



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO. 5 OF 2009

DAVID KIBIEGON KOECH.....PLAINTIFF/ RESPONDENT

VERSUS

SAMUEL KIMETTO.....1ST DEFENDANT/ APPLICANT

CYNTHIA CHERONO.....2ND DEFENDANT/ APPLICANT

RULING

1. The Applicants, **Samuel Kimetto and Cynthia Cheron**

filed a Notice of Motion dated **29th August, 2013** seeking the following orders:-

1) **spent**

2) **That a temporary injunction be issued against the plaintiff/ respondent herein.**

3) **That the plaintiff/ respondent by himself, his servants, agents, employees and/ or any other person acting in his name be restrained from disposing, alienating, wasting, trespassing onto, carrying on any construction, thereon or doing any other acts prejudicial to the defendants/ applicants proprietary interest on the subject parcel of land No. Kericho/Litein/ 686 (herein after referred to as the suit property) pending the hearing and determination of the application herein inter parties**

4) **That the plaintiff/ respondent by himself, his servants, agents, employees and/ or any other person acting in his name be restrained from occupying, interfering with carrying on any construction, thereon or in any other manner dealing with the suit property until the hearing and determination of the main suit**

5) **That the costs of the application be provided for.**

2. The Applicants' application is premised on the grounds on the face of the application and supported by the affidavit by the 1st Applicant sworn **29th August, 2013**. He avers that he is the lawful owner of the suit property in Bureti District Kericho County and that despite this suit still pending the plaintiff has trespassed onto the suit property and put up fences, is carrying out construction and has subdivided the title deed for the suit property into two titles denying the applicants the use of the said parcel without their consent or knowledge and without going through a succession cause.

4. The Respondent opposes the application and has filed a Replying affidavit dated **23rd September, 2013**. He denies having trespassed onto the plaintiff's parcel and avers that he is using his rightful share of the suit property and the portion belonging to the 1st defendant is untouched.

5. Following Directions taken, written submissions were filed by the Applicant but the respondent did not file any despite being given an opportunity to do so. I have read and taken the written submissions into consideration.

6. In determining whether or not to give the applicants the orders they seek of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of **Giella vs. Cassman Brown (1973) EA 358** as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 on doubt, it will decide an application on the balance of convenience”.

7. So has the Applicant shown a prima facie case with a probability of success? A *prima facie* case as described in the decision of **Mrao vs First American Bank of Kenya Limited & 2 Others** (2003) KLR 125

“... includes but is not confined to a 'genuine and arguable case'. It is a case 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.”

8. From the affidavit evidence and submissions, I am not satisfied that the applicants has established a prima facie case for the following reasons. Firstly, it is not in contention that the suit land is jointly registered in the names of the fathers of the 1st applicant and the respondent (both deceased) as joint proprietors. The point of departure is why the suit parcel was registered in both the names of the 1st applicant's father and the respondent's father and therefore who among the beneficiaries of the two deceased men is entitled to the land and its use. The applicants aver that the suit property was solely purchased by the 1st applicant's father who only permitted the plaintiff's father to use a structure therein as a storage facility: the two being business partners. The applicant claims that his father owned the whole parcel which was also affirmed by the Land Disputes Tribunal on **14th February, 2009**. No evidence has been adduced by the 1st applicant to support this allegation. The only document adduced as evidence is a copy of certificate of official search and copy of a green card showing the suit property is registered in the names of both Tiongik Rotich and Kipkoech Langat.

9. As to whether the Applicant will incur irreparable damages, I find that the harm caused may be adequately compensated by way of damages. The respondent is already in occupation of some portion of the suit property and granting the orders sought will not only stop the respondent from using the portion but he shall also be evicted and will incur irreparable damage not easily compensated by damages. In the event that during trial it is found that the 1st applicant is entitled to the entire suit property, then the respondent can compensate him by way of damages.

10 Thirdly, if the court is in doubt, the balance of convenience should be applied. Since I have no doubt, I do not need to consider this principle.

11. In light of the foregoing, the Notice of Motion **dated 29th August, 2013** is dismissed with costs.

Dated, signed and delivered on this 28th day of January 2014.

L N WAITHAKA

JUDGE.

PRESENT;

Mr. Mutai for the applicants/Defendants

No appearance for the Plaintiff/Respondent

C/c; Josphine Koech