



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC. NO.E022 OF 2021

WILLY KIBET CHUMBA alias WILLY BUTTY CHUMBA.....PLAINTIFF/APPLICANT

VERSUS

PETER KIPSAT LELEI.....1ST DEFENDANT/ RESPONDENT

WILLIAM KIPTARBEI KORIR.....2ND DEFENDANT/ RESPONDENT

RULING

1. The Applicant approached this court by way of a Notice of Motion dated 30th July, 2021 seeking for the following orders;

a) “Spent.

b) Spent.

c) *That this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendants whether by themselves, their servants, agents, or any persons whomsoever from entering, evicting, demolishing the Plaintiff’s/Applicant’s houses, selling, leasing, charging or otherwise interfering with the Plaintiff’s/Applicant’s quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the parcel of land known as title number Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103 measuring 4.6 acres pending the hearing and determination of the main suit.*

d) *In the alternative, this Honourable court be pleased to order the status quo prevailing as at 30th July, 2021 regarding possession, user and occupation of the parcel of land known as parcel number Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103 measuring 4.6 acres by the Plaintiff/Applicant pending the hearing and determination of this application inter partes or until further court orders.*

e) *That this Honourable court be pleased to order that an inhibition be issued and the same registered against the title of the parcel known as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103 to restrict any dealings or transfer of the said parcel of land and the Land registrar Uasin Gishu County be directed to register the inhibition against the parcel of land pending the hearing and determination of this application inter parties or until further court orders.*

f) *That costs of this application be borne by the Defendants/ Respondents.”*

The application is based on the eleven (11) grounds on its face, among them that the Respondents had issued a 3 month notice of eviction to the Applicant that was almost lapsing; that the Respondents are registered with the suit property as tenants in common; that the Applicant has been in peaceful and uninterrupted possession of the suit property from 1994 to date, had constructed his permanent house thereon and farms on the said land; that as he has filed a suit for title over the land by way of adverse possession, then the threatened eviction if not stopped will cause him to suffer irreparable loss and damage. The application is supported by an affidavit sworn by Willy Kibet Chumba, the Applicant, on the 30th July, 2021 reiterating the grounds.

2. The application is opposed by the 1st Respondent through the replying affidavit sworn by Peter Kipsat Lelei, the 1st Respondent, on the 23rd August, 2021, in which he among others deponed that the 2nd Respondent and himself are owners in common of the suit property measuring 6.2 acres, and that they own 2.8 acres and 4.65 acres respectively. That the said land has been subdivided and his portion registered as parcel 319 measuring 1.88 hectares. That he instructed his counsel to issue the eviction notice dated the 5th May 2021 to the Applicant requiring him to vacate from his portion within 3 months. That the said notice is proper and in accordance with sections 152A, 152B and 152E of the Land Act No. 3 of 2012. That this suit filed through the originating summons of 30th July, 2021 was an afterthought,

as it was filed after the eviction notice on 2nd August, 2021, and was only aimed at defeating the eviction notice. He denied the Applicant's claim that he has been in possession of the suit land from 1994, and that the Respondents had not exercised their right of repossession. He deponed that the Applicant was a minor attending secondary school in 1994, and that he had allowed the Plaintiff's mother, Jepngetich Kemei, who was his mother-in-law, to settle on his portion of the suit land upon her request in 1995. That he and the 2nd Respondent have been visiting the suit land without any hindrance including when they subdivided the property. That Jepngetich vacated the suit land on the 14th June 2019 upon his request, but the Applicant declined to leave. That he took over the land after Jepngetich left and has been cultivating it. That he was tilling the said land when the Applicant attacked him in March 2021 and that he reported the incident to the police under **OB. No. 08/10/03/2021**. That the matter was mediated by the chief during which the Applicant sought for forgiveness.

3. The Applicant filed a supplementary affidavit sworn on the 4th October 2021, denying that the 1st Respondent had ever exercised his right to repossess the suit property for over 12 years. He deponed that he got married on the suit property and that his children had been born there. He also denied having been permitted to live on the suit property, and that his development of the suit property has never been with permission or drawn question from the 1st Respondent. He denied that the suit property has been subdivided adding that if it were done, then it was without any party visiting the property. He also denied having ever threatened the 1st Respondent.

4. The 1st Respondent filed a further replying affidavit sworn on the 8th October, 2021, reiterating the facts in his replying affidavit. He annexed copies of the Mutation form under which the suit land was subdivided into parcels 317 to 319. That the Defendants were the among the Appellants in *Eldoret CACA No. 59 OF 2015* in which they were awarded 5.0 acres and 3.0 acres respectively by virtue of the sale agreement entered with the late James Gachobe Njeru, and by doctrine of constructive trust. That their participation in Eldoret HCCC No. 170 of 2012, from which the above appeal emanated from, interrupted the running of the limitation of time that the Applicant may have had over the suit land. The upshot of this affidavit was to demonstrate that the Applicant's occupation of the suit property was permitted and that it was never peaceful. That after the Applicant attacked him when working on the land on the 10th March 2021, a reconciliatory meeting involving the family members, who included the Applicant, took place on the 30th March, 2021 before the Chief Kipchamo Location, and it was resolved that the suit land belonged to him.

5. That following directions on filing and exchanging written submissions, the learned counsel for the Applicant and 1st Respondent filed theirs dated the 19th October, 2021, and 4th November, 2021 respectively.

6. The following are the issues for the court's determinations;

a) Whether the application meets the criteria for grant of a temporary injunction; and,

b) Whether the application meets the criteria for issuance of an order to the Registrar to register an inhibition in the title to the suit property.

c) Who pays the costs of the application.

7. The court has carefully considered the parties pleadings, affidavit evidence tendered, written submissions, superior courts decisions cited thereon and come to the following determinations;

a. That the law concerning grant of a temporary injunction is set out under Order 40 Rule 1 of the Civil Procedure Rules which sets out the instances where temporary injunction may be granted as follows;

“1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

The above provision has been subject of extensive court commentaries and the consensus on the grounds for grant of orders of temporary injunction have been reduced to three, as enumerated in the classical case of *Giella vs Cassman Brown 1973 EA 358*. An applicant needs to establish that he has a *prima facie* case with a probability of success, and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the court is however, in doubt on the foregoing, then it will decide the matter on the balance of convenience.

b. That on whether an applicant has demonstrated that he has a *prima facie* case, the court agrees with position taken in the decision cited by both parties of *Mrao vs First American Bank of Kenya Limited & 2 others [2003] e KLR 125*. Indeed, a *prima facie* case means a case that is arguable and sets out a narrative that demands an explanation or response from the other party. Such a case should show, or be based on an infringement of the Applicant's right, and that there was probable cause to go to hearing of the suit. That such a case should be one which could entitle the court to find in the Applicant's favour in the absence of a response by the Respondent.

c. The Applicant herein asserts that because he has been in occupation of the suit property for 27 years, and because he has filed a case for title over the property Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103, the suit property, by way of adverse possession, he has a *prima facie* case that necessitates the preservation of the status quo. That it is noted that he only referred to the suit parcel as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 319 in his submissions, and not in his pleadings.

d. The 1st Respondent in turn submits that the Applicant does not have a *prima facie* case with probabilities of success. He states that at the first instance, the property known as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103, does not exist as its title has been closed, following its subdivision pursuant to the Court of Appeal decision of 17th May 2018 in **Eldoret Civil Appeal number 59 of 2015** wherein the 1st and 2nd Defendants were the 1st and 2nd Appellants, which ruled in their favour. He has produced the decision in question which shows that a declaration was made that the 1st and 2nd Defendants herein were entitled to 5 and 3 acres respectively from the property known as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103, the suit property. He states that following this, he and the 2nd Respondent were registered as owners in common to the suit property on 30th October, 2019. Pursuant to this, he averred that he began the process of subdivision. He has produced the Land Control Board's consent of 11th September 2019, and a letter by town and county surveyors named "The Geomatician", in which one Robert Kiprop Ngirisei, in response to an inquiry by the 1st Defendant's advocate, confirmed that the site visits were undertaken on the suit property for survey and subdivision in March and April 2020. The above narration convinces this court beyond doubt that the suit property, as described by the Plaintiff in his pleadings, does not legally exist, following its title being closed after its subdivision and registration of the resultant parcels as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 317 to 319.

e. That the case cited by the learned counsel for the 1st Defendant of **James Obande Wasui vs Jeremiah Ochwada Musumba [2002] eKLR**, reflects similar circumstances to those in this case. That in that case, the court was faced with an application for an injunction pending the determination of the suit over a property that had since mutated into different parcels of land. The court denied the application on the basis that the application concerned land that no longer existed. That likewise in this instant matter, as the suit property sought by the Plaintiff through the originating summons dated the 30th July, 2021 no longer exists, the Applicant's application has no merit as he has not established a *prima facie* case with a probability of success, and has not shown what irreparable loss he is likely to suffer if the injunction order sought is not granted. That the balance of convenience sways towards not granting the application.

f. That in the absence of a valid suit against the parcel subdivided from the suit land, and now registered in the Defendants' names has been lodged in the instant suit, then no injunction orders can issue on the basis of the Applicant's application against the 1st Respondent's property as it is not subject of the suit. That it is noteworthy that despite the mutation having been brought to the attention of the Applicant through the further replying affidavit, there is neither an application on record to amend the originating summons, nor is there a further suit filed seeking title by way of adverse possession over the 1st Defendant's title, being Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 319. That all that the Applicant has done is to refer to the suit property in its submissions as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103, now known as Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 319. That reference through the submissions is clearly insufficient to amount to an amendment to the originating summons. That parcel 103 was of different acreage from parcel 319, and the registered owners are different. It was incumbent on the Applicant to sue over an existing title and or to take steps to amend his suit the moment he discovered the error on the description of the land he sought for.

g. That the 1st Respondent's contention that the period of limitation did not run against them during the time they had the suit that ended at the Court of Appeal in 2018 has not been disputed. That in any case the person or persons who were registered with the suit land before the Respondents herein got registered with parcel subdivided from it have not been joined in this suit. That the Applicant has not countered the documentary evidence availed to show that his use of the land was not always peaceful, and that the chief had to step in and reconcile them in March 2021. That further, the 1st Respondent position that the Applicant only came onto the suit land pursuant to the permission granted to his mother, who has since vacated the land upon the expiry of the leave, as he was then a minor remains unchallenged.

h. That in view of the above findings, an inhibition being sought over property Uasin Gishu/Cheptiret/Cheplaskei Block 3 (Sertwet) 103 that no longer exists, cannot be issued and the issue must rest at that.

i. That as the Applicant has failed in his application, he is obligated under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya to pay the 1st Respondent's costs.

8. That the totality of the conclusions above leads to the finding that Applicant's notice of motion dated the 30th July 2021 is without merit and dismiss it with costs to 1st Respondent.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23RD DAY OF FEBRUARY 2022

S.M.KIBUNJA, J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PETIONERS:Absent

RESPONDENTS: ...Absent

COUNSEL: ...Ms.Kweyu for Applicant.....

.....Mr. Lagat for 1st Respondent.....

COURT ASSISTANT: ONIALA.

S.M.KIBUNJA,J.

ELC ELDORET