



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 86 OF 2002

DOUNE FARMS LTD.....PLAINTIFF

VERSUS

RICHARD SOI.....1ST DEFENDANT

JOSEPH RUNYA CHUMA.....2ND DEFENDANT

JACKSON MUTAI.....3RD DEFENDANT

CHRISTINE LABOSO.....4TH DEFENDANT

RICHARD SITIENEL.....5TH DEFENDANT

AND

BOROP MULTIPURPOSE CO-OPERATIVE

SOCIETY LTD.....INTERESTED PARTY/APPLICANT

RULING

Before me is the Plaintiff's Notice of Motion dated 18th April, 2013 and brought under **order 51 rules 1 and 3, order 40 rules 1 (a) (b), 2, 3(1), 4(1) and 10** of the **Civil Procedure Rules, section 3A and 63(c)** of the **Civil Procedure Act Cap. 21 Laws of Kenya** the following orders:-

- a. **That a temporary injunction be issued to restrain the Plaintiff (the Defendant in the counterclaim), i.e. the Doune Farms Ltd by itself, its Directors, its servants and/or agents from occupying, from taking possession, fencing, sub-dividing, felling trees, fencing, cultivating and/or in any other manner from wasting and/or intermeddling with the suit property herein i.e. all that property known as L.R. No. 9045/9 (original number 9045/7/2 Rongai comprising 173.6 acres or thereabout pending the hearing and determination of this counterclaim and/or until further orders of this honourable court.**
- b. **That costs of this application be in cause.**

The application is supported by the affidavits of **John K. Rotich**, the Chairman to Borop Co-operative

Society Ltd. The affidavits are dated 18/4/2013, 21/5/2013 and 15/6/2013. He deponed that the interested party/applicant herein has a counterclaim on record grounded on fraud against the Plaintiff regarding L.R. No. 9045/9 (original number 9045/7/2 Rongai) comprising 173.6 acres wherein the Interested Party has sought; a declaration that the transaction dated 29th November, 2000 and subsequent certificate of title issued in respect of all the property known as L.R. No. 9045/9 in the name of the Plaintiff is null and void; an order that the certificate in respect to suit land namely L.R. No. 9045/9 and registered as L.R. No. 86377 in the name of Doune Farm Ltd be cancelled; a permanent injunction to restrain the Plaintiff (now Defendant) from occupying, taking possession or in any other manner whatsoever intermeddling with all that property known as L.R. No. 9045/9 Rongai comprising of 173.6 acres or thereabout; and costs of the suit. The applicant claims that during the pendency of the counterclaim the Plaintiff herein through its directors, servants and/or agents are carrying out and intends to continue to carry out acts of fencing, sub-dividing, felling trees and cultivating the suit property with impunity which acts goes to waste the property and/or does not preserve the suit property. He further stated that the applicant's settled on the suit property; that their rights under the Constitution and the laws of the land to occupy the said parcels with their families are now threatened with infringement as they face imminent eviction.

It is the Interested Party's case that their membership have been settled on the suit land with their families since 1998, when the land was purchased. It is also said that the plaintiff is also on the suit land and that is why the Interested Party seek an order of status quo so that the plaintiff is restrained from taking possession, fencing or interfering with the property. Mr. Arusei, counsel for the Interested Party urged that they are challenging the manner in which the land was acquired. It was his submission that the members of the Interested Party cannot be compensated in monetary terms because land being a sensitive issue, no amount of money is able to compensate them and they are likely to suffer irreparably. He urged that the balance of convenience tilts in favour of the applicant because there are threats of eviction and the court should invoke **Article 159(1)** of the **Constitution** to do justice to all the parties.

Mr. Richard James Kay Muir, the Director of the Plaintiff swore two affidavits dated 8/5/2013 and 11/6/2013 in opposition to the application. He stated that the Plaintiff is the sole and registered proprietor of the parcel of land known as L.R. No. 9045/9. That sometime in 29th November, 2000, the interested party agreed to sell the property to the Plaintiff for a consideration of KShs. 14,000,000/= and the parties thereafter entered into a sale agreement which was completed. On 6th April, 2001 when the Plaintiff took possession of the property, it found the Defendants claiming ownership of the property; that the Interested Party filed HCC 1561/02, **Borop Multi-Purpose**

Co-operative Society Ltd vs Doune Farm Ltd, Sonoiya Serser, Moses K. Siongok, Joel K. Yegon, David Sonoiya, James Langat, The Commissioner Of Lands, The Chief Land Registrar and The Registrar Of Titles, seeking to nullify the ownership of the suit land; it filed a chamber summons dated 12/11/2002 seeking injunctive orders similar to the orders sought in the instant application but withdrew it on 13/2/2003; the Interested Party filed another application on 14/7/2003 but abandoned it on 22/7/2003 with the intention of proceeding with the substantive suit. Another application was filed on 14/5/2004, similar to the previous ones but it was not prosecuted till it was dismissed on 14/5/2004. The suit was ultimately dismissed on 17/5/2012 and similarly an application seeking to set aside the dismissal order was dismissed on 13/12/2012 and the Interested Party has preferred an appeal.

I have considered the affidavits filed by parties, the rival submissions by counsel and authorities in support thereof. The first issue raised by the plaintiff is that this application is res judicata. **Section 7** of the **Civil Procedure Act** defines what constitutes res judicata. **Mulla** on the **Code of Civil Procedure 16th Ed Vol. I** at page 279 defines res judicata as follows:-

“Res judicata by its very words means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. This section requires that there should be a final determination.”

For a matter to be said to be res judicata, it must have been considered and determined on the merits. It cannot be said that HCC 1561/02 was heard and determined on the merits because it was dismissed for want of prosecution.

The next question is whether the applicant has satisfied the requirements for grant of an injunction as prayed in this application. For an order of injunction to issue, the applicant must satisfy the conditions for grant of injunction as enunciated in **Giella v Cassman Brown Ltd (1973) EA 358**, which are:-

“(1). the applicant must demonstrate that they have a prima facie case with probability of success;

(2). The applicant must demonstrate that they will suffer irreparable harm if the order of injunction is not granted;

(3) if the court is in doubt, it will decide the case on a balance of convenience.”

On the first ground, there is no doubt that the plaintiff is the registered owner of the suit land having purchased it and has been issued with a title. The Interested Party is challenging the said sale of the land to the plaintiff alleging fraud. As pointed out by the plaintiff’s counsel Mr. Kipkoech, though the Interested Party claims that their membership are settled on the said land from which they are resisting removal, they have not demonstrated how much of the 173 acres they occupy or what each of them owns. They admit that the plaintiff is also in occupation of the land and in my view, the applicant cannot seek a blanket order of injunction to restrain the plaintiff from fencing, occupying or taking possession of the land. The orders as framed cannot be granted as the plaintiff is already in possession. The applicant should have been more specific. The other question is how come each of the applicant’s members cannot present their individual interests if indeed the land had been allocated to them as their individual rights are allegedly being infringed. The least the Interested Party should do is disclose the names of its memberships claiming the land to be theirs.

Under **Section 26 of the Land Registration Act**, a title is conclusive proof of ownership. It reads as follows:-

“26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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.”

There are indeed allegations of fraud levelled against the plaintiff in the counter claim but these can only be proved at a full hearing where the applicant will have to prove that the plaintiff was party to the fraud or that the title was obtained unprocedurally. At this stage, being the registered owner, the plaintiff has a better claim to the land more than the that of the applicant.

Will the applicant suffer irreparable loss if the orders are not granted? The Interested Party as a Co-operative Society cannot suffer any prejudice if the orders are not granted. The plaintiff has demonstrated how the applicant filed HCC 1561/02, filed three similar applications in that case but never prosecuted any of them. The case remained in court till it was dismissed on 13/12/2012, over 10 years since it was filed. Though the applicant had the opportunity to prosecute the applications none was prosecuted during the pendency of the dismissed case. In dismissing the case, the court noted that the applicant had been applying delaying tactics. An attempt to set aside the dismissal order was dismissed by J Odunga on 13/12/2012. The applicant is said to have appealed against that dismissal order. Since the appeal is still pending it is an abuse of the court process for the applicant to come before this court to try and seek the same orders via this application which it did not prosecute for 10 years. In addition the failure to prosecute the numerous applications filed in HCC 1561/02 itself is an abuse of court process. An order of

injunction is an equitable remedy and he who comes to equity must come with clean hands. In addition equity does not aid the indolent. It is clear that the applicants' hands are unclean, guilty of laches and acquiescence. Over 10 years the case has been in court, the plaintiff has not been able to fruitfully make use of the land and is suffering loss that may never be compensated in monetary terms. The court is alive to the fact that land issues are very emotive in Kenya but the court should be able to make the delicate balance between the competing interests of all the parties. As pointed out earlier, the applicants have not even demonstrated specifically what land they occupy and which the court should restrain the plaintiff from interfering with. Such an application should be specific as to the suit land. Giving a blanket order regarding the whole 173 acres is prejudicial to the plaintiff who is also on the land and it would suffer irreparably.

Where does the balance of convenience tilt? It is obvious that it tilts in favour of the plaintiff considering that the plaintiff is the owner of the land is in occupation. The court cannot overlook the applicant's conduct in the dismissed case.

For all the above reasons, I decline to grant the orders sought. The applicant should pursue the appeal and let the matter proceed to hearing so that it is determined and put to rest once and for all.

DATED and DELIVERED this 30th day of September, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Chepkurui holding brief for Arusei for the applicant

N/A for the respondent

Kennedy – Court Assistant