



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO 387 OF 2013

ZABLON ADALO OGANGO.....PLAINTIFF

VS

ALICE MUSIMBI & 3 OTHERS.....DEFENDANTS

(Application for injunction; principles upon which the court will determine an application for injunction; case of plaintiff that defendant became illegally registered as proprietor of suit land which was originally in the name of the plaintiff; prima facie case established; application for injunction is allowed)

RULING

The application before me is the Motion dated 10 July 2013 filed by the plaintiff. It is an application for injunction brought pursuant to the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010. The plaintiff wishes to have the defendant restrained from entering, selling, transferring, leasing, charging or in any manner dealing with a land parcel described as Nandi/Kap Kangani/1466, but which must be taken to mean Kap Kangani/Kaimosi/1466, as that is the parcel number in the certificate of title. The application is opposed by the defendant who has filed a replying affidavit.

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

To determine whether a prima facie case has been laid out, it is inevitable that a preliminary assessment be made of the case of the plaintiff.

The plaintiff has pleaded that he is the registered proprietor of the land parcel Kaimosi/ Kap Kangani/1466. He has averred that on or about the 4th day of June 2008, the 1st defendant lodged a complaint with the second defendant seeking to have one acre of a parcel of land described as Kap Kangani/Kaimosi/51 transferred to her. The respondents in the claim before the Kapsabet Division Land Disputes Tribunal were Stephen Yego and Samuel Endeje. The plaintiff was not a party in the Tribunal proceedings. The Tribunal in its wisdom, made the decision that Stephen Yego should surrender 1 acre out of the land described as Nandi/Kaimosi/51 (which must be referring to the land parcel Kaimosi/Kap Kangani/51), to the 1st defendant. This decision was adopted by the Kapsabet Magistrate's Court and a decree issued on 18 March 2009. For reasons which are not very clear, the Lands Registrar of Nandi District, registered the 1st defendant as proprietor of the land parcel Kaimosi/Kap Kangani/1466 on the 14th June 2013. In his prayers in the plaint, the plaintiff wants that registration nullified, and further wants the 1st defendant permanently restrained from claiming ownership of the said land. The plaintiff also wants a declaration

that the award of the tribunal and the subsequent decree are null and void.

To the affidavit in support of the application, the plaintiff has annexed copies of title deed and certificates of official search for the land parcels Kaimosi/Kap Kangani/ 51 and Kaimosi/Kap Kangani/1466.

The 1st defendant apart from filing a replying affidavit to the application, also filed a defence and counterclaim. It is her case that she lodged a complaint with the Land Disputes Tribunal over the land which subsequently became Nandi/Kap Kangani/Kaimosi/1466. She has averred that the registration of the plaintiff as proprietor of the suit land was illegal and fraudulent and geared towards denying the 1st defendant the benefit of the decree of the decision of the Tribunal. She has stated that the land parcel Kap Kangani/Kaimosi/51 was sub-divided to create the parcel Kap Kangani/Kaimosi/1466. She has averred that the plaintiff got registered as proprietor of the suit land after she had lodged her claim before the tribunal. She has stated that the title deed that she holds is legal and that she was properly registered as proprietor. She has also raised issue about the description of the property as Nandi/Kap Kangani/1466. She has further averred that her title precedes that of the plaintiff and that the plaintiff's title ought to be cancelled.

No replying affidavit was filed by the 2nd to 4th defendants and neither did they participate in the application.

I have considered the pleadings and the divergent positions of the plaintiff and 1st defendant. I have also perused the affidavits and the documents annexed to them. I can see that the plaintiff became registered as the proprietor of the land parcel Kap Kangani/Kaimosi/1466 on 27th July 2007. I have also seen the proceedings in Kapsabet Division Land Disputes Tribunal case No. 13 of 2008. The land parcel in the said proceedings was Kap Kangani/Kaimosi/51. The Tribunal rendered its decision on 18th June 2008 and awarded the 1st defendant one acre out of the land parcel Kap Kangani/Kaimosi/51, which is not registered in the name of the plaintiff. According to a search displayed by the plaintiff, that land parcel is registered in the name of Stephen Yego who became registered as proprietor on 27th July 2007.

It therefore appears to me, subject to proof to the contrary being provided at a later stage, that the land parcels Kap Kangani/Kaimosi/51 and Nandi/Kap Kangani/1466 are two distinct parcels of land. The claim of the 1st defendant before the Tribunal was for the land parcel Kap Kangani/Kaimosi/51 and not Kap Kangani/Kaimosi/1466. From the material before me, it does not appear to be correct, as claimed by the 1st defendant, that the parcel Nandi/Kap Kangani/1466 was carved out of land parcel Kap Kangani/Kaimosi/51. The 1st defendant of course may prove otherwise at the hearing, but the material before me seems to suggest that those two parcels are separate and distinct, and still exist as such. At the time the plaintiff became registered as proprietor, the complaint before the Land Disputes Tribunal had not yet been lodged, and it is difficult for me to agree with the 1st defendant, that the plaintiff became registered as proprietor so as to defeat the decision of the Tribunal. I am still at a loss as to how the 1st defendant became registered as proprietor of the land parcel Kap Kangani/Kaimosi/1466 on the strength of a decree issued in respect of Kap Kangani/Kaimosi/51.

From the foregoing, I am of the view that the plaintiff has established a prima facie case with a probability of success, that the 1st defendant was not properly and legally registered as proprietor of the suit land. Having displayed a prima facie case, the plaintiff is entitled to the injunction sought. I therefore order the 1st defendant not to enter, remain upon, or in any other way interfere with the plaintiff's possession of the land parcel Kap Kangani/Kaimosi/1466 pending the hearing and final determination of this suit. I also issue an order of inhibition, inhibiting the registration of any disposition on the land parcel Kap Kangani/Kaimosi/1466 pending the hearing and determination of this suit.

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

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J. Kirui advocate of M/s S.K. Kitur and Co Advocates for the plaintiff/applicant

1st defendant/respondent - present (acting in person).

Mr. J.M. Ngumbi of the state Law office present for the 2nd - 4th defendants/Respondents