



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 68 OF 2013

STEPHEN KIPKOSGEI SAMOEI & 61 OTHERS.....PLAINTIFFS

VS

WILLIAM CHEPKIYENG & 21 OTHERS.....DEFENDANTS

(Suit by plaintiffs seeking to have defendants permanently restrained from dealing with several parcels of land; application for injunction filed seeking to restrain defendants from the suit land pending hearing of the suit; principles upon which the court will determine an application for injunction; parcels of land being subject of adjudication; no material presented as to how far adjudication process has gone; no consent from the adjudication officer; prima facie case; whether plaintiff has laid out a prima facie case; application dismissed)

RULING

Before me is a Motion dated 20/2/2013 brought inter alia under the provisions of Order 40 Rules 1,2 and 3 of the Civil Procedure Act, and Section 2 of the Land Act, Act No. 6 of 2012. The applicants seek the following substantive orders :-

THAT this honorable court be pleased to grant an order of temporary injunction restraining the defendants/respondents by themselves, their agents and/or servants from trespassing, encroaching onto, entering, occupying, disposing of, alienating and/or obtaining registration, conveyance, or issuance of titles in respect of all those parcels of land known as Lower Cheptebo 58,59,60,61,66,73,74,80,81,82,83,84,84,88,89,93,94,95,96,97,99,100, which parcels form part and parcel of the plaintiffs/applicants larger community land described as Lower Cheptebo Plot No. 43 measuring 400 acres pending the hearing of this suit and thereafter objection proceedings under the Cheptebo Land Adjudication Section which is under demarcation and survey stage.

The application is founded inter alia on the grounds that :-

(a) The plaintiffs/applicants who are numerous in number are owners of all that Community parcel of land known as Lower Cheptebo Plot No. 43 measuring about 400 acres, by virtue of customary trust.

(b) That on 15th May 2012, the defendants/respondents purported to cause sub-division of the said community land into several parcels and have encroached onto the said land.

(c) That the said community parcel of land Lower Cheptebo Plot No. 43 is currently under the demarcation and survey stage under the land Adjudication and Settlement office Elgeyo/Marakwet County described as Lower Cheptebo Adjudication Section pursuant to the provisions of Land Adjudication Act.

The application is supported by the affidavit of Stephen Kipkosgei Samoei who is one of the plaintiffs herein. The defendants have not filed any response to the application and indeed have not even entered appearance to this suit.

This does not however mean that the application must automatically be allowed. This is an application for injunction and I must be satisfied that the principles laid out in the case of *Giella vs Cassman Brown* (1973) EA 358, have been met before I can issue the injunction. In the said case, it was stated that before issuing an order for injunction, the court needs to be satisfied that a prima facie case has been laid out; be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and if in doubt, decide the application on a balance of convenience.

The starting point is inevitably the plaintiffs' case. This is a suit instituted by way of Plaint by two named plaintiffs being Stephen Kipkosgei Samoei and Philip Katui and 60 Others who are not named. The supporting affidavit to the application clarifies that this is a representative suit. In the plaint it is pleaded that the plaintiffs are the owners of land described as a community parcel of land known as Lower Cheptebo Adjudication Plot No. 43 measuring about 400 acres by virtue of prescription and customary right. It is pleaded that the said land is currently under demarcation and survey stage before the District Land Adjudication and Settlement Office of Keiyo and Marakwet Districts. It is further pleaded that on or about 15th May 2012, the defendants caused the said land to be sub-divided into illegal portions ranging from parcels Nos 58,59,60,61,66,73,74,80,81,82,83,84,84,88,89,93,94,95,96,97,99,100. The prayers sought by the plaintiffs as drafted are as follows :-

(a) The plaintiffs claim against the defendants is for an order of this Honourable Court permanently barring the defendants jointly and severally by themselves their agents and/or servants form (sic) encroaching onto sub-dividing alienating obtaining registration or issuance of Title Deeds and/or in any way interfering with the plaintiff's use possession and/or ownership of all that parcel of land described as Lower Cheptebo Adjudication Section Plot No.43 measuring 400 acres or thereabouts to endure (sic) until the Adjudication process that is on going at the time of this suit is completed.

(b) Costs of this suit.

In the supporting affidavit, it is deponed that the plaintiffs own the suit land and that on 15th May 2012, the defendants did encroach onto the said land purportedly on allegation of having sub-divided the same into 22 smaller portions. It is averred that the plaintiffs have held several meetings in an effort to resolve the matter without success. It is further deponed that the defendants have encroached into the said land and have fenced the same. The deponent has annexed several photographs said to be of the suit land to demonstrate the encroachment and fencing of the same.

Mr. Mukabane for the plaintiffs argued that the plaintiffs are entitled to an injunction. He stated from the bar that the Land Adjudication Officer has made final the adjudication register and has delivered it to the Lands Registrar who is in the process of issuing titles to the defendants. He stated, again from the bar, that since the adjudication register has been delivered and declared final, the plaintiffs' only remedy lies in court.

I have considered the pleadings, the application alongside the supporting evidence, and the submissions of counsel.

The plaintiffs from their own pleadings acknowledge that the said land is land under adjudication. The Land Adjudication Act, Chapter 284, Laws of Kenya, has an elaborate procedure with regard to the adjudication and issuing of titles to land that is hitherto unadjudicated. In summary, there is an Adjudication Officer who is in charge of adjudication. He is appointed by the Minister. Under him, are demarcation officers, survey officers and recording officers. These officers demarcate, survey and record interests within the adjudication areas. The adjudication officer together with the District Commissioner of the area appoint an Adjudication Committee for the area under adjudication. Every person who considers himself to have an interest in land within the adjudication section makes his claim to the recording officer and points out his boundaries to the demarcation officer. If there are two or more

conflicting claims to an interest in land, and the recording officer is unable to resolve the conflict, this dispute is submitted to an adjudication committee. The adjudication committee is meant to listen to the conflict and issue a decision. If the committee is unable to reach a decision on a matter before it, it shall refer the matter to an arbitration board. A person affected by a decision of the committee may also make a complaint to the executive officer of the committee and the executive officer is mandated to refer the complaint to the arbitration board. The arbitration board hears and determines the matters referred to it by the committee.

The adjudication officer prepares what is termed as an adjudication register. This comprises the demarcation map and the adjudication record. When the adjudication register is completed, the adjudication officer is inter alia supposed to give a 60 days notice for the inspection of the adjudication register. Any person who is of the view that the adjudication register is incorrect may make an objection to the adjudication officer in writing within 60 days of the publication of the notice for inspection. The adjudication officer is empowered to determine the objection. Any person aggrieved by the determination of an objection may within 60 days of the determination appeal to the Minister. After determination of all objections the adjudication register is inter alia forwarded to the Chief Land Registrar alongside any list of appeals. The Land Registrar then causes the registration of the parcels of land. Where there is an appeal, a restriction is to be made and registered on the subject land and is to endure until the determination of the appeal. Appeals are determined by the Minister and his decision is final. On such determination, the register may be altered in accordance with the determination. When all appeals have been determined the Director of Land Adjudication certifies that the adjudication register has become final.

Under Section 30, no person is to institute civil proceedings, except with the consent of the adjudication officer, concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final. If a person is aggrieved by the refusal of the adjudication officer to give consent, he may appeal against the refusal within 28 after the refusal, in writing to the Minister, whose decision shall be final.

Now, no evidence has been tabled that the adjudication register has become final. Indeed, it is not clear from the material tabled before me, how far the adjudication process has gone. It is impossible for me to tell whether, given the provisions of Section 30 above, the plaintiffs are entitled to commence these proceedings. It was incumbent upon the applicants to demonstrate how far the demarcation and adjudication process has gone. They also needed to demonstrate whether they raised concerns before the adjudication officer, the adjudication committee, the arbitration board, and the Minister concerned, and if so, what those decisions were. Most importantly, it was incumbent upon the plaintiffs to demonstrate that they are entitled to commence these proceedings, either because they have been given consent by the adjudication officer to do so, or that consent of the adjudication officer is unnecessary because the adjudication register is complete. It is not in doubt that the land is under adjudication and therefore it was imperative for the plaintiffs to provide the said material. Neither has any evidence been tabled to demonstrate that the defendants are the persons upon whom the so called sub-divided parcels have been vested upon. I cannot assume that the subject parcels of land are vested in the defendants without any proof being provided.

In the absence the necessary material, I cannot say that the plaintiffs have demonstrated a prima facie case with a probability of success.

If I am wrong, and I have to decide the matter on a balance of convenience, and if the position as claimed by the plaintiffs is that the defendants have taken over the land and fenced off the same because they have been vested with the land by the adjudication officer, then the balance of convenience, in my view, is in favor of the defendants.

In view of the above, I have little option but to dismiss this application. Since the defendants have not filed anything so far, I make no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. Magut of Ms A.K. Chepkonga & Co for the plaintiffs.

N/A for defendants who have not entered appearance.