



REPUBLIC OF KENYA



**Kipchilat v Boit (Environment & Land Case E003 of 2023)
[2023] KEELC 19848 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E003 OF 2023
JM ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

SILAS KIPCHILAT PLAINTIFF

AND

SARAH CHELEL BOIT DEFENDANT

RULING

1. By a Notice of Motion dated March 2, 2023, the Plaintiff filed an application seeking an order of temporary injunction to restrain the Defendant whether by herself, her employees, servants or agents from evicting the Plaintiff or his tenants or servants, encroaching, leasing, selling or in any other way dealing with the parcel of land known as Eldoret Municipality Block 12/773 pending the hearing and determination of the suit herein.
2. The application is premised on the grounds set out on the face of the Notice of Motion, and the Applicant's Supporting Affidavit sworn on 2nd March 2023. In the said affidavit, the Plaintiff avers that he has been peaceful and continuous occupation of the suit property from 1st January, 1998 until 1st March, 2023 when the Defendant issued him with an eviction notice. She deposes that the defendant's action is illegal as it offends the provisions of article 40 of the *Constitution of Kenya*.
3. In response to the application, the Defendant filed a Replying Affidavit sworn on 17th March 2023 in which she deposes that she is the administrator of the estate of the Samuel Kiplel Boit . The deceased had been issued with a letter of allotment dated June 1998 in respect of an Unsurveyed plot at Pioneer in Eldoret. He then complied with all the conditions in the letter of allotment but he died before he was issued with a title.
4. The Respondent avers that on 9.9.2022 a lease in respect of land parcel no. Eldoret Municipality Block 12/773 was issued in the name of Samuel Kiplele Boit- Deceased and Certificate of Lease was subsequently issued to the deceased on 2nd November, 2022. It is her contention that the plaintiff's



claim is misconceived as the leasehold interest in the suit land only crystallized in favour of the estate of the deceased on 2nd November, 2022 and the plaintiff cannot therefore claim the same by way of adverse possession. She argues that prior to November 2022, the land belonged to the Government of Kenya and the plaintiff cannot claim adverse possession against the Government of Kenya.

5. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.

Analysis and Determination

6. The only issue for determination is whether the Plaintiff is entitled to an order of temporary injunction.
7. The principles that guide the court in whether or not to grant an interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

 - (a) establish his case only at a *prima facie* level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
8. I will now proceed to determine if the plaintiff has met the above requirements.

Whether the plaintiff has established a *prima facie* case

9. The plaintiff's case is that he has been in occupation of the suit land which is registered in the name of Samuel Kipler Boit-Deceased for a period of more than 12 years and he is therefore entitled to the same by way of adverse possession. He acknowledges that the defendant is the beneficial owner of suit land by virtue of the Rectified Certificate of Confirmation of Grant dated 3.8.2022. The Plaintiff has annexed a copy of Certificate of Lease issued on November 2, 2022.
10. On the other hand, the Defendant contends that the plaintiff's case is dead on arrival as the defendant's rights over the suit land only crystallized upon issuance of the Certificate of lease in the name of Samuel Kipler Boit-Deceased on November 2, 2022 and therefore the plaintiff cannot sustain a claim of adverse possession against the estate of the deceased. It is his contention that prior to 2nd November, 2022 the suit land belonged to the Government of Kenya and that one cannot claim adverse possession against the government.
11. At this preliminary stage all, that the plaintiff is required to demonstrate is that he has a right which has been infringed and which is capable of being protected. The Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR observed as follows:

“The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court



does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case.

12. The plaintiff's assertion that he has been in occupation of the suit property and that he has been issued with an eviction notice is not in dispute. The issue as to whether his suit for adverse possession will succeed or not can only be determined at the main suit. At this interlocutory stage the court is more concerned with preserving the subject matter of the suit. It is therefore my finding that the plaintiff has established a *prima facie* case.
13. The second issue is whether the plaintiff is likely to suffer irreparable loss which cannot be compensated by damages if the injunction is not granted. It is the Plaintiff's contention that the eviction notice issued by the defendant is illegal and that monetary compensation cannot remedy the loss that will be occasioned by breach of the law. He has relied on the case of [Joseph Siro Mosiomo v Housing Finance Company of Kenya](#) (2008) eKLR.
14. On his part, the defendant's counsel has submitted that the plaintiff has not stated that he has a home on the suit land and that he has rental houses thereon which are purely for commercial purposes. In considering the question of irreparable loss with regard to land the court in the case of *Panari Enterprises Ltd -vs- Lijoodi & 2 Others* (2014) eKLR held as follows:

“Land is unique and no one parcel can be equated in value to another though the value of the suit property can be ascertained, it would be right to say that the plaintiff can be compensated in damages. I hold that the damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach”
15. Similarly, in the instant case although the rental income can be ascertained, ultimately this case is about land and I would hesitate to hold that it can easily be compensated in damages.
16. Regarding the balance of convenience, there is no doubt that the plaintiff has been in possession of the suit land and he would be prejudiced if he is evicted before his case is heard and determined. The balance of convenience therefore tilts in his favour.
17. In the final analysis, it is my finding that the plaintiff had satisfied the conditions for the grant of a temporary injunction. I therefore grant the application and make the following orders:
 - a. A temporary injunction is hereby issued restraining the Defendant/Respondent whether by herself, employees or agents from evicting the plaintiff, his agents, tenants or servants, encroaching, leasing selling or dealing in any way with the parcel of land known as Eldoret Municipality Block 12/773 pending the hearing and determination of the main suit.
 - b. The costs of the application shall be in the cause.

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

.....

J.M ONYANGO

JUDGE

In the presence of;

Mr. Mengich for the Plaintiff/Applicant



Miss Salim for the Defendant/Respondent

Court Assistant: A. Oniala

