



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 254 OF 2013

SIMON K. METO & 2 OTHERS PLAINTIFFS

VS

AUSTIN MURGOR & 3 OTHERS..... DEFENDANTS

(Application for injunction; allegations that defendants obtained land to public utilities in a settlement scheme fraudulently; defendants contending that land was properly allocated; doubt as to the merits or demerits of the case; balance of convenience; there being a cattle dip, school and dispensary on the land; status quo ordered to prevail)

RULING

The application before me is that dated 14 November 2013 filed by the plaintiffs. The application is brought under the provisions of Sections 3 and 3A of the Civil Procedure Act, CAP 21, and Order 40 Rules 1 and 4, of the Civil Procedure Rules and Section 13 of the Environment and Land Court Act, 2011. The plaintiffs are seeking orders to have the defendants ordered to re-connect water to a community cattle dip, and orders of injunction to prevent the defendants from interfering with the land and records pertaining to Plot No.1 Ndalat Settlement Scheme. The grounds upon which the application is founded are inter alia that there is a community cattle dip in the suit land but that its source of water was disconnected by the defendants forcing the community to use donkeys to draw water every week for the cattle dip and that the plaintiffs and the entire community who use the cattle dip stand to suffer irreparable loss.

The application is supported by the affidavit of the 1st plaintiff and is opposed by the defendants.

The principles that apply in an application of this nature were set down in the case of ***Giella v Cassman Brown (1973) EA 358***. The applicant must demonstrate a prima facie case with a probability of success, demonstrate that they stand to suffer irreparable loss, and if the court is in doubt, the court will decide the application on a balance of probabilities. Inevitably, a preliminary assessment of the case of the plaintiffs needs to be made.

This suit was commenced by way of plaint by three plaintiffs. In the plaint, it is pleaded that the plaintiffs have filed this suit on their own behalf and on behalf of the entire community in Kaptebee Ndalat Extension Scheme. It is pleaded that in the Ndalat Settlement Scheme, two plots being plot Nos. 459 and 460 were earmarked for public utilities. It is claimed that these two plots were corruptly grabbed by the late Charles Murgor who amalgamated the two with his plot No. 550, and the three plots came to be identified as plot No.1 in Ndalat Extension Scheme. It is stated that on the plot stands a primary school, a dispensary and shopping center, and a cattle dip, that are used by the community. In the suit, the plaintiffs want a declaration that the two plot Nos. 459 and 460 which are within Plot No. 1, are public utilities and they also want the defendants permanently restrained from these two plots.

The defendants are sons and administrators of the estate of the late Charles Murgor.

In their statement of defence, the defendants denied all allegations that the land was corruptly handed over to the late Charles Murgor. They contended that the utilities in the land were established by the late Charles Murgor on his private land and were never meant to be public property. They have averred that the only public property is a plot No. 507. It has also been pleaded that the plaintiffs have no right to assert a claim on behalf of the public as that is the mandate of the Attorney General. It is further contended that claims of corruption are handled by the Ethics and Anti-Corruption Commission and that the plaintiffs have no mandate to pursue the same.

To oppose the application, the defendants filed both grounds of opposition and a replying affidavit. They more or less repeated the averments in the defence and annexed a letter from the Ministry of Lands dated 16 August 2012. I will come back to this letter a little later.

I have considered the material in support and in opposition to this application for injunction. Let me first deal with the contentions of the defendants that the plaintiffs have no capacity to file this suit. It is apparent that the plaintiffs are not only suing on their own behalf but also on behalf of the public. I would not wish to delve too deeply into this argument at this stage of the proceedings, but on the surface of it, and from the material before me, I do not see any law that can bar the plaintiffs from agitating the rights that they are agitating. I also see no law that bars the plaintiffs from alleging any act of corruption and for founding a case based on corruption. Indeed, no law was cited by the defendants that can bar the plaintiffs from pursuing this action. But as I stated earlier, I would not wish to go too deeply into this argument at this stage of the proceedings, as I have before me, fairly limited material.

Both plaintiffs and defendants annexed various correspondences from the Ministry of Lands. I have looked at the correspondences. The undisputed fact that comes out of these correspondences is that the three plots, namely Plot Nos. 459, 460 and 550 were at some point separate plots. It is not in contention that the three plots were later amalgamated into one plot named Plot No. 1 and allotted to the late Charles Murgor. The plaintiffs however contend that the allocation of the plots number 459 and 460 to the late Charles Murgor was improper as according to them, these were public utility plots. It is very difficult for me at this stage of the proceedings to come to a proper conclusion as to who is correct and who is wrong. I would rather leave that after hearing the merits of the case. Following the principles of *Giella v Cassman Brown*, I am uncertain as to the strengths of both the plaintiffs' and defendants' case and I think for the purposes of this application, I would rather make a decision based on the balance of convenience.

It is not contested that on the disputed land, there is a primary school, a dispensary, and a cattle dip. These have been operating for a long time. I think it is most convenient that the operations of these utilities do continue until a final determination on merits is made as to who owns or ought to own the parcels of land in issue. The plaintiffs in this application want water reconnected to the cattle dip and they are ready to cater for the costs of laying the pipes and of operating the dip. I do not see what harm the defendants will suffer if the dip is allowed to operate in this way. I also think that it will be prudent, for purposes of conserving the subject matter of the suit, that I issue an order of injunction barring the defendants from sub-dividing, selling, leasing, charging or in any other way encumber or interfere with the land in dispute which was formerly comprised in the land identified as plot Nos. 459 and 460. The status quo prevailing on this disputed area of land ought to prevail until the final determination of this suit. The costs of this application shall be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF MARCH 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

Mr. Arap Mitei for Plaintiffs/applicants

Mr. E.M. Balongo for defendants/respondents