



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 181 OF 2014

JOSEPH NG'ANG'A.....PLAINTIFF

VS

JANE WAMBUI 1ST DEFENDANT

SAMWEL GITONGA 2ND DEFENDANT

WILSON K. GITONGA 3RD DEFENDANT

PETER MBURU 4TH DEFENDANT

RULING

(Application for injunction; principles to be applied; applicant stating that defendants are trespassers on suit land; plaintiff failing to disclose that there is an apparent relationship between himself and the defendants; Non-disclosure of material facts; matter having been mediated by elders and defendants having been allowed use of part of the land; status quo ordered to be maintained)

The application before me is that dated 3 June 2014 filed by the plaintiff. It is an application brought pursuant to the provisions of Order 40 of the Civil Procedure Rules and it seeks orders of injunction to restrain the defendants from "trespassing into, using, ploughing, or in any way dealing with the land reference number Moi's Bridge/Ziwa Block 16 (Chebarus)/ 151." Despite being served with the suit papers and the application, the defendants have neither entered appearance, nor filed a response to the said application. That does not however mean that I have to allow the application as a matter of course and I will need to be convinced that the applicant deserves the orders sought. The guidelines provided by the court of appeal in the case of **Giella v Cassman Brown (1973) EA 358**, are that a person seeking an injunction needs to demonstrate a prima facie case, and if in doubt, the court may decide the application on a balance of convenience.

The case of the plaintiff is discernible from his pleadings, the supporting affidavit to the application, and the various annexures thereto. It is not in doubt that the plaintiff is the registered owner of the suit land. He has annexed a copy of the title deed to demonstrate this. The land measures 3.863 Hectares which in my rough estimation, is just under 10 acres. In his pleadings, the plaintiff has averred that the defendants have trespassed into his land and have proceeded to cut trees thereon and waste the land without his permission. What the plaintiff has not disclosed in his pleadings, and which is material, is that the plaintiff had a relationship with the 1st defendant, and that the other defendants could be his sons. This I have discerned from the supporting affidavit. It is stated that the 1st defendant stayed with the plaintiff for some time and ran away before they got married, only for her to come back accompanied by the other defendants (as her children) and claim a share of the land.

The plaintiff has not disclosed when the 1st defendant ran away, or when she came back. These details, I think are material to this case. I have seen some minutes of a meeting that was held on 18 February 2011 by some elders, apparently in an attempt to reconcile the parties. In that meeting, it was resolved that the five sons of the plaintiff be allowed the use of a total of 5 acres and the plaintiff be allowed use of the rest, estimated to be 5 acres. It therefore seems to me, that the parties have been feuding for a while, and that some sort of compromise was reached, albeit a non-binding compromise. The plaintiff has however failed to disclose all this material to court and has failed to inform the court, whether the parties followed the resolution reached, or what exactly the position on the ground has been since the year 2011 when this compromise was reached.

Any party seeking an order of the court, needs to disclose all material facts, so that the court can arrive at a just decision. If certain material facts are concealed, then the court has to question why these facts are not being disclosed, and for that reason, can in its discretion, refuse to grant any orders sought. I feel strongly that the plaintiff is guilty of non-disclosure of material facts and that in my view, casts doubt as to his case. Being in doubt, I will decide the application on a balance of convenience. The balance of convenience in my view lies in having the status quo preserved. The status quo is discernible from the minutes of 18 February 2011, which is that the defendants occupy roughly 5 acres of the suit land. I can only assume that this has been the prevailing position since the year 2011, as I have no other material to the contrary before me. I think it is best that this position do prevail pending the hearing and determination of this suit.

I therefore make the following orders -

- (1) That the status quo prevailing on the land parcel Moi's Bridge/Ziwa Block 16 (Chebarus)/151 be maintained pending hearing and determination of this suit.
- (2) That the status quo is that the defendants occupy 5 acres of the suit land.
- (3) That costs of the application shall be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. A.K. Chepkwony present for the plaintiff/applicant.

Defendant/respondents – absent.