



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 29 OF 2017

KIROBON FARMERS CO. LTD.....PLAINTIFF

VERSUS

SAMUEL O. NYARANGI.....DEFENDANT

RULING

(Applications for injunctions; each party seeking to restrain the other from interfering with suit property; no prima facie case established; both applications dismissed)

1. Through plaint filed on 2nd February 2017, the plaintiff sought judgment for a permanent injunction to restrain the defendant from trespassing upon, farming, leasing, using and interfering with the plaintiff's possession and use of parcel of land known as LR No. Molo South/Langwenda Block 17/1 (Seguton). Contemporaneously with the plaint, the plaintiff filed Notice of Motion dated 2nd February 2017 seeking the following orders:

1. Spent.

2. Spent.

3. THAT the honourable court be pleased to restrain the respondent by himself, his servants, employees and or authorized agents from entering, farming, leasing and or interfering with the applicant's land parcel LR No. Molo South/Langwenda Block 17/1 (Seguton) in any manner whatsoever detrimental to the applicant pending the hearing and determination of this suit.

4. THAT the costs of this application be provided for.

2. The defendant responded to the suit through defence and counterclaim filed on 14th March 2017 wherein he sought dismissal of the plaintiff's case and an order of cancellation of the certificate of title issued to the plaintiff. The defendant also sought judgement for a perpetual injunction to restrain the plaintiff from interfering with the plaintiff's quiet enjoyment of the suit property. Shortly after filing defence and counterclaim, the defendant filed Notice of Motion dated 9th March 2017 in which he sought the following orders against the plaintiff.

1. Spent.

2. Spent.

3. THAT this honourable court be pleased to restrain the plaintiff by itself, its servants,

employees and/or agents from entering, farming, leasing and/or in any other manner interfering with the defendant's peaceful and quiet enjoyment of land parcel number Molo South/Langwenda Block 17/1 (Seguton) pending the hearing and determination of this suit.

4. That this honourable court be pleased to make an order of inhibition to inhibit any registration or dealings in land registration number Molo South/Langwenda Block 17/1 until the hearing and determination of this suit.

5. That the costs of this application be provided for.

3. This ruling is in respect of both Notice of Motion dated 2nd February 2017 and Notice of Motion dated 9th March 2017. The application dated 2nd February 2017 filed by the plaintiff is supported by the affidavit of Samuel Kimutai Birir sworn on 2nd February 2017. Additionally, the plaintiff has relied on further affidavit of Samuel K. Birir sworn on 15th March 2017. Mr. Birir deposed that the plaintiff is the registered owner of the suit property. He annexed a copy of the Title Deed in support of his contention. He deposed further that the suit property had been used or leased by various persons some of whom were members of the plaintiff. Among those who used or leased the suit land was Francis Nyarangi (deceased) a family member of the defendant. That the said Francis Nyarangi had at some time expressed interest to purchase the land but did not pay for it. That the defendant was at the time of swearing the affidavit preparing the land for farming and to lease to third parties. The plaintiff therefore sought an injunction against the defendant in terms of Notice of Motion dated 2nd February 2017.

4. The defendant opposed Notice of Motion dated 2nd February 2017 through his replying sworn on 2nd March 2017. He deposed that his correct name is Sammy Onchuru Nyarangi and not Samuel Onchuru Nyarangi as pleaded by the plaintiff. He is a son to Justice James Onyiego Nyarangi (deceased) and Margaret Moragwa Nyarangi (deceased). That his late mother was a member of Seguton Farm Ltd and paid Kshs.100/= as a registration fee and Kshs.50, 000 which entitled her to a plot measuring 100 acres. He annexed copies of two receipts in respect of the payments, both of which were made on 19th September 1977. He further deposed that the plaintiff herein had sold land measuring 1,338 acres to Seguton Farmers Limited and Seguton Farmers Limited in turn sold the land to 34 members including the plaintiff's mother who was registered in trust for the plaintiff's father. His family took possession in 1977 and has been in continuous possessions since then and his father made full payment for the plot. He deposed further that the plaintiff had purported to till the land in preparation for planting thus putting him and his sorter in a dilemma. He added that he is the administrator of his father's estate and annexed a copy of the Grant of Letters of Administration Intestate issued on 8th April 2015.

5. Defendant's Notice of Motion dated 9th March 2017 is supported by the defendant's affidavit sworn on 9th March 2017 and further affidavit sworn on 18th April 2017. The defendant adopted the contents of his replying affidavit sworn on 2nd March 2017, his list of documents and witness statements. He added that since 28th February 2017 the plaintiff had been attempting to evict him and members of his family from the suit property without success. He deposed further that his family has uninterruptedly been on the suit property since 1977 up to the date of swearing the affidavit. He thus urged the court to grant the injunction sought in Notice of Motion dated 9th March 2017. The defendant also relied on further affidavit sworn on 18th April 2017.

6. Both applications were argued by way of written submissions. Plaintiff's submissions were filed on 19th June 2017 while the defendant's submissions were filed on 27th June 2017. I have considered the applications, the affidavits, submissions and authorities cited.

7. For an application for an interim injunction to succeed, the applicant must establish a *prima facie* case with a probability of success and also show that he will suffer irreparable damage if the injunction is not granted. If the court is in doubt as to whether a *prima facie* case has been established, then it should decide the case on a balance of convenience. If no *prima facie* is established, then the application ought to be dismissed without any need to the look into the other two tests.

8. Explaining the meaning of *prima facie* case, the Court of Appeal stated in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR as follows:

Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie* case is a case in 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

9. For a *prima facie* case to exist, there must in the first place be a case validly brought before the court by the applicant. Otherwise, there would be no probability of success of the applicant’s case upon trial. Our Civil Procedure Rules have elaborate provisions on how suits should be instituted. Order 4 rule 1 (4) provides:

1. (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

10. The above provisions are couched in mandatory terms. I have perused the verifying affidavit sworn herein on 2nd February 2017 and filed in court on the same date alongside the plaint. The deponent Samuel Kimutai Birir deposes that he is the “Chairman Kirobon Farmers Co. Ltd and hence competent to swear” the affidavit. He neither deposes that he is authorized by the plaintiff to swear the affidavit nor annexes any authority under the seal of the company to do. Even in the subsequent “Replying Affidavit” sworn by him on 6th April 2017, there is neither deposition that he is authorized by the plaintiff to swear the affidavit nor any evidence of authority under seal as contemplated by the above provisions. The obligation to comply with Order 4 rule 1(4) is so serious that Order 4 rule 1(6) provides:

(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.

11. In view of what I have stated above, I find that the plaint herein offends the provisions of Order 4 rule 1(4). In such circumstances, there cannot be any *prima facie* case. That situation does not change even in the circumstances of this case where the plaintiff has exhibited a title deed to show that it owns the suit property. For a case to have any prospect of success, it must be properly pleaded. If not then there is no *prima facie* case, however overwhelming evidence the plaintiff may put before the court since if the matter went trial right away the case would have no prospect of success. In the circumstances, Notice of Motion dated 2nd February 2017 is dismissed. The defendant has in his submissions urged the court to strike out the suit. There is no express application before court seeking striking out of the plaint. There was mention of a preliminary objection in the statement of defence but there was no specific mention of the grounds on which the objection was being made. Striking out is draconian remedy and for that reason I do not strike out the suit since the issue has not been formally raised and considered on the merits.

12. Regarding the application dated 9th March 2017, I note that the defendant’s case is that the suit property was acquired by his late mother upon payment of KShs. 50,000 to Seguton Company Ltd on 19th

September 1977. The defendant is one of the administrators of the estate of Justice James Onyiego Nyarangi (deceased). There is no evidence that the defendant is the administrator of the estate of Margaret Nyarangi (deceased) in whose name payment for the plot is said to have been made. I am aware that the defendant has deposed that the suit property was acquired by his mother in trust for his father. The existence of trust is always a question of evidence and there must be adequate evidence to support the allegation of trust. I see no such evidence in this case. In any case, the defendant admits that the plaintiff is now the registered owner of the suit property. In such a scenario, the plaintiff's rights would be protected by the provisions of Section 25 (1) of the Land Registration Act. Until such a time when the plaintiff's title is cancelled, I do not see how the defendant would establish a *prima facie* case against the plaintiff. In the circumstances, I find the defendant has not established a *prima facie* case against the plaintiff. Notice of Motion dated 9th March 2017 must therefore fail.

13. In conclusion, Notice of Motion dated 2nd February 2017 and Notice of Motion dated 9th March 2017 are both dismissed. Each party to bear own costs.

14. 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:

Mr. Langat holding brief for Mr. Gai for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: Gichaba