



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT AT ELDORET

E&L CASE NO. 160 OF 2017

LUKAH KIMALEL MATINI.....PLAINTIFF/APPLICANT

VERSUS

JAMES KIPROP LAGAT.....1ST DEFENDANT/RESPONDENT

JAPHET KIPKEMBOI KIPROP.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

This is ruling in respect of an application brought by way of a Notice of motion dated 12th April 2017 by the Plaintiff/applicant for orders that:

1. Spent.
2. That a temporary injunction be and is hereby issued to restrain the defendants, their servants and or their agents from trespassing, destroying trees, cultivating and or otherwise interfering with parcel of land known as SACHO/KABARAK/352 pending the hearing and determination of this application inter- partes
3. That a temporary injunction be and is hereby issued to restrain the defendants, their servants and or their agents from trespassing, destroying trees, cultivating and or otherwise interfering with parcel of land known as SACHO/KABARAK/352 pending the hearing and determination of this suit.
4. That the costs of this application be provided for.

This application was certified urgent by the court on 12/4/17 and the applicant was ordered to serve the application within 7 days for inter- parte hearing on 5/6/17. The parties agreed to canvass the application by way of written submissions which were filed by 22/11/17 and a ruling date given.

PLAINTIFF/APPLICANT'S COUNSEL'S SUBMISSIONS

Counsel for the plaintiff/applicant filed his written submissions and gave brief facts of the case that the plaintiff is the registered owner of the whole of that parcel of land known as SACHO/KABARAK/352 whereas the 1st respondent is the registered owner of the adjoining parcels of land known as SACHO/KABARAK/351. He submitted that the respondents have encroached and trespassed onto the applicant's parcel of land and felled indigenous trees with a view of cultivating hence causing serious destruction on the suit land. Counsel stated that the dispute had previously been resolved by the Land Registrar Baringo County but the respondents have disobeyed the resolution. Counsel further submitted that the aggrieved party was given 30 days to appeal against the ruling of the Land Registrar to the Chief Land Registrar but no such appeal has been filed to date.

It was Counsel's submission that the issue for determination is whether the applicant has made a case sufficient to warrant the protection of this court through an injunction. He relied on the Giella V Cassman Brown co. Ltd case which stipulates the principles of grant of an injunction. Counsel submitted that the applicant is the registered owner of the whole of that parcel of land known as SACHO/KABARAK/352 as evidenced by the copy of Title Deed and certificate of official search marked LKM I(a) and (b) annexed to the applicant's affidavit while the 1st respondent is the registered owner of the adjoining parcel of land known as SACHO/KABARAK/351.

Counsel submitted further that the applicant has been in occupation of the suit land for a period of over 40 years utilizing the same for cultivation and keeping livestock for his livelihood and that of his family. He stated that the peaceful occupation by the applicant is in

jeopardy as the respondent has encroached on the suit land and has been cutting down indigenous tree species which have huge medicinal and esthetic value. It was his submission that if the respondent's actions are not checked through the grant of an injunction, all the values mentioned above will go to waste. No amount of compensation can make good the damage so caused by the respondents.

Counsel stated that the plaintiff applicant had annexed a copy of a certificate of title and an official search indicating that he is the registered owner of the suit to show that he has proprietary interests in the suit parcel of land. He cited the case of Emmanuel Cheruiyot Kwambai Vs Richard Kotut Kwambai and 3 Others Eldoret E & L No. 95 of 2017, where this court held that by the plaintiff/applicant annexing a copy of title and certificate of official search shows that the plaintiff has proprietary interests in the suit parcel of land. He also stated that the defendants have not tendered any documentary evidence contradicting the same and urged the court to grant the orders as prayed as the plaintiff had established a prima facie case with a probability of success.

DEFENDANT/RESPONDENT'S COUNSEL'S SUBMISSIONS

Counsel for the respondent opposed the plaintiff/applicant's application dated 12th April 2017 and relied on the replying affidavit dated and sworn on 3/7/17 by the 1st Respondent on behalf of the 2nd Respondent. He stated that the application is an abuse of the court process as the applicant has failed to establish any prima facie case to warrant the grant of temporary injunction against the Respondents.

It was Counsel's submission that the applicant has failed to furnish proof of the existence of a lawfully demarcated boundary between his parcel of land and that of the 1st respondent and of the alleged trespass and or interference by the Respondents. He stated that it is not clear whether the parcel of land in the annexures belong to the Applicant and that they do not prove any interference and the person causing the interference.

Counsel further submitted that since the Applicant's parcel of land and that of the 1st Respondent are adjacent parcels which require the clear demarcation of the boundary by a surveyor. He also submitted that the application is bad in law and statute barred as the applicant waited for over 20 years to lodge the legal challenge.

Counsel therefore submitted the applicant has not established a prima facie case with a probability of success and the same should be dismissed with costs.

Analysis and determination

This is an application for a temporary injunction to restrain the defendant respondents from interfering with the suit land until the hearing and determination of this suit. Interlocutory injunctions are equitable remedies which are sought for purposes of preservation in order not to change the substratum of the suit pending the hearing and determination of the suit. Parties must come to court with clean hands in order to get reciprocal equity. Parties must also be able to satisfy the court that they have a prima facie case with a probability of success.

I have considered the pleadings and the submissions by both counsel for the plaintiff/applicant and the defendant/respondents. I notice that the plaintiff is the registered owner of the suit land known as SACHO/KABARAK/352 which copy of title was annexed to the supporting affidavit. It is not in dispute that the plaintiff and the defendants own adjacent plots. It is also not disputed that the parties appeared before the Baringo Land Registrar who resolved the issue and gave any aggrieved party 30 days within which to appeal to the Chief Land Registrar or a court of law. From the documents on record I have not seen such appeal.

This being an application for a temporary injunction pending the hearing of the main suit I will not deal with the merits of the case as the defendant's Counsel's submissions suggest. If I go to the details, then I will be determining this case at the interlocutory stage. The main suit also prays for a permanent injunction so I will not prejudice any party at this stage.

If the defendants have not encroached or interfered with the plaintiff's suit land as they allege then the grant of a temporary injunction should not affect them in any way. The court is asked to preserve the substratum of the case as if the same is not done there will be nothing to litigate as the ground shall have shifted. There is no doubt however that if the defendants are indeed engaged in indiscriminate felling of trees on the disputed parcel of land, it will have a negative impact on the suit property which cannot be compensated by way of damages.

I find that the application has merit and the same is allowed as prayed. Defendants to pay costs of the application.

Parties to comply with order 11 within 30 days and fix the matter for hearing.

Dated and delivered at Eldoret on this 5th day of December, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Cheruiyot holding brief for Mr. Kigen for Plaintiff/Applicant

Mr. Koech: Court Assistant