



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 146 OF 2015

(FAST TRACK)

ALBERT KIPRUTO METTO.....1ST PLAINTIFF

FRANCIS KIPKEMBOI LAGAT.....2ND PLAINTIFF

VERSUS

WILLIAM AYABEI CHEMITEI.....1ST DEFENDANT

FRANCIS CHEMITEI SONGOROH.....2ND DEFENDANT

FRANCIS KIPTUM KIPKORIR.....3RD DEFENDANT

UASIN GISHU COUNTY LAND REGISTRAR..... 4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The plaintiffs have come to court for an order that there be temporary orders of injunction restraining the defendants either themselves or through their agents, employees, and/or servants from advertising for sale, alienating, charging, disposing of, leasing out, dealing in, wasting, fencing or otherwise destroying crops and trees growing on those parcels of land known as ***SERGOIT/KOIWOPTAOI BLOCK 10 (KARO)/308 and 309*** pending the determination of the suit.

The plaintiffs claim that they are the grandsons of the late Kimeto Mbulwa Mungotio who is the lawful owner of the land parcel which has now been registered as in the name of the 1st defendant who is the registered proprietor of Sergoit/Koiwoptaoi Block 10(Karo)/308 and Sergoit/Koiwoptaoi Block 10(Karo)/309 situate in Uasin Gishu County. The said parcel is their ancestral home wherein they were born and they have lived there peacefully and without any interruption all their life. It was only on 24th April, 2015 that the 1st, 2nd and 3rd defendants came with police officers and over 60 armed men and demolished their houses thereby evicting them on the basis of a court order issued in Eldoret Chief Magistrate's court Civil Case No. 744 of 2008 between the 1st, 2nd and 3rd defendants herein and one Kipkemboi Mulwa who is unknown to the plaintiffs herein. No demand notice, court summons, pleadings or eviction orders have ever been served upon the plaintiffs herein despite the fact that they have been living on the farm openly and peacefully before and after the death of their father and grandfather who acquired the land from Kechui Farm.

The 2nd defendant sent some individuals on 16th May, 2015 to the farm with the intention of spraying maize crop grown on 7 acres of the farm with herbicides but were restrained by the plaintiff's neighbours.

The plaintiffs and their children have now been rendered homeless as a result of the illegal eviction as the due process of the law was not followed. There is thus need to authorize the plaintiffs/applicants to resume occupation of their ancestral home and to stop further interference with or dealings on the suit property by the defendants pending the resolution of the issues raised in the suit herein. Being the grandsons of the original owner of the suit property; having resided on the land continuously and uninterrupted for over 35 years and there being no legal basis through which the 1st, 2nd and 3rd defendants acquired title to their land, the plaintiffs have established a *prima facie* case with high chances of success. Unless the orders sought herein are granted, the plaintiffs and their children stand to suffer irreparable loss as they will stand evicted through an illegal process and their crop grown on the farm will be susceptible to being destroyed by the defendants who may thereafter dispose of the property to third parties to their detriment thereby exposing them to the risk of being rendered landless.

The balance of convenience lies in favour of granting the orders sought to stop the acts of illegality being committed further by the defendants against the plaintiffs and their children. It is in the interest of justice and fairness that the plaintiffs' legal as well as their acquired customary land rights over the suit property be protected by this honourable court. It is just and expedient that the honourable court stamps its authority to restrain parties from abusing its process to perpetrate injustices on the innocent. It is only fair and expedient that the application be allowed.

The application is supported by the affidavit of Albert Kipruto Metto who states that their father is Stephen Lagat (now deceased) while their grandfather is Kimeto Mbulwa Mungotio (also deceased). Their grandfather used to work as a tractor and combine harvester driver in Karo Farm which initially belonged to a white settler before selling it to Indian brothers known as Huda and Huda. The farm was later named Kechui Farm. That they were given first priority to purchase it by the owner in the early 1970s when they intended to move away. He was among 22 persons considered as such and he made payments on various dates between 1973 and 1975 at which point he was shown where he would settle pending final survey and issuance of formal title documents.

That the place he was shown by the departing owner is the same place they were born in and that is where they have resided all along. It is only long after his death that unscrupulous individuals took advantage of their young age and the fact that they have lost their parents to change records and managed to acquire title to their grandfather's property. The property was formally surveyed in the year 2004 and was irregularly divided into two and given registration numbers SERGOIT/KOIWOPTAOI BLOCK 10(KARO)/308 and SERGOIT/KOIWOPTAOI BLOCK 10(KARO)/309 without their knowledge.

That they verily believe that the title in the custody of the 1st, 2nd and 3rd defendants was obtained by fraud in collusion with officers at the Eldoret Lands Office hence the institution of this suit seeking the annulment thereof. The said parcel is their ancestral home wherein they were born and they have lived therein peacefully and without any interruption all their life and that it was only on 24th April, 2015 that the 1st, 2nd and 3rd defendants came with police officers and over 60 armed men and demolished their houses thereby evicting them on the basis of a court order issued in Eldoret Chief Magistrate's Court Civil Case No. 744 of 2008 between the 1st, 2nd and 3rd defendants herein and one Kipkemboi Mulwa who is unknown to them. That the said eviction was executed without any notice to them. The defendant in the said case (Kipkemboi Mulwa) is not known to any of them. They have never been served with any demand notice, court summons or eviction notice and only came to know of it upon perusing the court file after the execution thereof and that following the eviction, they are now unable to access the farm where there are growing maize crops as well as potatoes and other food crops which they have been using to feed themselves and their children. The said crops require weeding for it to grow well but they have now been denied access by persons sent by the 1st, 2nd and 3rd defendants herein.

That they are now living in the open and their wives and young children are now exposed to the harsh weather conditions as they now live in temporary structures outside the suit property. They verily believe on the advice of their advocate, Mr. Magut that the due process of the law makes it mandatory that they ought to have been duly notified of the court proceedings and even upon conclusion thereof, they ought to have been given adequate notice of the intended eviction before the same was executed to give them ample time to peacefully relocate if need be. They verily believe that the defendants' action was intended

at stealing a match on them as they know they have no legal basis for their claim to their ancestral home as the title they are holding was obtained by fraud.

The 2nd defendant sent some individuals on 16th May, 2015 to the farm with the intention of spraying the maize crop grown on 7 acres of the farm with herbicides but were restrained by their neighbours. They are apprehensive that unless restrained, they may go ahead with their illegal intention thereby putting to waste the investment of over Kshs.200,000/= in preparing the farm, purchasing farm input and planting the crop. That they have now been unfairly rendered homeless as a result of the illegal eviction.

The 1st defendant filed a replying affidavit stating that the plaintiffs herein have no *locus standi* to sue in this matter without grant of Letters of Administration if the allegation is that they claim on account of deceased persons and state that the suit parcel belonged to a company called Karo Farm Ltd, which sold the said parcel of land in 2005 and the respondents purchased a portion thereof which was identified as Sergoit/Koiwoptaoi Block 10 (Karo)/308.

That the land in question was a settlement scheme and is not ancestral land and that they went onto the land on 24.4.2015 to remove the plaintiffs pursuant to a court order as the 2nd plaintiff is also known as Kipkemboi Arap Mulwa and was the defendant in the said case who was well aware of the court case as he was served and chose not to defend it. The plaintiffs, according to the defendants, are living on parcel No. Sergoit/Koiwoptaoi Block 10 (Karo)/309, which is their grandfather's parcel of land as partitioned by the initial owners M/s Karo Farm Ltd and the surveyors.

The defendants believe that the plaintiffs have not established any rights for the grant of an injunction because:

- (a) They claim as relatives of a deceased person and they have no grant of letters or proof of probate.***
- (b) They have not proved any legal right of ownership over property No. 308.***
- (c) They are not claiming their right to Plot No. 309 where they are living on.***
- (d) The prerequisites for the grant of an injunction have not been established.***

The plaintiffs filed a supplementary affidavit stating that contrary to the averments in the said affidavit, they have the *locus standi* to institute this suit. They have instituted this suit in their own individual capacities save that they have been in occupation of the suit land by virtue of being the grandsons of the late Kimeto Mbulwa Mungotio who purchased the land in which they were born and wherein they have lived all their lives. That they are advised by their advocate on record, Mr. Magut that under Article 40(2)(a) of the Constitution, they are entitled not to be arbitrarily deprived of any interest in or right over property. That the action taken by the 1st, 2nd and 3rd defendants to evict them without the due process of the law is utterly illegal and irregular thereby granting them the capacity to come to court for the prayers they are seeking. That the averment that they are living on the parcel of land known as SERGOIT/KOIWOPTAOI BLOCK 10(KARO)/309 is meant to mislead the court. Their efforts to trace the records regarding that parcel have been futile thereby making it clear to them that the same had been irregularly made into one parcel with parcel number SERGOIT/KOIWOPTAOI BLOCK 10(KARO)/308 with the aim of rendering them landless. That in any event, both parcels belonged to their late grandfather and that it is the entire portion that they have inhabited for over 30 years hence the insinuation that they have where they can live in is false. They do not know anyone by the name Kipkemboi Arap Mulwa. It thus follows that the orders obtained against the said Kipkemboi Arap Mulwa could not in any way have been in respect of them.

In Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, the court of appeal found that the principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled in Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof. According to the judges of the

court of appeal 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 as to call for an explanation or rebuttal from the latter.

On whether the plaintiff has established a *prima facie* case with probability of success, the plaintiffs argue that they are grandsons of Kimetto Mbulwa Mungotio who is the lawful owner of the land which has now been registered as 308 and 309 situate in Uasin Gishu County. They were evicted on 24.4.2015 due to a court order issued in Eldoret CMCC Case No. 744 of 2008 between the 1st, 2nd and 3rd defendants and one Kipkemboi Mulwa who is unknown to them. They were never served with demand notice and summons and or pleadings. The claim that the title being held by the defendants was obtained fraudulently with the officials of Karo Farm, which purchased the entire farm at a time when the plaintiffs' grandfather had already purchased it from the previous owner. The plaintiffs further argue that they are protected by Article 50(1) of the Constitution which provides for a fair public hearing before court.

The plaintiffs argue that they are likely to suffer loss that cannot be compensated in damages as they are now unable to access their farms. They are living in the open and their wives and young children are exposed to harsh weather.

On balance of convenience, the plaintiffs argue that it tilts towards granting the injunction on grounds that the plaintiffs have been in actual occupation, use and possession of the suit property which they have been raised with their families.

The defendants on their part submit that the plaintiffs have no *locus standi* to sue since they have not taken out grant of letters of administration in respect of their late grandfather Kimetto Mbulwa Mungotio (deceased) who is the purchaser of land parcel known as Sergoit/Koiwoptaoi Block 10 (Karo)/309.

The defendants argue further that the plaintiffs have failed to prove legal right of ownership over the parcel of land known as Sergoit/Koiwoptaoi Block 10(Karo)/308 which belongs to the 1st, 2nd and 3rd defendants and that the plaintiffs have not demonstrated that they are likely to suffer irreparable damage since the defendants have been in occupation since 2005. The defendants argue that the balance of convenience tilts towards dismissing the application as the defendants were not in possession of the land in dispute.

On the issue as whether the plaintiff has established a *prima facie* case with a likelihood of success, this court finds that there is a decree of the Chief Magistrate's Court at Eldoret in Civil Suit No. 744 of 2008 declaring that the land in dispute belongs to the plaintiff and an order for eviction of Kipkemboi Arap Mulwa who is claiming to be the grandfather of the plaintiffs, an allegation the plaintiffs deny. The plaintiffs' grandfather was known as Kimetto Arap Mbulwa and not Kipkemboi Arap Mulwa and therefore, it is not crystal clear that the plaintiffs' grandfather was the defendant in the Lower Court case. However, the court determined the ownership of the land in issue as belonging to the defendants and therefore, it was upon the plaintiffs to apply to set aside the judgment entered in CMCC No. 744 of 2008 on review or appeal this has not been done. The plaintiffs were the occupants of the land in dispute until they were evicted vide a court order. They ought to have either applied for review of the court order or appealed as Interested Parties who were not served with the pleadings on grounds that the matter proceeded without affording them a hearing. The court further finds that the right being asserted accrued to Mr. Kimetto Mbulwa Mungotio who is deceased. The said right to the land allegedly allocated to Mr. Kimetto Mbulwa Mungotio can only be enjoyed by the administrator of the Estate of the deceased on proof that the deceased had a right in the property. The plaintiffs have not demonstrated that they are the administrators of the Estate of the deceased to enable them commence this action. The plaintiffs have not served the farm managers who allocated the land to the defendants and therefore, their claim based on fraud by the farm managers cannot be established unless the managers of Karo Farm are enjoined. On the basis of the foregoing, the court finds that the plaintiffs have not established a *prima facie* case with a probability of success.

On the issue of irreparable loss, the court finds that the plaintiffs were evicted by virtue of a valid

court order and can be compensated with damages if they succeed in the main suit. Allowing the plaintiffs back into the parcel of land would be an infringement on the defendants' rights as they are the registered proprietors of the parcel of land. The balance of convenience tilts towards not granting the injunction as the plaintiffs are not in occupation. The application is ultimately dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE