



**Kipkulei v Kimani & 39 others (Environment & Land Case
139 of 2015) [2016] KEELC 1313 (KLR) (10 February 2016) (Ruling)**

Benjamin Kipkech Kipkulei Alex Kungu Kimani and 39 others [2016] eKLR

Neutral citation: [2016] KEELC 1313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 139 OF 2015**

M SILA, J

FEBRUARY 10, 2016

BETWEEN

BENJAMIN KIPKECH KIPKULEI PLAINTIFF

AND

**ALEX KUNGU KIMANI & 39 OTHERS & 39 OTHERS & 39
OTHERS DEFENDANT**

RULING

(Application for injunction; principles to be applied; plaintiff being registered owner of certain parcels of land; land earlier having been owned by a settler; land split; initially split into two and defendants purchasing one portion; other portion purchased by ADC; ADC subdividing its portion and selling part to the plaintiff; defendants claiming that they also purchased the land under ADC; no such evidence; prima facie case established by the plaintiff; orders of injunction issued against the defendants)

1. This suit was commenced by way of plaint filed on 29th May 2015 and together with the plaint, the plaintiff filed an application for injunction seeking to restrain the defendants from interfering with several parcels of land which the plaintiff claims to own. These parcels are land registration numbers 1695/12, 1695/13, 1695/14, 1695/15, 1695/16 and 1695/17 (hereinafter the suit properties). The application is opposed by the defendants who filed a replying affidavit.
2. This is an application for injunction and I stand guided by the principles laid down in the case of Giella vs Cassman Brown (1973) EA 358. In the said case, it was held that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success and further show that he stands to suffer irreparable loss if the injunction is not granted. If in doubt, the court will decide the application on a balance of convenience.



3. It follows that the starting point is to make a preliminary assessment of the case presented by the applicant. Where there is a response by the respondent, the material tabled by the applicant must be weighed against that tendered by the respondent. It is only then that the court can make an assessment of whether the applicant has presented a prima facie case with a probability of success to entitle him to the injunction sought.
4. What then is the case of the applicant? The case of the applicant is that he is the registered owner of the suit properties having purchased the same from various persons in the year 2007. It is his position that he has been cultivating the said properties without interruption until the year 2014, when the defendants invaded portions of the suit properties and started cultivating without his authority. He has identified the defendants as being members of Ndibithi Farmers Company Limited who were former workers of a settler farmer who previously owned the suit properties. It is the position of the plaintiff that these properties were purchased from the settler by the Agricultural Development Corporation (ADC) who in turn sold to the plaintiff. It is his case that the defendants also purchased portions of the land that was purchased by ADC and settled in it but they have now invaded his land. He has reported the matter to the police and some of the defendants are facing criminal charges of Forcible Detainer and Trespass. To his supporting affidavit, the plaintiff has annexed copies of his titles to the suit properties.
5. The defendants/respondents, opposed the application for injunction through the replying affidavit of David KihuguKariuki. They also filed a Statement of Defence to the suit and a Counterclaim. They have denied that the suit properties are owned by the plaintiff. They have averred that the history of the properties in issue is that they were initially owned by a white settler by the name of Gilbert De Preville Colville who owned the entire land parcel No. 1695. They have stated that Ndibithi Farmers Company, which came about after the workers of the settler formed themselves into a land buying company, purchased 2,504 acres of the land owned by Mr. Collville in the year 1964. They assert that this 2,504 acres comprised of the land parcels No. 10998, 1715, 1695, 7281, and 7281/2. They state that they raised money to purchase the properties but there were some wrangles in their ranks which led to problems in them getting title to what they purchased. At the moment they state that there is a dispute between Ndibithi Farmers Company and ADC over the suit properties, which matter they claim they have reported to the National Land Commission. It is their view that the plaintiff's titles were acquired by way of fraud. In their counterclaim, they inter alia want the plaintiff permanently restrained from the suit properties and that the same be registered in the name of Ndibithi Farmers Company Limited.
6. A supplementary affidavit was filed by the plaintiff through which he inter alia deposed that there have been two previous suits over the matter filed by the defendants being Nakuru HCCC No. 150 of 2012 and Nakuru HCCC No. 548 of 2009, and Nairobi HCCC NO 2366 of 2007. He further deposed that the whole parcel No. 1695 was 2,504 acres of which Ndibithi Farmers purchased 606.8 hectares or 1499.44 acres and obtained title to the parcel LR No. 1695/1. The plaintiff has explained that his titles emanate from subdivisions of the remainder which was LR NO. 1695/2, which was purchased by ADC.
7. I have considered the application alongside the submissions of both counsels.
8. The parties have attempted to give what they believe is the history of the land in question. What I can discern from the material presented before me is that the suit properties were hived off the original land parcel No. 1695. This parcel No. 1695 was owned by a white settler by the name of Colville who appears to have registered a company known as Colville Limited to hold the property. I have seen a transfer dated 11 March 1974 vide which Colville Limited transferred a portion of 606.8 hectares to Ndibithi Farmers Company Limited for consideration. This portion became the LR No. 1695/1. This



is discernible from the transfer instrument annexed to the plaintiff's supplementary affidavit and which has not been challenged by the defendants.

9. Despite the defendants asserting that they purchased the whole of the land parcel No. 1695 which measured 2,504 acres, they have not tabled any evidence to support this. There is absolutely nothing before me to support the claim that Ndibithi Farmers Company, who comprise of the defendants, purchased anything more than 606.8 hectares. I have seen the earlier litigation where Ndibithi Farmers claimed to have purchased the whole of the 2,504 acres but they never succeeded in the litigation. Indeed in one of the suits, Nakuru HCCC No. 150 of 2012, Ndibithi Farmers Company Limited vs MwanaMwireriRironi and Naivasha Farmers Co. Ltd, Emukule J, while dealing with an application for injunction stated that there was no basis for any claim by Ndibithi Farmers, of the purchase of the entire 2,504 acres. It baffles me where Ndibithi Farmers Company Ltd and its members get the idea that they purchased the whole of LR No. 1695. What is clear from the material before me is that Ndibithi Farmers purchased 606.8 hectares which became registered as LR No. 1695/1.
10. The defendants, at least from the material before me, have not demonstrated to me that they are entitled to the other portion, which became registered as LR No. 1695/2 and which went to ADC. ADC appears to have subdivided this land and sold it to several persons including the plaintiff who became proprietor of the suit properties. I have seen the Certificates of Title displayed by the plaintiff and from the material presented before me, I am unable to doubt them.
11. Weighing the cases of the plaintiff and defendants as presented through this application, and without prejudice to any contrary finding upon hearing of the suit on merits, I am of the opinion that the plaintiff has demonstrated before me a prima facie case with a probability of success. The defendants on the other hand have failed to persuade me that the suit properties form what they purchased from Mr. Colville. There is no question that if the defendants are not restrained from undertaking activities in the suit properties, the plaintiff will suffer irreparable loss. I am not in doubt as to the plaintiff's case, and I therefore need not consider the balance of convenience.
12. The upshot of the above is that I am of the view that the plaintiff is entitled to the injunction sought against the defendants. I therefore allow this application and make the final orders :-
 - (a) That pending the hearing and determination of this suit, the defendants and/or their servants, agents and/or assigns are hereby barred from entering, being upon, cultivating, or in any other way interfering with the plaintiff's quiet possession of the land registration numbers 1695/12, 1695/13, 1695/14, 1695/15, 1695/16 and 1695/17.
 - (b) That the costs of the application shall be to the plaintiff.
13. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 10TH DAY OF FEBRUARY 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Fredick Kibet holding brief for Mr E.O Odhiambo instructed by M/s Cheptumo & Co. Advocates for the plaintiff/applicant.



Mr Kaka Kamau present for the defendants/respondents.

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

