



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 420 OF 2013

DANIEL KIMELI KIPRONO & ANOTHER.....PLAINTIFF

VS

HOSEA K. KEMBOI & 2 OTHERS.....DEFENDANT

(Application for injunction; plaintiffs evicted from suit land by defendants; defendants purporting to have been executing an eviction order; eviction order issued in a matter in which plaintiffs were not parties and was in respect of a different parcel of land; eviction conducted when the beneficiary of the decree had died; prima facie case; whether plaintiffs have demonstrated a prima facie case; application allowed)

RULING

The plaintiffs filed this suit principally seeking orders of permanent injunction to restrain the defendants from evicting them from the land parcel Turbo West/Osorongai/Block 1 (Chepterwai)/3 (the suit land). Simultaneously with the suit, the plaintiffs filed an application for injunction to restrain the defendants from evicting them from the suit land, pending hearing and determination of the main suit. It is the application for injunction which is the subject of this ruling.

The case of the plaintiffs is that they are sons and administrators of the estate of one Moses Kiprono Bett, under whose name the suit land is registered. The land measures 101.6 acres. It is averred that in the year 1963 or thereabouts, the late Moses Bett, together with Kipkemboi Busienei and Maritim Kiptui, jointly purchased a land parcel described as L.R No. 4793/2. The three then sub-divided the land into three portions which came to be registered as Turbo West/Osorongai Block 1 (Chepterwai)/1 , 2 and 3.

A dispute arose as to the acreages and boundaries between Kipkemboi Busienei and Moses Bett which resulted in a suit Eldoret HCCC No. 61 of 1997. Moses Bett died in the year 2008, and it is said that the suit abated one year thereafter, as there was no substitution. The plaintiffs who are sons of Moses Bett, continued living on the suit land. It is the plaintiffs' case that on or about 17 July 2013, the defendants with the help of Ronboy Auctioneers, the 3rd defendant, alongside police officers, raided the plaintiffs' homestead in the suit land, and unlawfully demolished houses and destroyed property worth about Kshs. 2,100,000/=, without any legal right or court order.

It is averred that the 1st and 2nd defendants, through the 3rd defendant, were purporting to execute an eviction order issued in the year 2007, in a suit Eldoret CMCC Award No.1 of 2002, which suit was between Kipkemboi Busienei as plaintiff, and Maritim Kiptui as defendant. It is said that both Kipkemboi Busienei and Maritim Kiptui are deceased. The plaintiffs state that they were not a party to the said suit and neither was their father Moses Bett. It is further averred that both parties to that suit are now deceased. The plaintiffs have further faulted the eviction on grounds inter alia :-

(a) that the defendants had no legal authority or capacity to carry out the eviction of the family of the plaintiffs.

(b) that the suit in which the orders had been obtained had since abated and no action could legally be undertaken without an order reviving the suit or an order of substitution.

(c) that the orders of eviction were never issued against them or against their father Moses Bett who was not a party to the suit.

(d) that the eviction was undertaken contrary to the Auctioneers Act and Rules.

The plaintiffs have averred that the defendants have threatened to come back and evict them hence the need for an injunction.

Upon being served, the 1st and 2nd defendants entered appearance and filed defence. They also filed a preliminary objection in respect of the subject application. The 3rd defendant, so far, has not entered appearance to this suit and has not filed any response to the application.

In their statement of defence, the 1st and 2nd defendants have denied that the plaintiffs reside on the suit land. They have averred that the plaintiffs live on the land parcel Turbo West/Osorongai Block 1 (Chepterwai)/1 and that they have encroached and trespassed into that land. They have admitted attempting to evict the plaintiffs pursuant to an eviction order issued in Eldoret CMC Award No. 1 of 2002. It is stated that the plaintiff in that case was Kipkemboi arap Busienei and that he died on 3 March 2013 when the orders of eviction had already been issued. They have contended that the plaintiffs were validly evicted. It is further stated that the issues herein have already been determined in the case Eldoret CMC Award No. 1 of 2002 and that this suit is *res judicata*. In their preliminary objection, the 1st and 2nd defendants have raised five issues which I can condense into two being :-

(a) That they have been improperly enjoined to the suit as they have not taken out letters of administration to represent their late father.

(b) That the matter is *res judicata*.

I directed that the preliminary objection be argued together with the application, and there being no replying affidavit nor grounds of opposition, I will take it that the 1st and 2nd defendants have contested this application through the preliminary objection.

In applications of this nature, the court needs to be convinced that the applicant has demonstrated a prima facie case; be alive to the tenet that an injunction will not normally be granted unless the applicant stands to suffer loss which cannot be compensated by an award of damages; and finally, if in doubt, the court will decide the matter on a balance of convenience. This principles were espoused in the case of **Giella v Cassman Brown (1973) EA 358** and I need not re-invent the wheel. I will however add that the essence of an application for injunction is to enable the court make a pronouncement on how best the subject matter of the suit ought to be preserved, pending the hearing and determination of the suit.

I understand the case of the plaintiffs to be that they reside on the suit land which is registered as Turbo West/Osorongai Block 1 (Chepterwai)/3 (parcel No. 3). They aver that the defendants have attempted to illegally evict them from that land. No title was annexed in respect of that land parcel, but it seems as if there is no dispute, so far, that the proprietor of the land is one Moses Bett (deceased) and that the plaintiffs are administrators of his estate. The plaintiffs contend that their eviction from this land parcel is illegal. The 1st and 2nd defendants on the other hand, argue that the plaintiffs occupy the land parcel No. Turbo West/Osorongai Block 1 (Chepterwai)/ 1 (parcel No. 1) and not parcel No.3, and that they, (the defendants), were entitled to evict the plaintiffs from the said land as they held eviction orders issued in the case Eldoret CMC Award No. 1 of 2002.

Although the 1st and 2nd defendants did not file any replying affidavit, I have gleaned from the list of

documents that they intend to rely on the proceedings in the case Eldoret CMC Award No. 1 of 2002, and, the decree and the order, which is said to be the eviction order that was relied upon to evict the plaintiffs. Eldoret CMC Award No. 1 of 2002 is a case that was between Kipkemboi Busienei, father of the 1st and 2nd defendants, and one Maritim Kiptui. It was not one between the 1st and 2nd defendants and the plaintiffs, or Moses Bett, the father of the plaintiffs. The land in issue was Turbo West/Osorongai Block 1 (Chepterwai)/1, and not the suit land which is parcel No. 3. The order of eviction annexed was issued on 6th November 2007, and the person to be evicted, was the defendant (Maritim Kiptui), from the land parcel No.1.

It is easily discernible that the suit Eldoret CMC Award No. 1 of 2002 did not involve the plaintiffs or their father. They were not parties to that suit. Neither were the orders of eviction directed at them. Even if they were parties, the orders of eviction were issued in the year 2007 and there needed to be filed an application for notice to show cause, pursuant to Order 22 Rule 18, since the execution was being undertaken more than one year after the issuance of the order of eviction. Moreover, the 1st and 2nd defendants could not purport to execute the decree, as their father, who was the decree holder, had died by the time the decree was being executed. The 1st and 2nd defendants needed first to have filed an application to substitute the deceased litigant before they could proceed to execute any decree. It matters not that the order of eviction was issued before Kipkemboi Busienei died. Immediately he died, proceedings had to come to a stop until substitution was undertaken, which is indeed the import of the provisions of Order 24 of the Civil Procedure Rules, 2010.

It has been argued that this suit is *res judicata*, but I do not see where this argument is coming from. The suit Eldoret CMC Award No. 1 of 2002, involved different parties and the subject matter is certainly not the subject matter in this case. That argument, at least from the material before me, must fail.

Prima facie, from the material before me, I am unable to see how the purported eviction can be justified, even if the 1st and 2nd defendants were of the opinion that the plaintiffs were resident in their land parcel, i.e, parcel No. 1. If the 1st and 2nd defendants are of the view that the plaintiffs are occupying land that belongs to them, then all they need to do is to file the appropriate suit for their eviction, and their rights will be determined in such suit. The avenue is not to engage the law of the jungle and proceed to forcefully evict the plaintiffs. In any case no material has been placed before me by the 1st and 2nd defendants that the plaintiffs are occupying their land parcel No. 1.

I am of the view that the plaintiffs have demonstrated a prima facie case with a probability of success. I do not hesitate to issue an order of injunction, barring the defendants from evicting, destroying, demolishing or threatening to evict the plaintiffs from the land that the plaintiffs occupy, irrespective of whether the defendants think that the plaintiffs occupy land parcel no.1 until the final determination of this suit. The plaintiffs had asked for an order compelling the defendants to restore the plaintiffs' homes to the state that they were in prior to the illegal eviction. I think this order is best left for the final determination of the suit. For now, I direct the plaintiffs to engage a quantity surveyor to assess the extent of the damage caused, and the amount of money that will be required to put the structures back to their original state. After the report is prepared, the plaintiffs are free to repair the houses and put them into a habitable state if they are minded to do so. If the plaintiffs succeed in the main suit, then I may make an order compelling the defendants to pay this amount in damages.

The defendants shall bear the costs of this application.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Miss Gacau of M/s Nyairo & Co Advocates present for the plaintiff/applicant

Mr. Mukabane holding brief for M/s Chebii & Co Advocates for the 1st & 2nd defendants.

3rd defendant - Absent