



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 26 OF 2016

THOMAS OMBOTO OMBOTO PLAINTIFF

VERSUS

ERICK MAIKO OMWORO 1ST DEFENDANT

LIVINGSTONE OMWORO 2ND DEFENDANT

DICKSON MOTANYA MAIKO 3RD DEFENDANT

RICHARD N. MAIKO 4TH DEFENDANT

ELIZABETH KEMUNTO MAIKO 5TH DEFENDANT

RULING

1. Before me for determination is the plaintiff's Notice of Motion dated 18th February 2016 brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules and Sections 1A and 1, 63 (e) and 3A of the Civil Procedure Act. The plaintiff seeks inter alia an order:-

“That a temporary injunction do issue restraining the defendants, their servants, workers and/or assigns from in any way dealing and/or interfering with the plaintiff's quiet possession, use and/or enjoyment and to stop unlawful interfering, trespassing, ploughing, planting, plucking tea leaves, subdividing, wasting and/or to do any act that is inconsistent with the plaintiff's right as the registered owner of the land parcel namely LR No. Mekenene/Mogusii/Block I/02 pending the hearing and determination of the main suit.”

2. The plaintiff further seeks an order that the OCS Mekenene Police Station do supervise compliance of the order once the same is issued. The application is supported on the grounds set out on the face of the application and on the supporting affidavit sworn by the plaintiff/applicant on the 18th February 2016. Inter alia the plaintiff avers that he is a bonafide member of Kamasega Farmers Co-operative Society land buying society and that as a shareholder of the society he was allocated land by the society and was on or about 24th November 2015 issued with a title deed in regard to **LR No. Mekenene/Mogusii/Block I/02**. The plaintiff asserts that he is presently the registered owner of the said parcel of land and therefore entitled to exclusive use and possession.

3. The plaintiff states that the defendants have without any colour of right started interfering with his quiet possession of the suit land by engaging in acts which are inconsistent with the plaintiff's rights as the registered proprietor of the suit land. The plaintiff avers that the defendants have started interfering

with the plaintiff's crops growing on the suit land claiming ownership of the same and specifically the defendants do not want the plaintiff to continue plucking the tea on the suit land. The plaintiff claims the defendants' acts are unlawful and tortious and urges that the court steps in to restrain the defendants from engaging in the unlawful acts.

4. The 5th defendant, Elizabeth Kemunto Maiko swore a replying affidavit dated 18th April 2016 on her own behalf and on behalf of the other defendants in opposition to the plaintiff's application. The 5th defendant states that she was married in 1969 to her late husband Livingstone Maiko who died on 17th September 1981 as per the death certificate annexed marked "**EKM6**". The 5th defendant further states her late husband was duly licensed to farm tea by the Kenya Tea Development Authority (KTDA) as per annexures "**EKM1 a, b and c, 2 and 3**" and that the tea was grown in the plot owned by her late husband in Kamasega Farmers Co-operative Society Limited as per "**EKM4**". The defendants state they have all along resided on their plot at Kamasega Farmers Co-operative Society Ltd and that is where their tea is. The 5th defendant states that she and her deceased co-wife the late Martha Moraa Maiko have tea in the suit land which they deliver to Nyansiongo Tea Factory Co. Ltd as per annexures "**EKM 5 and 7**". The defendants state that they are yet to be issued with a title deed to their land by Kamasega Farmers Co-operative Society Ltd and state they were surprised when the plaintiff/applicant came to their land with people to pluck their tea. The defendants state it is their tea and that they reside on the land where the tea is growing and depend on the tea for their livelihood. The defendants aver that the plaintiff has not demonstrated that he owns any tea and/or he had planted any tea or is a shareholder of Kamasega Farmers Co-operative Society Limited and hence his application should be disallowed.

5. The plaintiff filed a further affidavit sworn on 10th May 2016 in response to the 5th defendant's replying affidavit. The plaintiff states that he and others were adjudged to be members of Kamasega Farmers Co-operative Society Ltd following arbitration proceedings and decree in Nairobi HC Misc. Application No. 153 of 1987. The plaintiff acknowledges the 5th defendant's husband Livingstone Maiko was a shareholder of Kamasega Farmers Co-operative Society Ltd and was therefore entitled to be allocated a plot. The share certificate annexed as "**EMK4**" shows Livingstone Maiko was allocated Plot No. 9 yet according to the plaintiff (paragraph 14 of further affidavit) the said Livingstone Maiko was allocated Plot No. 8 while Plot No. 9 was allocated to one Sandimu Kebata. The plaintiff avers he was allocated Plot No. 2. The plaintiff further acknowledges the 5th defendant's husband planted tea bushes beyond his allocated acreage although society members were not supposed to plant permanent crops like tea bushes or build permanent houses until subdivision was done. The plaintiff argues the defendants ignored this requirement and are now in flagrant trespass onto the plaintiff's parcel of land.

6. The parties filed written submissions to ventilate their respective positions. In the filed submissions the plaintiff applicant takes the position that the plaintiff having acquired title to his parcel of land namely **Mekenene/ Mogusii/Block I/02** he was vested with absolute rights of ownership in terms of sections 24 and 25 of the Land Registration Act, 2012 and that his title is absolute and indefeasible and can only be challenged on grounds of fraud or misrepresentation to which he is shown to have been a party or if it is shown the title was unlawfully or illegally acquired as provided under Section 26 (1) (a) and (b) of the Land Registration Act, 2012. The plaintiff further contends that by reason of being the registered owner of the suit property he has demonstrated a prima facie case to entitle him to the grant of the orders sought. The plaintiff refers the court to the case of **Ahmed Ibrahim Suleiman & Another –vs- Noor Khamisi Sureir [2013] eKLR** to support his submission that as the registered owner of the suit property his title is indefeasible and further that the defendants acts constitute trespass which cannot be condoned.

7. The defendants in their written submissions contend that the plaintiff has not demonstrated a prima facie case as he has not shown the defendants are in occupation of his land. The defendants submit that the plaintiff has not annexed a survey map or a surveyor's report to show the location of his parcel of land on the ground and therefore there is no basis to allege the defendants have trespassed onto his land. The defendant further submits that the plaintiff has not shown any evidence that the tea bushes were planted by him.

8. Having reviewed the application and the affidavits in support and in opposition and further having

considered the submissions by the parties the issue to determine is whether the plaintiff has satisfied the conditions for grant of a temporary injunction as established in the case of **Giella –vs- Cassman Brown & Company Ltd [1973] E.A 358** where the court stated that an application for a temporary injunction must show:-

i. That he has a prima facie case with a probability of success; and

ii. That unless the injunction is granted he stands to suffer irreparable harm which cannot be compensated by an award of damages.

iii. That in case the court is in doubt in regard to any of the two antecedent conditions the court may determine the matter on the consideration of the balance of convenience.

9. In the present matter the plaintiff has shown he is the registered owner of land parcel number **Mekenene/Mogusii/Block 1/02** and has exhibited a copy of the title deed in respect of the same. The plaintiff admits the husband of the 5th defendant was a member of the Kamasega Farmers Co-operative Society Ltd and thus he was equally entitled to be allocated land by the society and that he was actually allocated land save that the plaintiff states the defendants were allocated **Plot No. 8** while the share certificate the defendants have exhibited shows their plot to be **number 9**. The plaintiff states following subdivision of the society land he was allocated **land parcel No. 2** and he avers that the defendants plot is far from this plot. It is not disputed that the defendants have planted tea bushes that they have been plucking. The issue is whether these tea bushes are in the plaintiff's plot and/or in the defendants' parcel of land. The plaintiff has not furnished any survey map and/or a surveyor's report to show the positioning of the respective plots on the ground. The court having considered all the material and evidence presented before it cannot at this stage make a determination whether or not the defendants are in occupation of the plaintiff's parcel of land and/or whether indeed the tea bushes planted by the defendant and which they have been plucking are in the plaintiff's parcel of land. The court will require evidence at the trial to make that determination.

10. The plaintiff has not claimed that he is the one who planted the tea bushes that the defendants have been plucking. The plaintiff did not tender any evidence to the effect that the tea bushes belong to him. He merely asserts that the tea bushes are on land that is registered in his name. The plaintiff's evidence is that he has had a long ranging dispute with the society which has gone through arbitration and the High Court where he and others were acknowledged as members of Kamasega Farmers Co-operative Society Ltd. The plaintiff was only issued with a title deed for land parcel **Mekenene/Mogusii/Block I/02** on 3rd November 2015. On their part the defendants were as far back as 10th November 1977 issued with a share certificate that indicated **Plot No. 9** was allocated to Livingstone Maiko (5th defendant's deceased husband). If they have been occupying the said plot 9 since then and have planted tea bushes therein they cannot be in trespass simply because the plaintiff may have been issued with a title over the area where **Plot 9** stood before the subdivision. The subdivision and allocation of the society land for issuance of titles ought to have had a criteria and presumably persons ought to have been allocated land where they had settled and/or developed. It is not clear what criteria the society used in the subdivision and allocation of land for purposes of issuing titles. Even if the subdivision meant that persons had to be relocated, that ought to have been done in a structured manner where the affected parties ought to have been given appropriate notices. The evidence of how the subdivision and allocation was done is not before the court and the court will not speculate.

11. The injunction as prayed for by the plaintiff is in the nature of a mandatory injunction as it seeks to injunct the defendants from carrying on activities on the disputed land which they have hitherto carried on as of right before the plaintiff got registered and was issued with a title deed. If the injunction is granted in the terms sought it would virtually mean ordering for the eviction of the defendants. In my view this is not a plain and clear case where a mandatory order of injunction can be granted at the interlocutory stage. See the cases of **Kenya Breweries Ltd –vs- Washington Okeyo [2002] 1 E. A 109** and **Locabail International Finance Ltd –vs- Agro Export & Another [1986] 1 ALL ER 901** where the courts laid the principles to be considered in granting a mandatory injunction at the interlocutory stage.

12. This court in the case of **Ahmed Ibrahim Suleiman and Another –vs- Noor Khamisi Surur [2013] eKLR** granted a mandatory injunction at the interlocutory stage as the court was satisfied the case was plain and clear and in the court's view the defendants could not have had any answer to the plaintiff's claim. There were also special circumstances which made the grant of a mandatory injunction meritorious and necessary. I cannot say the same in regard to the present case. In the instant case there are issues/matters that require further explanation which can only be done at the trial. In the circumstances of the instant case the ends of justice would require that the parties be ordered and directed to maintain and observe the prevailing status quo where the defendants remain in possession and continue plucking the tea until the suit is heard and determined on its merits.

13. I accordingly decline the plaintiff's application dated 18th February 2016 and in place thereof make an order for the parties to maintain and observe the obtaining status quo on the terms set out hereinabove. Each party shall bear their own costs for the application.

14. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 14th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Soire for Nyawencha for the 1st to 5th defendants

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE