



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 328 OF 2013

ALLAN GEORGE NJOGU & 2 OTHERS.....PLAINTIFFS

VS

MARY NJOKI MUYA & 5 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles upon which the court will determine an application for injunction;)

The application before me is that dated 30 May 2013. It is an application for injunction filed by the plaintiffs pursuant to the provisions of Order 40 Rule 1,2,3,5 and 10 of the Civil Procedure Rules, 2010. The plaintiffs want the defendants restrained from interfering with the land parcels known as Eldoret Municipality Block 14/1180 -1191. It will be noted that the suit premises are 12 plots in number. It is the plaintiffs' case that these properties belong to them and that the defendants are trespassers. It is for this reason that they want the defendants restrained, pending hearing and determination of this suit.

The principles upon which the court will determine an application for injunction were spelt out in the case of *Giella v Cassman Brown (1973) EA 358* and I need not re-invent the wheel. First, the applicant has to demonstrate a prima facie case with a probability of success; secondly, the court needs to be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and finally, if in doubt the court will determine the matter on a balance of convenience.

The first stop, inevitably, is to make a preliminary assessment of the plaintiff's case. Where the defendant has responded by filing defence and/or a replying affidavit, such assessment needs to be made bearing in mind the response of the defendant.

This suit was instituted by way of plaint. In the plaint, the first two plaintiffs are adults of sound mind whereas the 3rd plaintiff is a limited liability company. It is averred that the plaintiffs are the registered owners of the suit premises. It is further averred that the defendants have "in the recent past to date" continued to interfere and/or trespass on the plaintiffs' parcel of land and that the defendants have continued to disrupt the plaintiffs' operations. It is pleaded that owing to the invasion by the defendants, the plaintiffs have filed a criminal complaint vide OB No. 36/24/9/12 and that there are pending criminal proceedings before the Eldoret Chief Magistrates Court, being Criminal Case No. 405 of 2012. The main prayers in the plaint are a declaration that the defendants are trespassers on the plaintiff's property, a prohibitory injunction to restrain the defendants from further interference, a prohibitory injunction to restrain the defendants from damaging the reputation of the plaintiffs, general damages, and costs.

The supporting affidavit to the application for injunction has been sworn by one Jackson Oduor Okwaro who has averred that he is one of the applicants in the matter. It is however clear that he is not one of the

plaintiffs or applicants, but I have seen that in the Verifying Affidavit, he has described himself as a Director of the 3rd plaintiff company. Inter alia it is deponed that the defendants are trespassers with no colour of right. It is further deponed that on 24th September 2012, the defendants entered the suit properties and committed malicious damage and stealing, hence the report to the police, and the said criminal proceedings. It is further averred that the defendants have put up structures, and are cultivating crops, and have demarcated the land to suit themselves, and that they are burning bricks on the properties without regard to the rights of the plaintiffs.

The six defendants upon being served entered appearance through the law firm of M/s Kariuki Mwaniki & Company Advocates. However, a Statement of Defence was only filed for the 1st, 2nd, 4th, and 6th defendants. A replying affidavit to oppose the application for injunction was sworn by Thomas Obare, the 6th defendant, on his own behalf, and on behalf of the 1st, 2nd and 4th defendants. It will therefore be noted that the 3rd and 5th defendants have filed no defence and have not responded to the subject application.

In the Statement of Defence, it is contended that the 1st, 2nd, 4th and 6th defendants have been dwelling on the land parcel Eldoret Municipality Block 14/1163 between the years 1976 and 1986 to date. It is stated that at no time have they interfered or trespassed on the land parcels Eldoret Municipality Block 14/ 1180-1191. They have also pleaded that they have never been prosecuted in any criminal case. They have denied occupation of the suit lands and have denied that they are engaged in any brick making activities. They have asserted that they have been dwelling and cultivating their respective parcels of land.

In the Replying Affidavit, Mr. Obare, has repeated that they have not trespassed on the suit land and has deponed that they have been in lawful occupation of the suit properties for a long duration of time dating back to the year 1976. He has denied any engagement in brick making activities on the land. He has averred that the dwelling houses, properties and crops on the land belong to them. He has further deponed that the plaintiffs have failed to enjoin all the people who occupy the land who are said to be more than one hundred.

Mr. Cheruiyot for the plaintiffs, urged me to allow the application for injunction. He argued that nowhere in the replying affidavit has it been stated that the defendants are the legal owners of the suit properties. He pointed out that in the Statement of Defence, it is asserted that the 1st, 2nd, 4th and 6th defendants have never been in occupation of the suit properties. He further argued that although in the replying affidavit, it is stated that they have been in possession since the year 1976, there is no claim before court for adverse possession.

Mr. Mwaniki for the defendants, was of the opinion that the plaintiffs have not demonstrated a prima facie case. He averred that although trespass is alleged to have been from 24 September 2012, the defendants have been in possession since the year 1976. He further averred that the claim is on eleven parcels of land (though it is actually 12), and that the 6 defendants cannot be in occupation of the 11 parcels. He averred that the situation on the ground is different from what is depicted.

It is with the above opposing positions that I need to determine this application for injunction.

The case of the plaintiffs is that they are registered owners of the suit properties. Several copies of Certificates of Official Search were annexed to the supporting affidavit of Mr. Okwaro. I have looked at them. They are ten in number. The properties Nos. 1181-1184, 1187-1191, are registered in the name of the first plaintiff. The property No. 1186 is registered in the name of the second plaintiff. No copies of official search or certificates of title for the properties Nos. 1180 and 1185 were annexed. I have also not seen any certificates of official search or any evidence that the 3rd plaintiff owns any of the suit properties.

I do not think that given the material before me, the 3rd plaintiff has demonstrated that it has any interest in the suit properties and has therefore failed to demonstrate a *prima facie* case with a probability of success. The company will have to prove its case on merits without the benefit of an order of injunction.

As for the 1st and 2nd plaintiffs, they have shown that they are registered owners of the properties Nos. 1181-1184 and 1186-1191. I have however not seen any annexure to support the allegation that they have made a report to the police station or that any of the defendants are facing criminal prosecution as alleged. That said, the Statement of Defence before me is that the 1st, 2nd, 4th, and 6th defendants reside in the land parcel Eldoret Municipality Block 14/1163. The case of the 1st, 2nd, 4th and 6th defendants is that they do not reside on the suit properties. This of course, seems to be contradicted by the replying affidavit, where it is alleged, that they have been residing on the suit properties since 1976. In my view, parties are bound by their pleadings, and I will take the position in the defence, as being the position of the 1st, 2nd, 4th and 6th defendants. That position is that the 1st, 2nd, 4th and 6th defendants do not reside on the suit properties, and that they have no interest in it, their interest being in the property No. 1163 which property is not in issue in this case. The 1st, 2nd, 4th and 6th defendants have therefore not demonstrated any competing interest in the suit properties, which is recognizable, and which may be protected by law. Neither do they have any counterclaim to assert any right on the suit properties. If they had any competing interest, I would have had to gauge that interest with the plaintiffs' interest, to determine whether in the circumstances, it would be wise to grant the injunction sought. But since no interest has been demonstrated by the 1st, 2nd, 4th and 6th defendants, and given that the 3rd and 5th defendants have not opposed the subject application, I see no reason why I ought to decline this application for injunction.

I therefore allow the application for injunction, but only in favour of the 1st and 2nd plaintiffs, and bar the defendants from interfering with the land parcels Eldoret Municipality Block 14/1181, 1182, 1183, 1184, 1186, 1187, 1188, 1189, 1190 and 1191. Since I do not know who the owners of the properties Eldoret Municipality Block 14/ 1180 and 1185 are, I decline to issue any order on these two properties. Neither can the 3rd defendant, who has not demonstrated any ownership of any of the suit properties, be entitled to the benefit of this order.

As to costs, the same shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JANUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mrs N. Bor for the plaintiff's/applicants

Mr. J.N. Njuguna holding brief for Mr. Kariuki Mwaniki for the defendants/respondents.