partes*.
- c. That an injunction be issued against the defendant/ Respondents restraining them by themselves, their servants and /or agents from interfering with, undertaking further development, selling, charging, leasing, cultivating and/or dealing with the suit land being plot Number Eldoret Municipality Block9/2316 formerly PDP No. 17/93/58 SUB-PLOT NO.2 or in any other manner that is detrimental to the plaintiff/applicant pending the hearing and determination of the main suit.
- d. That the O.C.S Naiberi Police Station be directed to oversee compliance of the above orders.
- e. That costs of this application be provided for.

This application came for hearing *inter partes* on 20th June 2017 when counsel's for both parties argued the application.

Plaintiff/Applicant's Counsel's Submissions

Mr. Okara Counsel for the plaintiff/applicant relied on the grounds on the face of the application together with the supporting affidavit and annexures filed in court. He submitted that the suit property was allocated to the applicant by the then Municipal Council of Eldoret in 1994 and thereafter he paid the requisite fees as per the allotment letter. He stated that the Plaintiff/ Applicant recently discovered that his parcel of land had been registered under the names of the 1st and 2nd defendants/ Respondents who have commenced development yet he had not sold the same to them.

Counsel relied on the fact that the applicant had an allotment letter to the suit land dated 14th April 1994 and also alleged that the allotment letter issued to the defendants was a forgery. He took issue with the signature of the then Town Clerk P.K. Kiptoo terming it a forgery. Counsel urged the court to grant the orders as prayed as the plaintiff had established a prima facie case against the defendants as per the principles enumerated in the Giella case

DEFENDANTS/RESPONDENTS' COUNSEL'S SUBMISSIONS

The application was opposed by Mr. Mutei, Counsel for the defendant who relied on the replying affidavit and the annexures therein. It was counsel's submissions that the annexures thereto to the replying affidavit clearly indicate that defendants/respondents are the registered proprietors of the leasehold interests over the suit land and have also demonstrated how the property was acquired.

Counsel further stated that the defendants proceeded to develop the suit property with the consent and approval of the County Government of Uasin Gishu. He questioned what the applicant has been doing since 1994 when claims to have been allocated the land. Counsel submitted that the claims that the applicant has recently discovered that the defendants had fraudulently "registered themselves" as owners of the suit land without stating how recent does not hold any water as the respondents are the registered owners of the suit land as evidenced by the plaintiff's annexed official search.

Mr. Mutei Counsel for the defendants submitted that the defendants annexed documents to prove that they acquired the suit land through purchase in 2011 and have occupied the same for six years without anybody claiming ownership. He submitted that the plaintiff is guilty of laches and cannot qualify to benefit from the equitable reliefs sought. He also relied on the principles laid down in the GIELLA – VS – CASSMAN BROWN & CO. LTD which are well known as:

- a. The applicant must set out a prima facie case with a probability of success.
- b. That an injunction will not be granted if damages are an adequate remedy.
- c. And that if in doubt the court shall determine the matter on a balance of convenience.

Defendants' Counsel further submitted that the applicant had not satisfied any of the conditions above and even the balance of convenience is not in the applicants favour. He stated that the respondents apart from occupation have proved that with the approval and inspection of relevant authorities they have developed permanent structures.

On the issue of the authenticity of the allotment letter produced by the Respondents which bears the same date as that of the applicant, Counsel submitted that that cannot be done at submissions level as it is not even mentioned in supporting affidavit. He also stated that allegations of forgery cannot be dealt with at this stage.

It was also stated by Counsel for the respondents that the authorities relied on by the applicant were basically in support of the respondents case as they give protection and indefeasibility of title as provided for under section 24, 25, and 26 of the Land Registration Act 2012. Counsel therefore urged the court to dismiss the application with costs.

Analysis and determination

This is an application for a temporary injunction to restrain the defendants from undertaking further development of the suit land. I will not belabor much as the principles of granting temporary injunctions are well settled and I will not reinvent the wheel. It is not in dispute that the defendants are the registered owners of the suit land. It is not also in dispute that the defendants have been in occupation and are undertaking construction which is at an advanced stage as per the annexures by the plaintiff/applicant.

Further it is apparent that the issues by both parties are as to whether the plaintiff applicant has met the threshold for grant of temporary injunction. Grant of orders of temporary injunctions are equitable in nature and discretionary. The court must however exercise this discretion judiciously. When exercising this discretion, the court must be alive to the fact that the aim is to do justice to whoever party that deserves the same without any bias.

I have looked at the pleadings, the supporting documentation together with the judicial authorities cited by both counsels. It is evident from the annexures that the defendants are the registered owners of the suit land having been registered as such in 2012. There are two allotment letters to the plaintiff and the previous owner who sold to third party which have a similar date. I notice on the allotment letter that there were conditions to be met by the allottee. There was a condition for acceptance within 90 days together with the payment of the purchase price. The other condition was that there would be no sale, transfer, charge, sublet or part with possession with the suit land without the consent of the Council. The defendants have annexed a consent to transfer from the Council which shows that they adhered to this requirement. The defendants further annexed a transfer form, rate payment receipts, sale agreement and a certificate of lease registered in their names.

On the other hand, the plaintiff annexed a letter of allotment, rates payment receipts, photos of the ongoing development on the suit plot and an official search indicating that the defendants are the registered owners having been registered as such in 2012.

From the various judicial authorities that I have perused, I find that the plaintiff applicant has not met the threshold for grant of temporary injunction. The balance of convenience would tilt in favour of the defendants who have established that they are the registered owners of the suit land. The defendants are also at an advanced stage with the construction on the suit land as exhibited by the plaintiff in his annexure. The plaintiff has also not established that he would suffer irreparable damage or injury that cannot be compensated by way of damages. In any case if the plaintiff's case succeeds after the full hearing he can be compensated by way of damages. I will not comment on the issue whether the plaintiff is guilty of laches, this will be handled at a later stage during the full hearing of the case.

The upshot is that the plaintiff's application dated 27th April 2017 therefore fails and is dismissed with costs in the cause.

Parties to comply with order 11 of the Civil Procedure Rules within 30 days thereafter fix the main suit for hearing.

It is so ordered.

Dated and delivered at Eldoret on this 21st day of September, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Mutei for Defendant/Respondent

Miss Tum for Okara for Plaintiff/Applicant

