



REPUBLIC OF KENYA



KENYA LAW
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Jeserem & 4 others v Kiptoo & another (Environment & Land Case E017 of 2023) [2023] KEELC 19851 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E017 OF 2023
JM ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

**MONICAH JESEREM 1ST PLAINTIFF
LEAH JEPKOECH 2ND PLAINTIFF
VIOLA JEBET 3RD PLAINTIFF
MILKA JEROP TOO 4TH PLAINTIFF
JANE JEPKOECH 5TH PLAINTIFF**

AND

**WILLIAM CHEMWENO KIPTOO 1ST DEFENDANT
ELIUD B BORE 2ND DEFENDANT**

RULING

1. The Applicants filed an application dated March 14, 2023 seeking an order of temporary injunction restraining the defendants/ Respondents either by themselves, their agents, servants, employees or lessees from trespassing, encroaching, leasing, cultivating, planting, encumbering, alienating or in any way adversely dealing or interfering with the peaceful use and ownership of the plaintiff's suit parcels of land namely;
 - i. Soy/Kipsang Block 14(EMTIT)20;
 - ii. Soy/Kipsang Block 14(EMTIT)21;
 - iii. Soy/Kipsang Block 14(EMTIT)22;
 - iv. Soy/Kipsang Block 14(EMTIT)23
 - v. Soy/Kipsang Block 14(EMTIT)24;



- pending the hearing and determination of this application inter partes and thereafter the main suit.
2. They also sought an order directing the Land Registrar Uasin Gishu County through its authorized County surveyors to establish the correct boundary in respect of land parcels number Soy/kipsang Block 14(EMTIT)20-24 and Soy/kipsang Block 14(EMTIT)18 and 19.
 3. The application is anchored on the grounds set out in the Notice of Motion and the Supporting Affidavit of Jane Jepkoech (5th Defendant/Respondent) sworn on March 14, 2023.
 4. In the said affidavit, the 5th Respondent has deposed that the plaintiffs are the sisters of 1st Defendant. During her lifetime in 2016 their late mother bequeathed the plaintiffs land parcels numbers Soy/Kipsang Block 14(EMTIT)20-24 respectively and the same were registered in their names. Copies of the plaintiffs' titles have been annexed to the Supporting affidavit. The 1st defendant is in occupation of land parcels number Soy/Kipsang Block 14(EMTIT)18 and 19 measuring 30 acres which is registered in the name of their late mother, Magdalena Mikocho Cheptoo.
 5. The Plaintiffs have been in possession of their respective parcels of land since 2016 but the 1st defendant recently trespassed onto the suit property and leased it to the 2nd Defendant thereby interfering with the plaintiffs' quiet enjoyment and use of the same. It is further deponed that the defendants have resorted to violence to prevent the plaintiffs from accessing their respective parcels of land.
 6. In response to the application the 1st Defendant/Respondent filed a Replying Affidavit sworn on April 26, 2023 in which he avers that their late mother was the registered owner of land parcel number Soy/Kipsang Block 14(EMTIT)/1. He denies that their late mother demarcated, sub-divided and transferred portions of the said parcel to the plaintiffs. He maintains that he is in occupation of land parcel number Soy/Kipsang Block 14(EMTIT)/1 and not parcels Soy/Kipsang Block 14(EMTIT)/18 and 19. It is his contention that parcel number Soy/Kipsang Block 14(EMTIT)/1 is still intact on the ground.
 7. He further contends that he received two letters from the County Survey office, Uasin Gishu indicating that parcel Soy/Kipsang Block 14(EMTIT)/1 would be demarcated on February 10, 2023 while the second letter indicated that the demarcation would be done on February 20, 2023. He then conducted an official search and he was shocked to learn that the Applicants had caused portions of parcel Soy/Kipsang Block 14(EMTIT)/1 to be registered in their names, leaving parcels no 18 and 19 in their late mother's name. He also learnt that after parcels 20-24 were registered in the names of the plaintiffs, restrictions were placed on the said titles by their late mother.
 8. The 1st Respondent avers that the plaintiffs have failed to disclose that there is a suit between them and the 1st Respondent over the same subject matter which is pending in the Chief Magistrate's court, being CM ELC Case No E21 of 2023. In the said suit, the 1st Defendant has obtained an interim order stopping the demarcation of the boundaries between parcels 20-24 and land parcels number 18 and 19.
 9. He contends that the Applicants have contradicted themselves by alleging on one hand that demarcation was done during their mother's lifetime yet on the other hand they are seeking orders of demarcation. He is of the view that orders of demarcation cannot be granted at an interlocutory stage as this would be tantamount to determining the suit. He denies that the Applicants are in occupation of the suit property and states that since he is the one in occupation of the land, the orders sought against him are not tenable.
 10. The 1st Respondents has cast doubts on the purported sub-division of parcel no Soy/Kipsang Block 14(EMTIT)/1 by his late mother as he was view that if she did the sub-division there would have been no need for her to place restrictions of the new titles. Furthermore, if their mother intended to share



out her land she would not have done it selectively by giving land to her daughters only and leaving him out. He expressed the fear that the Applicants were out to disinherit him as they were likely to claim a share of parcels Soy/Kipsang Block 14(EMTIT)/18 and 19 during the succession process. He denied the Applicants' allegations that he had leased out the suit property.

11. Upon being served with the replying affidavit, the 5th Respondent filed a Further Affidavit explaining that the restrictions placed on the suit properties were prompted by the 1st Respondent's threats to sell the land.
12. Regarding the suit in the lower court, she contended that the orders sought were to restrain the County Surveyor from demarcating or interfering with land parcel number Soy/Kipsang Block 14(EMTIT)/1 and its resultant sub-divisions being parcels Soy/Kipsang Block 14(EMTIT)/18-24 and that the order for demarcation of the boundaries between the said parcels was unlawful. It was her further contention that the 1st Respondent did not seek any restraining orders against the Applicants. She added that they had raised a preliminary objection on the pecuniary jurisdiction of the lower court.
13. The application was disposed of by way of written submissions and both parties duly filed their submissions which I have considered.

Analysis and Determination

14. The main issues for determination are:
 - i. Whether a temporary ought to be granted.
 - ii. Whether the County Land Registrar Uasin Gishu County should be directed to demarcate the boundary between land parcels number Soy/Kipsang Block 14(EMTIT)/20-24 and 19 and 19.
15. Before delving into the merits of this application, I note with concern that the Applicants have conceded that there is another suit in the lower court between themselves and the 1st Respondent yet at paragraph 17 of their plaint they stated that "there is no other suit pending and there has been no previous proceedings between the parties herein over the same subject matter" This is reiterated in the Verifying affidavits sworn by each of the Applicants on March 14, 2023.
16. What is even more disturbing is that despite being aware of the interim orders issued by the lower court restraining the County Surveyor from demarcating the boundaries of parcels number Soy/Kipsang Block 14(EMTIT)/20, 21, 22, 23 and 24, they filed the instant application seeking inter alia an order directing the Land Registrar Uasin Gishu County through its authorized County Surveyors to establish the correct boundary in respect of land parcels number Soy/Kipsang Block 14(EMTIT)20-24 and Soy/Kipsang Block 14(EMTIT)18 and 19.
17. The effect of issuing such an order would be to reverse the order of the lower court in the absence of an appeal thus creating a state of confusion.
18. It is axiomatic that a party seeking an equitable remedy such as an injunction must come to equity with clean hands. Clean hands in this context means being truthful and making a frank disclosure to the court of facts known to the applicant. It is not difficult to see why it is necessary to make such disclosure as failure to do so may result in the court wasting its scarce resources on matters that are either sub-judice or res-judicata. The court may also end up issuing conflicting orders that are not capable of being executed.
19. On this ground alone, I am inclined to strike out the application for being sub-judice.



20. Having said that, I will nonetheless proceed to consider whether the Applicants have met the conditions for injunction as laid down in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

21. In the case of *Mrao v First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:

“A *prima facie* case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

22. The Applicants are the registered owners of land parcels number Soy/Kipsang Block 14(EMTIT)/20, 21,22,23 and 24 having been so registered during the lifetime of their mother in 2016. They contend that they have been utilizing the suit property from 2016 until recently when the 1st defendant unlawfully trespassed thereon and leased it to the 2nd defendant.

23. What is noteworthy is that apart from the copies of the certificates of official search which indicate that there are restrictions in respect of the said title, the Applicants have not placed any material before the court to show how they have been utilizing the land. Furthermore, they do not appear to be sure of the boundaries to their respective parcels of land hence the prayer for demarcation and establishment of the boundaries. This casts doubts on their allegations that they have been utilizing the land. On his part the 1st Respondent is challenging the manner in which the Applicant’s acquired their titles. He also states that nothing has changed on the ground and denies that the Applicants have been occupying or utilizing the suit property as they live in their respective matrimonial homes.

24. It is trite that at the interlocutory stage, the court cannot make conclusive finding on contested facts. However, the Applicants needed to establish that their rights to the suit property have been infringed, which they have failed to do. In the circumstances I am not persuaded that they have established a *prima facie* case with a probability of success.

25. On question of irreparable loss, the Applicants have not demonstrated what loss they will suffer if the order of injunction is not granted. It is telling that they did not refute the allegation that they have not been utilizing the suit property.

26. In the absence of proof that they stand to suffer irreparable loss if the injunction is not granted, there would be no need for the court to consider the balance of convenience.

27. All in all I am not persuaded that the applicants are deserving of the orders sought. Consequently, the application lacks merit and it is hereby dismissed.

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

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2023

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J.M ONYANGO



JUDGE

In the presence of;

1. Mr. Melilei for the Plaintiffs/Applicants
 2. Mr. Kipnyekwei for Mr. Esikuri for the Defendants/Respondents
- Court Assistant: A. Onila

