



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 598 OF 2016

KIPKEMOI MUTAI.....1ST PLAINTIFF

WALTER KIBET NGENO.....2ND PLAINTIFF

VERSUS

CHRISTOPHER BII.....1ST DEFENDANT

RAYMOND RONO.....2ND DEFENDANT

RULING

(Application for injunction to restrain the defendants from interfering with the suit property; no prima facie case established; application dismissed)

1. This ruling is in respect of plaintiff's Notice of Motion dated 23rd December 2016. The application is brought under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules and seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit this honourable court be pleased to issue an order of temporary injunction restraining the defendants by themselves, their agents, servants from entering, cultivating, erecting structures, selling, transferring, alienating, disposing, tilling, leasing or in any way from interfering with the parcels of land known as Nakuru P/No. Nyota Pendle/Teregena 26 a copy hereof be served upon the Kirenget Police Station for effecting compliance.

4. The costs of this application be provided for.

2. The application is supported by an affidavit sworn by the 1st plaintiff on 23rd December 2016 wherein he deposes that the plaintiffs are the owners of the parcel of land known as Nyota Pendle/Teregena 26, the suit property. He annexes a copy of a letter of offer dated 16th January 2009 in support of the contention. He further deposes that the defendants have trespassed onto the suit property.

3. The defendants opposed the application through a replying affidavit sworn by the 2nd defendant on 30th January 2017. In it, the 2nd defendant deposes that the suit property belongs to his father Daniel Kipkorir Cheruiyot who bought it from Cheruiyot Arap Too, the original allottee. He annexed a copy of a sale

agreement dated 19th September 1996. He further deposed that the suit property initially belonged to Agricultural Development Corporation (ADC) and that it was initially referred to as L.R No.8327/306 before it was given a new description. That Cheruiyot Arap Too obtained his allocation from ADC and that the 2nd defendant has been on the suit property since the year 1996 and was joined by the 1st defendant in the year 2006. That the defendants have constructed on the suit property and have settled on it with their families with the full consent of Daniel Kipkorir Cheruiyot. The defendants accuse the plaintiffs of forcefully entering the suit property in the year 2014 and selling plots despite protests by the defendants and despite demand letters asking them to vacate. They dismiss the letter of offer exhibited by the plaintiffs as fake.

4. The application was argued by way of written submissions. Plaintiffs'/applicants' submissions were filed on 23rd March 2017 while the defendants'/respondents' submissions were filed on 12th April 2017. I have considered the application, the affidavits filed and the submissions. I note that parties have in the submissions also referred to documents which have been filed with their respective list of documents but which have not been introduced by way of any affidavit in respect of the application. Since an application is determined on the basis of affidavit evidence, I will as far as the application is concerned, disregard all documents that have not been introduced by way of being annexed an affidavit.

5. In an application such as the one before the court, the applicant must establish a prima facie case with a probability of success. Additionally, the applicant must show that he will suffer irreparable damage if an injunction is not granted. If the court is in doubt, then it should decide the matter on a balance convenience.

6. The plaintiffs herein stake their claim on the suit property on the basis of letter of offer dated 16th January 2009. The letter offered "plot No. 26 of approximately 7.1 Ha Nyota Pendle/Teregana Settlement scheme in Nakuru District." It imposed a condition that a sum of KShs. 110,500 be paid within 12 months and in default the offer would be cancelled. I have not seen any receipt evidencing payment of the said sum of KShs. 110,500. There is a letter dated 13th April 2009 alleging payment of KShs.111, 500, a figure different from that in the letter of offer. I note that in both the plaint and the application, the plaintiffs refer to a plot known as "Nakuru P/No. Nyota Pendle/Teregana 26", a description which is not exactly the same as that in the letter of offer. I also note that the size of the land is stated as approximately 7.1Ha in the letter of offer and as 7.5 acres in the plaint. Considering that 7.1Ha translates to about 17.5 acres, the difference is significant.

7. Further I note that the defendants are also laying claim to the suit property which they refer to as Nyota Pendle/Teregana/26. They claim to be in occupation and that the plaintiffs are the trespassers.

8. In view of all the foregoing, I am not persuaded that the plaintiffs have demonstrated ownership of the suit property. There is a significant discrepancy in their description of the property as regards its size. I am also not persuaded that the plaintiffs have demonstrated that they paid the amount specified in the letter of offer. For these reasons, I am not persuaded that the plaintiffs have a prima facie case with a probability of success. Notice of Motion dated 23rd December 2016 is dismissed with costs to the defendants.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23rd day of November 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

Mr. Langat holding brief for Mr. Kipkenei for the defendants/respondents

Court Assistant: Gichaba