



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 256 OF 2013

EVANS MAIRURA OMWENGA.....PLAINTIFF

VS

DANIEL C. CHEBET.....DEFENDANT

RULING

The application before me is the motion dated 18 April 2013 filed by the plaintiff. It is an application inter brought under the provisions of Order 40 Rules 1, 2 ,and 3 of the Civil Procedure Rules. The applicant seeks orders of injunction against the defendant to restrain him from trespassing, occupying, utilizing and or in any other manner adversely interfere with the plaintiff's land parcel Eldoret Municipality/ Block 14/783 pending the hearing and determination of this suit. The application is opposed by the defendant.

This being an application for injunction, I stand guided by the principles laid out in the case of *Giella v Cassman Brown (1973) EA 358*. First I need to be satisfied that the plaintiff has laid out a prima facie case with a probability of success, secondly, be alive to the tenet that an injunction will not normally be granted unless damages will be an inadequate remedy; and finally if in doubt, decide the application on a balance of convenience.

The first step is of course to determine whether the plaintiff has laid out a prima facie case. This inevitably will be determined by a preliminary assessment of what the plaintiff has pleaded as supported by the facts deponed in the supporting affidavit.

The case of the plaintiff is that he is the registered owner of the land parcel Eldoret Municipality/Block 14/ 783 (the suit land). It is pleaded that the defendant is the immediate and contiguous land property neighbor of the plaintiff. It is averred that in the year 2003, the defendant requested the plaintiff to allow him to graze his cattle on the suit land until such time that the plaintiff would need it back. It is averred that in July 2012, the plaintiff noticed that the defendant had erected a stone wall on the road frontage of the suit land without the plaintiff's permission and upon inquiry, the defendant claimed that he had purchased the said land. The plaintiff has pleaded particulars of fraud against the defendant inter alia, that he knowingly and dishonestly entered into a sale agreement over the suit land; that he executed transfer documents over the suit land; that he presented transfer documents with a view of securing registration of the said land; and that he constructed buildings and a fence with a view to dispossessing the plaintiff. The plaintiff in his prayers has asked for a declaration that he (plaintiff) is the lawful owner of the suit land; has sought a permanent injunction to restrain the defendant from interfering with the suit land; mesne profits and general damages for unlawful encroachment into the suit land.

The affidavit in support of the application has annexed a copy of the certificate of title which indicates that the plaintiff is the leasehold proprietor of the suit land. The averments in the plaint are also more or

less repeated. There is a further affidavit which in my view puts the dispute in good perspective. In the further affidavit, the plaintiff has deponed that in July 2012 he noticed a wall had been constructed over the suit land. He then inquired from the defendant and the defendant stated that he had bought the land. On 8/8/2012, the plaintiff was called to the Eldoret Criminal Investigations Department and it emerged that the defendant had supplied the police with a sale agreement dated 22 July 2004. That sale agreement is between the defendant, as purchaser, and one Paul Kibor Kemboi, as vendor. It is on the basis of that sale agreement that the defendant is laying claim to the suit land.

In his replying affidavit, the defendant has deponed that he has been in peaceful occupation of the suit land since the year 1984 with the full consent of Paul Kibor Kemboi, whom he recognizes as the registered owner of the suit land. The defendant has deponed that he thereafter purchased the suit land from the said Paul Kibor Kemboi through the agreement of 22/7/2004. He has asserted that he has indeed been paying rates in the name of Paul Kibor Kemboi. He has denied being given permission to occupy the land by the applicant since it was Paul Kemboi who gave him consent. He has stated that the applicant is a total stranger to him and has refuted that the plaintiff is the owner of the suit land. He has contended that there is investigation going on at the Eldoret CID offices to determine how the plaintiff obtained title to the suit land. He has deponed that the title of the plaintiff was obtained fraudulently. He annexed a copy of the initial lease which indicates that a lease was issued to the said Paul Kibor Kemboi. He also annexed a copy of a transfer of land instrument and an affidavit from Samson Owaga a police officer attached to the CID, Eldoret.

Mr. Nyachiro for the applicant urged me to allow the application for injunction. He stated that the plaintiff is the registered owner of the property having become registered in the year 1996. He contended that in the year 2004 when the defendant entered into a sale agreement with Paul Kibor Kemboi, Paul Kemboi was not the owner of the suit land. He stated that no evidence has been tabled that as at 2004 Paul Kemboi was the registered owner. On the averment by the defendant that the matter is pending before the CID Eldoret, Mr. Nyachiro pointed out that the nature of the complaint filed had not been elaborated. Turning to the agreement itself, Mr. Nyachiro averred that the same is a nullity as it is not witnessed. He also pointed out that neither is the purported transfer of the suit land witnessed.

Mr. J.K. Kiplagat for the defendant in opposing the application, relied on the sale agreement and further stated that the plaintiff has been on the suit land since the year 1984 and has made improvements on the property and is in possession. He averred that there is investigation going on over the suit land as to how the plaintiff got title. His view was that the application of the plaintiff is premature since the matter is under investigation by the police.

I have considered the application for injunction. There is no doubt that the plaintiff is the registered owner of the suit land. From the certificate of lease, I can see that he became so registered on the 19 June 1996. It is however the case of the defendant that the plaintiff obtained the land fraudulently and that the police are investigating the plaintiff's title. It is further his case that the suit land belongs to him (the defendant) through the sale agreement of 2004.

I have seen the sale agreement. It is dated 22nd July 2004. The vendor is Paul Kibor Kemboi and the purchaser is the defendant. The purchase price is Kshs. 380,000/= and the subject matter is the suit land. The agreement is actually not witnessed and it is not clear who drew it. More importantly, there is no proof that at the time the two parties entered into this agreement, the vendor had capacity to sell the suit land. The defendant has not yet transferred the suit land into his name and no explanation has been given as to why the defendant has not attempted to effect the transfer since the year 2004 if indeed he had bought the land in the proper way. If I am to agree with the defendant, it means that the suit land is registered in the name of Paul Kemboi (since the transfer to the defendant has not been effected). However, there is no affidavit of Paul Kemboi to assert that he is the true owner of the suit land and not the plaintiff. Even the complaint that is said to have been made at the police station was not made by the said Paul Kemboi.. The purported agreement also cannot be enforced as it is not attested. Section 3 (3) of the law of contract act provides as follows :-

3. (3) No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded-

- i. is in writing;*
- ii. is signed by all the parties thereto;*

and

iv. incorporates all the terms which the parties have expressly agreed in one document; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

It follows that one cannot attempt to enforce an agreement for sale of land which has not been attested to by an independent witness. It cannot therefore be said that the defendant can assert title through a sale agreement that is a nullity. I have also seen the transfer form purporting to transfer the suit land to the defendant. The same is not attested and has no photographs or details of the parties save for their names and addresses. It is not an instrument that can transfer any interest in land.

The indifference of Paul Kemboi to the whole saga herein is rather telling. Without deciding the matter with finality, it may very well be that the defendant was conned of his money by the said Paul Kemboi. The defendant will however have opportunity to prove my instincts wrong.

As matters stand, I think the plaintiff has demonstrated a prima facie case with a probability of success. He is the registered proprietor of the suit land and as registered proprietor Section 26 of the Land Registration Act, advises me to take that fact of registration as prima facie evidence that the plaintiff is the proprietor of the suit land. The same is worded as follows

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The defendant has of course sought to show that the plaintiff's title is the subject of investigation. Simply because a person is under investigation does not make him guilty. Article 50 of the Constitution is clear that every person is innocent unless proven guilty. The competing claim of the defendant is weak at best.

In the premises, I do not hesitate to issue an order of injunction restraining the defendant from interfering with the suit land pending the hearing and determination of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF AUGUST 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. P.M. Namiti holding brief for Mr. Nyachiro for the applicant.

Mr. J.K. Kiplagat present for the respondent