



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 29 OF 2014

MUSA KIPTAI MULWOAPPLICANT

VS

NGOBITWA FARMERS COOPERATIVE SOCIETY LTD..... 1ST DEFENDANT

ALBINA J. KIMONGE.....2ND DEFENDANT

JOSEPH KIPROTICH RUTO.....3RD DEFENDANT

ANTHONY CHEBOIBOCH..... 4TH DEFENDANT

(Application for injunction; principles to be applied; plaintiff arguing that he is entitled to certain lands which were allocated to the 2nd-4th defendants by the 1st defendant; both parties claiming the said lands; on the facts more appropriate to decide the application on a balance of convenience; balance of convenience lying with the plaintiff who has all along been in possession of the suit lands; application for injunction allowed and in addition order of inhibition issued).

RULING

The application before me is an application dated 3 February 2014, filed by the plaintiff. It is an application for injunction through which the plaintiff wants the defendants restrained from interfering with the plaintiff's possession of the land parcels Soy/Soy Block 10 (Navillus) /2287,2288,2289 and 2290 pending hearing and determination of this suit.

The case of the plaintiff as set out in the plaint and in the supporting affidavit to this application, is that he purchased shares from the 1st defendant, a land buying company, and as at the year 2000 he was entitled to 11 acres of land out of which 1 acre was deducted to cater for public utilities. In the year 2005, he purchased additional shares which entitled him to a further 10 acres. He was then shown the total acreage of 20 acres which he proceeded to fence, develop and utilize. In the year 2011, he went to check on his title deed, only to find that his acreage has been reduced to 15 acres comprised in the land parcel No. 2290 and that the balance of 5 acres had been divided into three parcels, namely, parcels numbers 2287, 2288 and 2289, and registered in the name of the 1st defendant. He placed a caution, but this, according to him was mysteriously removed, and the three land parcels transferred to the 2nd, 3rd and 4th defendants respectively. It is his case that the 2nd to 4th defendants are not entitled to these parcels of land. He has stated, that all along, it is he who has been in occupation of these parcels of land. That is the reason that the plaintiff wants the defendants restrained from these three parcels of land.

The 1st defendant did not file any response to the said application and has yet to file a Statement of Defence. The 2nd-4th defendants however filed a joint statement of defence and have responded to the subject application. It is their position that they are properly entitled to the parcels of land numbers 2287,

2288, and 2289. They have stated that they are fully paid members of the 1st defendant and that they did pay money for land. They have pointed out that they have titles to the land which they have displayed in their replying affidavits. They have averred that when they moved to occupy their respective parcels of land in February 2014, the plaintiff denied them entry. They have asked that the subject application be dismissed.

Mr. Kipkenei for the plaintiff urged me to allow the application for injunction, whereas Mr. Cheptarus for the 2nd,3rd and 4th defendants, opposed the application. Mr. Aseso for the 1st defendant stated that in principle he is not opposed to the application for injunction. I have considered the subject application and the rival arguments and I take the following view of the matter.

To be entitled to an injunction, one needs to demonstrate a prima facie case, and if the court is in doubt, it will decide the matter on a balance of convenience. It is the plaintiff's position that he is entitled to 20 acres of land which are comprised in the land parcels No. 2287,2288,2289 and 2290. He has stated that he has all along been in possession and occupation of these parcels. It is his case that the 1st defendant fraudulently transferred these three parcels of land to the 2nd to 4th defendants. I would have hoped that the 1st defendant will file a reply to shed light as to how the land was allocated to the 2nd to 4th defendants rather than to the plaintiff. But as I have earlier pointed out, no replying affidavit was forthcoming from the 1st defendant and neither have they filed a Defence. Their counsel has no objection to the application for injunction, which essentially means that they are not opposed to the 2nd to 4th defendants being restrained from taking possession of the suit land, pending hearing of the suit.

I cannot tell from the reply of the 2nd to 4th defendants why it is them and not the plaintiff who were allocated the parcels No. 2287, 2288 and 2289. They have merely stated that they are fully paid up members and deserved to be given land, which they were later allocated by the 1st defendant. I can see from their replying affidavits that they have never been in possession of the three parcels of land. They did attempt to take possession in February 2014, but they were stopped by the plaintiff.

It is not possible for me to make a decision at this stage of the proceedings, and from the material before me, who is properly entitled to the three parcels of land No. 2287, 2288 and 2289. I will therefore refrain from making a pronouncement as to who between the plaintiff and defendants has laid out a prima facie case. I prefer that I decide this application on the balance of convenience. In my opinion, the balance of convenience lies in favour of the plaintiff who has been in possession and occupation of the said parcels of land. I therefore hold that occupation and possession of the land parcels Soy/Soy Block 10 (Navillus) / 2287, 2288, 2289 and 2290 remain with the plaintiff pending hearing and determination of this suit. The plaintiff should however not make any new structures or developments outside normal farming activities on the suit land.

So as to preserve the suit lands, I also stop the defendants from selling, charging, leasing, or in any other way encumbering the land parcels Soy/Soy Block 10 (Navillus) /2287, 2288 and 2289. I also make an order of inhibition inhibiting the registration of any disposition in the register of the land parcels, Soy/Soy Block 10 (Navillus) /2287,2288 and 2289.

The plaintiff will however file an undertaking as to damages within 7 days from today.

As to costs, the same shall be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. R.K. Kipkenei present for plaintiff/applicant.

Mr. M.J. Omusundi present for 1st defendant/respondent.

Mr. J.K.C. Cheptarus present for the 2nd – 4th defendants/respondents.