



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**E.L.C NO. 128 OF 2017**

**FRANCIS KIPNGENO LABOSO.....PLAINTIFF/APPLICANT**

**VERSUS**

**KIMUTAI NGENO.....1ST DEFENDANT/RESPONDENT**

**JOTHAM K. NGENO.....2ND DEFENDANT/RESPONDENT**

**PHILIP KORIR.....3RD DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. What is before this Honourable Court is an application by way of Notice of Motion dated 11th January 2018. In the said Notice of Motion which was filed under Certificate of Urgency, the Applicant seeks the following orders:-

*(i) THAT the Application be certified urgent and service thereof be dispensed with in the first instance.*

*(ii) THAT pending the hearing and determination Of this Application interpartes, an order of Injunction do issue restraining the 1<sup>st</sup> and 3<sup>rd</sup> Respondents by themselves, agents and/or servants or otherwise whoever be restrained from using, carrying out, construction, possessing, selling or disposing of, cultivating, entering, trespassing, being or remaining on, or howsoever interfering with the Plaintiff's use or interests in all those land parcels known as registration number L.R. No. Kericho/Silibwet/837 and Kericho/Silibwet/1040.*

*(iii) THAT the Respondents do bear the costs of the Application.*

2. The Application is premised on the grounds stated in the Notice of Motion.

3. The Notice of Motion is supported by the Affidavit sworn by Francis Kipngeno Laboso on 11th January 2018. In the said affidavit, the Applicant depones that the land parcels in dispute belong to him. He has annexed copies of searches and green cards marked as FKL5, FKL6 and FKL7 to support his assertion of ownership.

4. The 1st and 3rd Respondents filed their joint Replying Affidavit sworn by Kimutai Ngeno; the 1st Respondent herein on 23rd February 2018. In the said affidavit, Mr. Ngeno Kimutai depones that he is the registered owner of L.R No. Kericho/Silibwet/4233 which is allegedly under construction by the 1st Respondent. He has annexed photographs evidencing the same marked as KN-1.

5. He further avers that the construction taking place is on property L.R No. Kericho/Silibwet/4233 and not L.R No. Kericho/Silibwet 837 and Kericho/Silibwet/1040 as alleged by the Applicant. He has annexed copies of building approval for the same from the County Government of Bomet.

6. Mr. Ngeno states that he learnt of the property from one David Ruto and after conducting due diligence purchased the same from the then registered owner for a consideration of Kshs. 2,500,000/-. He has annexed a copy of the Sale Agreement as well as a deposit slip marked as KN 5 in support of this assertion. He further depones that he obtained all the relevant consents and followed the due procedure leading up to the registration of the land parcel in his name.

7. He depones further that in January 2018 when he went to conduct a search on his property he learnt that his parcel of land arose from the sub-division of land parcel number L.R No. Kericho/Silibwet/837. In the circumstances it is his position that he is a bona fide purchaser for value without notice and that his interests should be protected by this court since his title has not been impeached under section 26 of the

Land Registration Act No. 3 of 2012.

8. Mr. Ngeno further avers that the ongoing construction is on a loan of Kshs 6,000,000/- obtained from Mwalimu National Sacco and that he would suffer great injustice if the construction were stopped.

9. In his said affidavit, Mr. Ngeno also states that this court lacks the pecuniary jurisdiction to entertain this suit which in his opinion should have been filed at the Magistrates court since he purchased the property at Kshs 2,500,000/-.

10. The matter came up for hearing of the application on 27th February 2018 as directed by the court.

## **THE ARGUMENTS**

### **The Applicant's Arguments**

11. Mr. Laboso who was in person referred the court to his Supporting Affidavit sworn on 11th January 2018 and prayed that the Respondents be restrained from interfering with his property comprised in Kericho/Silibwet/837 pending the hearing and determination of the suit.

12. Mr. Laboso in his brief submissions stated that this was not the first time that the matter was in court and that the court had previously dealt with the said parcel of land in HCCC No. 68 of 2013. He further argued that he had not sold his land to anyone and was not aware of any sub-division of the same.

### **1st and 3rd Respondents's Arguments**

13. Mr. Kigen for the 1st and 3rd Respondents argued that what is approved for construction i.e Kericho/Sibwet /4233 is not the property mentioned in the application. He states that the said property belongs to his client and that the same has not been impeached by the applicant. He states further that there is no evidence of fraudulent dealings with respect to how the 1st Respondent obtained his title. In the circumstances, he argues that the prayers for injunction pending the hearing and determination of the suit are untenable. He argues that there is no prayer for an injunction pending the hearing of the main suit and therefore prays that the application be dismissed with costs.

14. Mr. Kigen further argues that immediately his client was served with court papers he went to the lands registry where he was advised that parcel number 4233 is one of the subdivisions of the applicant's parcel no Kericho/Silibwet/837. In the circumstances he argues that his client is a bonafide purchaser for value without notice and that the applicants recourse is to the person who subdivided his land into 10 portions and not the Respondents.

15. Mr Kigen argues that the Applicant had not mentioned the said Judgment of HCC No. 68 of 2013 in his affidavit. He argues that his client is carrying out construction on parcel No. 4233 registered under his name and therefore the applicant has no cause of action against him.

16. It is his argument that the applicant has not demonstrated that he has a prima facie case with a probability of success as he has not produced evidence that the construction is being carried out on his land. He also prays that any documents filed by the applicant without leave of court be expunged from the court's record.

## **ISSUES FOR DETERMINATION**

17. Having perused the pleadings and considered the parties oral arguments, I have distilled the following as the issues arising for determination:-

(a) Whether the order for temporary injunction is merited;

(b) Who bears the costs of the application.

## **ANALYSIS AND DETERMINATION**

### **(a) Whether the order for Temporary Injunction is Merited**

18. The role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties' cases. This was so held in the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1**, where the court stated as follows:-

***“In an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases,”***

19. The conditions for the grant of an injunction are now well settled. The court in the case of **East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR** restated with the approval the conditions set out in the case of **Giella Vs Cassman Brown & Company Limited (1973) E.A 361**, which held that:

“The conditions for the granting of an interlocutory injunction were set out in **GIELLA VS. CASSMAN BROWN & CO., LTD. [1973]**

E.A. 358 at p. 360 where it was stated thus:-

***“First, an applicant must show 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 an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”***

20. The first question for determination by the court herein is whether the applicant has satisfied the conditions for the grant of an injunction. The conditions for the grant of an injunction must be surmounted logically by an applicant. The court in the case of **Samwel Omweri Maranga v Matoke Mabiria & 6 others [2016] eKLR** stated as follows:-

***“The conditions for granting interlocutory injunction are sequential and must be applied as separate, distinct and logical hurdles which the applicant must surmount. If the applicant fails to meet the first condition, there is no need to consider the rest. See Nguruman Ltd vs. Jan Bonde Nielsen & 2 others Nairobi CA No. 77 of 2012 and Kenya Commercial Finance Company Ltd vs. Afraha Education Society (2001)1 E.A. 86.”***

21. In light of this the first question to consider is whether the applicant has established a prima facie case with a probability of success. In order to obtain the injunctive relief prayed for in the Notice of Motion herein, the Applicant was first to establish that he had a prima facie case with a high chance of success. It was imperative for him to show that he owned the suit parcels of land or at the very least that he has a valid claim to the same.

22. The Applicant herein in his Supporting Affidavit sworn on 11th January 2018 avers that he is the registered owner of the parcel of land known as Kericho/Silibwet/837. The Respondent in his affidavit concedes that this is indeed the parcel of land from which his parcel of land Kericho/Silibwet/4233 was excised.

23. The Applicant annexed a copy of the title as well as the green card with respect to the property L.R No. Kericho/Silibwet/837. He did not produce a copy of official search for the same and cites the reason for the same being that he applied but the Lands office declined to issue the same to him. According to the copy of the green card, the land parcel No. 837 appears to belong to Francis Kipngeno Laboso. The green card also indicates that the property was initially owned by one Tapnyobii W/O Torkoti alias Tabnyobii Kiruchu A. Torgoti.

24. The 1st Respondent on his part produces a document of title with respect to parcel No. Kericho/Silibwet/4233 but however concedes that the same was excised from the land belonging to the Applicant i.e parcel No. 837.

25. In a case such as this where a court is faced with 2 parties claiming competing proprietary interests in the suit land, it is imperative for the court to discern on a balance of probabilities whether on the strength of the documents and evidence placed before it the applicant has established a prima facie case. See the Court of Appeal decision in **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR**.

26. In the circumstances and on the strength of the evidence produced by the applicant it is my finding that he has demonstrated on a balance of probabilities that he has an arguable case with a probability of success.

27. Having met the first hurdle the next question for determination is whether the Applicant has demonstrated that he is likely to suffer irreparable injury that cannot be adequately compensated by way of damages. The court in the case of **Stephen Abu Mukhobi v Daniel Oria Odhiambo & another [2016] eKLR** considered what is meant by irreparable injury and stated as follows:

***“By definition, an irreparable injury is, in equity, “the type of harm which no monetary compensation can cure or put conditions back the way they were”. In Alternative Media Limited vs. Safaricom Limited (2004) eKLR, the court held as follows:***

***“The second principle established by the Giella case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of Mureithi vs City Council of Nairobi (1979) LLR 12 Madan JA (as he then was) cited with approval the speech of Lord Diplock in the case of American Cynamid Co. vs Ethicon (1975) 1 ALLER 504 at page 506 where he said:- the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage.”***

28. The court in that case in considering whether the Plaintiff was likely to suffer irreparable harm stated as follows:-

***“In this particular case, the nature of the injury that the Plaintiff claims he is suffering is alleged construction on the suit property by the Defendants. If allowed to continue, the Plaintiff asserts he will suffer irreparable injury which cannot be compensated in damages. I am inclined to agree with him. Indeed, the structures that the Defendants are putting up on the suit property are structures that are permanent in nature. I therefore find in favour of the Plaintiff/Applicant that he has demonstrated that if the interlocutory injunction is not granted, he will suffer irreparable injury which cannot be compensated in damages.”***

29. The Applicant annexed photographs of the construction on the impugned parcel of land marked as FKL3. It is clear that that the building under construction is a permanent one. In the circumstances I am inclined to agree with the Applicant that damages will not be adequate

compensation if the construction is permitted to continue.

Having satisfied the 1st 2 conditions, it is imperative to now consider in whose favour the balance of convenience tilts. In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

***“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”***

30. In the case at hand I am of the view that that the balance of convenience tilts in favour of the applicant who has demonstrated that he has a claim over the suit property and that damages would not serve as an adequate compensation for him.

31. The Applicant in the Application herein maintained that he stands to suffer damage that cannot be adequately compensated in monetary terms. The Respondent states that the he is currently undertaking construction on the suit parcel of land which is courtesy of a loan facility in the sum of Kshs. 6,000,000/- and therefore stands to suffer grave loss if the construction is stopped. He therefore seeks this courts protection as a bona fide purchaser for value without notice. It has often been argued that damages are not an adequate compensation for matters relating to land.

32. In view of the foregoing analysis it is my considered view that the Applicant has satisfied all the conditions for the grant of an injunction. Accordingly the application is granted and I direct as follows:

a) That a temporary injunction be and is hereby granted restraining the 1<sup>st</sup> and 3<sup>rd</sup> Respondents by themselves, agents and/or servants or otherwise whosoever from using, carrying out construction, possessing, selling or disposing of, cultivating, entering, trespassing, being or remaining on, or howsoever interfering with the plaintiff’s use or interests in all those land parcels known as L.R. No. Kericho/Silibwet/837 and Kericho/Silibwet/1040 and/or in any other manner pending the hearing and determination of the suit herein

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

c) The parties shall comply with order 11 of the Civil Procedure Rules within 45 days from the date hereof.

**Dated, signed and delivered at Kericho this 20<sup>th</sup> day of March, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

Plaintiff/Applicant

Jotham K. Ngeno (2<sup>nd</sup> Defendant)

Court Assistant: Rotich