



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 492 OF 2013

BONIFACE ODERO SIMANI.....PLAINTIFF

VS

HERMAN SHIBITI.....1ST DEFENDANT

ENOCK MUSIEGA.....2ND DEFENDANT

DAVID AMIKOLAS SHIBITI.....3RD DEFENDANT

CHIEF LAND REGISTRAR UASIN GISHU COUNTY.....4TH DEFENDANT

(Application for injunction; principles to be applied; plaintiff claiming to have purchased the suit land and that the registration of 2nd defendant as owner was done fraudulently; 2nd defendant also claiming to have purchased the suit land and to have obtained proper title to it; competing positions of the parties; best to decide the matter on a balance of convenience; balance of convenience in favour of the 2nd defendant who is in possession; status quo ordered to be maintained and order of inhibition issued)

RULING

This suit as originally filed on 28 October 2013, was against one defendant Herman Shibiti. The plaintiff in the original plaint pleaded that on 28 April 2009, he bought from the defendant the land parcel Eldoret Municipality Block 21 (Kin'gon'go)/ 4698 which land measures 0.2023 hectares. He pleaded that upon purchase, he moved into the said land and developed a school and church known as "Bread of Life Christian." He further pleaded that in the years 2012 and 2013, the defendant and/or his agents without justification started trespassing into the said land. He asked for a permanent injunction to be issued against the defendant. Simultaneously with the plaint, the plaintiff filed an application for injunction. The defendant did not oppose the application and I allowed it on 20 November 2013.

On 27 January 2014, the plaintiff filed an amended plaint. In the amended plaint, the plaintiff has added three more defendants. He has also added a claim for the land parcel Eldoret Municipality Block 21 (Kin'gon'go) / 4697. It is his case that on 5 December 2013, he entered into an agreement with the 1st defendant for the purchase of the said land and that he paid a consideration of Kshs. 550,000/=. He has pleaded that an application for Land Board consent was also signed on the same day and that he has been in occupation of the said land since the year 2009 and that he has built a school and church. He has pleaded that the 2nd and 3rd defendants clandestinely processed title and registered the 2nd defendant as proprietor without following due process. It is his position that the registration of the 2nd defendant as proprietor was done fraudulently. In his amended plaint, he has added a claim for cancellation of the title

of the 2nd defendant.

Together with the amended plaint, the plaintiff filed an application for injunction. He has sought that the defendants be restrained from occupying or interfering with the land parcel No. 4697. In his supporting affidavit, the plaintiff has deponed that the registration of the 2nd defendant as proprietor was done fraudulently and that as a consequence, the 2nd and 3rd defendants are facing criminal charges before the Eldoret Chief Magistrate's Court.

The 2nd defendant filed a Statement of Defence and a Replying Affidavit to the subject application. He has deponed that he got registered as proprietor properly having purchased the land for kshs. 1,000,000/=. He also deponed that he is not aware of any criminal charges.

It is with the above rival positions that I need to determine this application.

The principles upon which a court is guided in applications of this nature were set down in the case of ***Giella v Cassman Brown (1973) EA 358***. First, an applicant has to establish a prima facie case with a probability of success; secondly, the court ought 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, decide the matter on a balance of convenience.

In this case, the position of the plaintiff is that he bought the suit land from the 1st defendant and that the registration of the 2nd defendant as proprietor was done fraudulently when already there was a caution in place. The position of the 2nd defendant is that due process was followed before he became registered as proprietor. Both have given arguments and tendered documents that support their respective positions. Given these opposing positions, I would not wish to pronounce myself, at this stage of the proceedings, as to which party has set down a prima facie case. I would rather leave that to be determined at the hearing of the suit.

It is best in my view, that this application be determined on the basis of the balance of convenience. I had directed the parties to agree on a valuer to write a report on the status of the land. I have the valuation report with me. The report states that the property is developed with a semi-permanent residential house and an incomplete external ablution block. It is stated that the property is let out to a monthly tenant. It would appear from the documents before me, that it is the 2nd defendant who put up this structure. It is therefore the 2nd defendant in possession of the suit land. I think it is best that that status do obtain pending the hearing and determination of this suit.

I therefore make the following orders :-

- (1) That the status quo on the suit land be maintained. The status is that the 2nd defendant is in possession and that there is a semi-permanent structure and an incomplete ablution block. Save for completing the ablution block, let there be no other developments on the suit land.
- (2) The 2nd defendant can continue utilizing the suit land pending the hearing and disposal of this suit.
- (3) The plaintiff should not interfere with the possession of the 2nd defendant of the suit land unless with the authority of the 2nd defendant.
- (4) I issue an order of inhibition, inhibiting the registration of any disposition in the register of the land parcel Eldoret Municipality Block 21 (King'ong'o)/ 4697.
- (5) The costs of this application shall be costs in the cause.

It is so ordered.

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

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. D.R. Omboto present for the plaintiff/applicant.

Miss Opinde present for the 2nd defendant/respondent.