



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 43B OF 2016

DOUGLAS MUSA MACHAGE.....PLAINTIFF

VERSUS

SAMUEL NGIGI KARURI1ST DEFENDANT

EUNICE WARIARA NGIGI.....2ND DEFENDANT

RULING

(Application to enforce an interim order of injunction; injunction issued in favour of plaintiff to maintain possession of disputed land; defendant interfering with that possession; plaintiff in this application seeking to be put back in possession and seeking police protection; application allowed)

1. The application before me is that dated 21 June 2016 filed by the plaintiff. It is an application said to be brought pursuant to the provisions of Sections 1A, 1B, 3, 3A, 63 (e) 89 and 90 of the Civil Procedure Act, Cap 21, Laws of Kenya and Order 40 Rule 10 (1) (b) and Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following principal order which is prayer (b) of the application :-

That the County Commissioner for Nakuru County, the OCPD for Nakuru Police Division assisted by all or any police officers at their disposal or under them do proceed and enter upon the land comprised in unregistered L.R No. 4815/5 and L.R No. 4815/6 each measuring 5 acres being subdivisions of L.R No. 4815/3 and eject the defendants Samuel Ngigi Karuri and Eunice Wariari Ngigi and any of their agents and servants that they might find therein and to further provide such security as might be necessary for plaintiff, his servants and workmen to enter and prepare the said lands for planting and to remain therein should they desire to do so pending the hearing and determination of the plaintiff's earlier application coming up for hearing on 13th October 2016 or until further or other orders of the court.

2. The background leading to this application is that through a plaint filed on 1 March 2016, the plaintiff filed suit against the defendants vide which he averred that he had an agreement to purchase two 5 acre portions to be excised from the land parcel L.R No. 4815/3 at the price of Kshs. 600,000/= per acre. A written agreement was made on 12 March 2011 and some payments made after which the plaintiff took possession of the land. He then started some wheat farming and he avers that he paid the whole of the purchase price and an additional Kshs. 300,000/= to facilitate the transfer to his name. It is pleaded that in April 2015, the defendants made a new demand of Kshs. 1,600,000/= which the plaintiff declined to pay.

In February 2016, the defendants rescinded the agreement. This is what prompted the plaintiff to file suit. In the suit the plaintiff is seeking orders inter alia for specific performance and permanent injunction against the defendants.

3. Together with the suit, the plaintiff filed an application seeking the following orders :-

(i) That this application be certified urgent.

(ii) That this application be heard ex-parte and service upon the defendants be dispensed with in the first instance.

(iii) That a temporary injunction do issue to restrain the defendants from charging, leasing, mortgaging, selling, transferring to 3rd parties or to themselves or in any other manner doing, dealing or perpetrating acts of waste upon land comprised in unregistered L.R No. 4815/5 and L.R No. 4815/6 being sub-divisions of L.R No. 4815/3 pending the hearing and determination of this suit or until further or other orders of the court.

(iv) That a temporary injunction do issue to restrain both defendants from interfering with the plaintiff's possession of the said parcels of land comprised in L.R o. 4815/5 and L.R No. 4815/6 being subdivisions of L.R No. 4815/3 by entering therein and damaging his trees, crops, fences , and any other developments therein or in any way whatsoever interfering with the said possession including free and unhindered access pending the hearing and determination of this suit or until further or other orders of the court.

4. On 31 March 2016, the application was due for inter partes hearing but Mr. Opar for the defendants sought an adjournment. I allowed the adjournment but issued interim orders in terms of prayers (iii) and (iv) of the application pending inter partes hearing, and owing to the congestion of the diary, I gave the date of 13 October 2016 for inter partes hearing. I directed the interim orders to subsist to this day.

5. The supporting affidavit to this application has been sworn by one Justin Omwoyo, the farm manager employed by the plaintiff. He has averred that on 20 May 2016, he hired a tractor to harrow the land to prepare it for planting of wheat. As he was doing so, a person who introduced himself as the grandson of the defendants ordered the works to stop and threatened them with injury. Due to the security risk they vacated the land. He reported to the plaintiff who held a discussion with the parties over phone. On 23 May 2016, the plaintiff instructed him to proceed and continue with cultivation. He then instructed the workers to proceed to the land at around 11.00 am. At around 3.00 pm he was called on phone and informed that the same grandson had come and ordered them to vacate the land and they left. At 6pm he went to the land and saw a tractor cultivating the same land and when he inquired, he was informed that they were doing so under the instructions of the defendant. He then reported the incident at Ngata Police Station.

6. In his replying affidavit, the 1st defendant deposed inter alia that at no time did he sell the suit land to the plaintiff. He also deposed that he does not know Justin Omwoyo and has never seen him. He stated that he had a lease agreement with the plaintiff which expired in December 2015 and that the plaintiff has no right to cultivate the land. He stated that on 20 May 2016, he found that the plaintiff had hired a tractor to harrow the land which to him was an act of trespass. He asked them to stop the works. He stated that it was him who informed the plaintiff's agents to stop their activities and not his grandson. He denied having communicated with the plaintiff in any way and also denied having instructed a tractor to plough the land. He stated that he is aware that there are interim orders in the suit but the order does not allow the plaintiff to do anything on the land. He has averred that it is in fact the plaintiff who has disobeyed the order of court and the same should be vacated.

7. I took in the submissions of both Mr. Obutu for the applicant and Mr. Opar for the respondent. Mr. Obutu submitted inter alia that the court made an order restraining the defendants from the land and that the respondents have admitted interference. Mr. Opar in his reply, submitted that the court only allowed prayer 3 of the application which only stopped the sale, charge or lease of the land. He submitted that the

defendant has not done any of these things. He submitted that the interim order did not allow for any party to continue ploughing the land. Mr. Obutu in rejoinder submitted that prayer 4 of the application allowed for the plaintiff to be in possession and the defendant was not to interfere with such possession.

8. I have considered the matter. What I have is a fairly unusual application, for the plaintiff does not in any way seek for the defendants to be cited for contempt, or to have them punished for disobeying an order issued by the court. Ordinarily, this is the sort of application that one would encounter in the event of an alleged disobedience of a court order. What the plaintiff wants is an order that he be put in possession, and the order be enforced by the police, pending the hearing of the application for injunction which is scheduled for 13 October 2016.

9. Although Mr. Opar submitted that the court only allowed prayer 3 in the interim, this is clearly not the position, for I did allow prayers 3 and 4 of the application pending inter partes hearing. Prayer 4 dealt with the possession of the land by the plaintiff and I did grant the same. In essence the defendants were barred from interfering with the plaintiff's possession and use of the land. There was no order issued barring the plaintiff from using the land. Once in possession it was upon him to utilize the land as he wished including ploughing it. I really do not see how the defendants can justify their actions in stopping the plaintiff from cultivating the land. They are lucky that the plaintiff did not move to cite them for contempt. But as I said, the application before me is not one for contempt and it is not wise for me to make any final determinations on that question.

10. That said, the order is clear that the plaintiff do remain in possession pending hearing of the application for injunction inter partes. The defendants are warned not to interfere in any way with the plaintiff's use and possession of the 10 acres of land under litigation pending the hearing of the application for injunction. If they do so, they risk being cited for contempt and risk being put in jail or paying a hefty fine. It is a path they are best advised not to take.

11. The plaintiff has of course cited security concerns hence the need for police protection. I see no reason why I should deny him this. In essence, I do allow the application as drawn. The plaintiff will also have the costs of the application.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms. Alwala holding brief for Mr. Opar for defendants/respondents

No appearance on part of M/s S. M Omae for plaintiff/applicant

C/Assistant: Janet

MUNYAO SILA

JUDGE

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