



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 42 OF 2014

MARIGAT GROUP RANCH & 3 OTHERS.....PLAINTIFFS

VS

JOSHUA KISENGER.....DEFENDANT

(Application for injunction; principles to be applied; plaintiff being a group ranch; allegation that defendant is not a member of the group ranch and is a trespasser; defendant being on the land by virtue of a licence granted by a member of the ranch; whether in the circumstances defendant can be said to be a trespasser; balance of convenience; defendant having been on the suit land for a while and having developed it; balance of convenience in favour of defendant; application for injunction disallowed)

RULING

Before me is an application dated 14 February 2014 filed by the plaintiffs. In this application, the plaintiffs seek to restrain the defendant from entering, encroaching, constructing, developing, or interfering in any manner with the whole or part of all that parcel of land known as Baringo/Marigat/1 (the suit land) pending hearing and determination of this suit. The application is therefore an application for injunction and is indeed brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure rules.

The 1st plaintiff is a group ranch registered under the provisions of the Land (Group Representatives) Act, CAP 287, Laws of Kenya. The 2nd, 3rd and 4th defendants are its officials. In this suit, commenced by way of plaint, they have averred that between June 2013 and January 2014, the defendant illegally and without any colour of right, consent or lawful authority of the plaintiffs, entered and started constructing temporary and permanent dwelling structures on part of the suit land. It is stated that the defendant is not a member of the group ranch and has not sought the authority or consent of the plaintiffs before entering or dealing with the suit land. It is averred that because of the defendant's actions, the plaintiffs have been denied access to the portion of the suit land for purposes of carrying out sub-division. The plaintiffs have thus sought orders for a declaration that the defendant's occupation of the suit land is illegal and amounts to trespass. They have also sought orders of permanent injunction to restrain the defendant from dealing with the suit land.

The supporting affidavit to this application has more or less repeated the averments in the plaint. Various documents including the title deed, letter of consent to sub-divide the land and a demand letter asking the defendant to vacate the suit land are annexed.

The defendant upon service of summons and application, filed defence and a replying affidavit to oppose the application. It is his position that he is a cousin to one Samwel Kipkulei Kimibei (deceased) who is a registered member of the group ranch. He has averred that the late Kimibei invited him to settle with him

on his parcel, within the group ranch, and that he settled there with his sister Kangato Kimoru, his niece Carren Chemusian and his nephew David Kimoru. He has stated that they have been on the group ranch since the year 2001 with the full knowledge of the plaintiffs. He has further stated that he is in the process of filing a succession cause for the estate of Kimibei. It is his position that the structures in issue were put up by himself in the year 2001. He has further contended that the 2nd to 4th plaintiffs have mismanaged the group ranch and have been developed an interest in the portion occupied by the defendant because it is in a strategic area. To his replying affidavit, he inter alia annexed a copy of the register of members of the group ranch.

Mr. Mutei for the applicant in urging me to issue the injunction, contended that pursuant to the provisions of Section 8 of CAP 287, the plaintiffs as the representatives of the group ranch have mandate to deal with the suit land. He averred that there is no demonstration that the defendant is a member of the group ranch and that his claim that he entered the land in the year 2001 is unsupported. He stated that there is nothing to show that he is a beneficiary of Kimibei (deceased). He argued that the plaintiffs have demonstrated a prima facie case and that the balance of convenience tilts in having the interests of the 333 members of the ranch preserved. He averred that the members stand to suffer irreparably.

Mr. Kipkenei for the defendant opposed the application. He stated inter alia that the defendant is the proposed administrator of the late Kimibei. He questioned when a person can be declared a trespasser as it was his position that the defendant has been on the suit land since the year 2001. He averred that the defendant lives on the land with the other relatives of the deceased and that the balance of convenience tilts in favour of the defendant.

I have considered the pleadings, the documents in support of the application and in opposition. I have also considered the law, in particular the provisions of CAP 287. The application before me is one of injunction. The principles applicable to an application of this nature were set down in the case of ***Giella vs Cassman Brown (1973) EA 358*** which was cited by both counsels. First the applicant needs to set out a prima facie case with a probability of success, secondly, the court will not always issue an injunction unless irreparable loss is demonstrated, and finally, if in doubt, the court will consider the balance of convenience. I see no need to re-invent the wheel and I will stand guided by the above principles.

In order to determine whether an applicant has set out a prima facie case, inevitably, a preliminary assessment has to be made of his case. This assessment has to be made in light of the defence of the defendant, where one has been filed.

In a nutshell, it is the case of the plaintiffs that the defendant is not a member of the group ranch and is therefore a trespasser as he does not have the permission of the plaintiffs to be on the land. Pursuant to Section 8 of CAP 287, the 2nd to 4th plaintiffs as the representatives of the group ranch are entitled to file suit for and on behalf of the group ranch, so their capacity to sue, is not in doubt. The position of the defendant is that he is on the land by virtue of being a relative of one Kimibei (deceased) who is in the register of members. Both parties are in agreement that the late Kimibei is in the register of members.

It is not unusual in our society for a person to reside with his relatives. I do not see why I should doubt the version of the defendant that he was invited to live on the suit land by Kimibei, one of the members of the group ranch. Kimibei is now deceased, but that does not mean that he did not leave behind relatives and dependants. Inevitably, the relatives and dependants of Kimibei will reside on a portion of the suit land which Kimibei was residing on and/or utilising. Thus in as much as the defendant is not a member of the group ranch, it does not mean that he can never set foot on the suit land. The immediate family of Kimibei do not seem to have any problem with the defendant being on the suit land and have raised no complaint about his presence. I am not at this stage of the proceedings, based on the material before me, comfortable, in declaring that the defendant is a trespasser. Neither have I been given any evidence that the defendant has obstructed the plaintiffs from sub-dividing the suit land to the members or that he has interfered with the occupation of other members.

On the other hand, it may be that the defendant is residing and utilizing a portion which may end up not being among the areas allocated to Kimibei. Both parties have presented facts which may be in support

of their positions, but which cannot be determined with finality, at this stage of the proceedings. It is probably best that I decide the matter on a balance of convenience. In my view, the balance of convenience lies with the defendant who has been resident on the suit land and has developed structures on the same. I am, at this stage of the proceedings, unable to bring myself to barring him from being on the land, which from the material before me, he seems to have been using for a while with no complaint from the family of Kimibei.

That said, I think the 2nd to 4th defendants as representatives of the group ranch need to move with speed to have the individual portions of members determined so that the wrangles within the ranch are brought to an end once and for all.

For the reasons above, I dismiss this application. The costs will be costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. Mutei for the plaintiff/applicant

Mr. Kipkenei for the defendant/respondent