

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 331 OF 2013

PHYLIP KIMELI KOECHPLAINTIFF

VS

DAVID KIBUNGEI KOECH & ANOTHER.....DEFENDANT

RULING

The application before me is that dated 14 June 2013 filed by the plaintiff. The said application has been brought vide the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010. The applicant is seeking orders of interlocutory injunction to have the 1st defendant restrained from leasing, constructing or in any other manner deal with the land parcel Miteitei/ Kamali/ Block 4/ 317 (Taptengelei) pending hearing and determination of this suit. The said application is supported by the affidavit of the plaintiff.

Despite being served, the defendants have not filed any response to the application. Neither have they entered appearance nor filed Defence to this suit. The application is therefore uncontested by the defendants. Although there is no contest, it does not mean that the application must automatically succeed. I still need to be convinced that the applicant has a prima facie case with a probability of success; 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 case on a balance of convenience.

The starting point is inevitably the pleadings of the plaintiff as elaborated in the supporting affidavit to the application. The plaintiff's case is that the 1st defendant, who is his brother, unlawfully registered himself as the sole proprietor of the suit land yet they were supposed to be registered as joint owners with the plaintiff. The plaintiff and 1st defendant held shares jointly in a Co-operative Society. The Society seems to have distributed land to its shareholders. The case of the plaintiff, as I understood it, is that since they held the shares jointly, then the land ought to have been registered jointly with himself and the 1st defendant as proprietors. However, the 2nd defendant (the Lands Registrar, Nandi District) registered the 1st defendant as sole proprietor leaving out the name of the plaintiff. The plaintiff has pleaded allegations of fraud against both defendants. He has pleaded that the 1st defendant acted fraudulently in registering himself as sole proprietor and also in failing to disclose that the land ought to be jointly registered with the plaintiff. On the part of the 2nd defendant, it is pleaded that the Lands Registrar, acted fraudulently in unlawfully registering the 1st defendant as sole proprietor when the register of Taptengelei Farmers Co-operative Society shows clearly that the land was to be jointly owned.

I have considered the pleadings and the supporting affidavit which have not been controverted by the defendants. I have seen a copy of the register of the Society. The same shows that Plot No. 317 is supposed to be jointly owned by the plaintiff and 1st defendant. I have also seen a letter from the District Land Registrar, Nandi District, calling for the title deed of the 1st defendant to be cancelled since it was issued by mistake. The letter, which is dated 24 October 2007 asks the 1st defendant to return the title deed as the same was to be registered in the names of two proprietors.

The 1st defendant has either leased out the land to Safaricom Ltd (a mobile telephone company) or is in the process of so leasing out the land. The plaintiff has averred that Safaricom Ltd are constructing on the suit land with intention to put up a mast.

I think the plaintiff has furnished evidence to demonstrate that prima facie the suit land was supposed to be registered in the joint names of himself and the 1st defendant. There is also evidence that the suit land may be wasted or may be utilized in a manner that the plaintiff is not comfortable with. This may lead to

the plaintiff suffering irreparable loss.

In the premises, I am of the view that this is a fit case to issue an injunction. I therefore allow this application and issue an order of injunction restraining the 1st defendant from leasing, constructing or causing to be constructed any structure on the suit land pending the hearing and determination of this case. I also issue an order of inhibition, barring the registration of any dispositions on the suit land pending the hearing and determination of this case.

The costs of the application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.K. Mokuu holding brief for M/s S.K. Kitur for the plaintiff