



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 138 OF 1996

CHEBET YATOR ::: PLAINTIFF

=VERSUS=

KIPTOO KURIASES AND

KIBIWOTT KURIASES ::: DEFENDANTS

RULING

The Application before me is for an interlocutory injunction. It seeks orders to restrict the Plaintiff from selling, offering for sale, cultivating or in any other way, dealing with **TITLE NO. LELEN/KABIEGO/57**.

The Applicants also seek an order prohibiting all further registration or change of registration in the ownership, leasing, sub-leasing, allotment, user, occupation or possession of the suit property.

Finally, the Applicants ask that the status quo prevailing be maintained until the suit is heard and determined.

The Applicants acknowledge that the title to the suit property is registered in the name of the Plaintiff. However, it is their contention that the Plaintiff holds the property in trust for himself and for the Defendants. However, because the Plaintiff has intentions of disposing of the property, the Defendants wish to have that intention nipped in the bud.

The Applicants asserted, through the affidavit of **DESPER JOSEPH KIPTOO**, that the Plaintiff had started altering the boundaries within the suit property by paddocking. He is also said to have closed all the pathways.

It is significant that the Plaintiff did not file any affidavit to counter the affidavit of **DESPER JOSEPH KIPTOO**. Accordingly, this court finds that the factual basis for the application has not been controverted. That means that the Plaintiff actually intends to dispose of the suit property. It also means that the Plaintiff had blocked all pathways, and had also started altering boundaries within the property, through paddocking.

In the written submissions signed by **Chemwok & Co. Advocates**, the Plaintiff points out that on 25th March, 1997, the Court had ordered that the status quo be maintained.

As that order had continued to remain in place, the Plaintiff asks this court to refrain from

varying it.

The lawyers assert that because the Plaintiff had not disposed of the property since 1986, there should be an assumption that the property would remain intact until the case was heard and determined.

As far as the Plaintiff was concerned, any order that is issued by this court would be used mischievously, to the advantage of the party in whose favour the order was issued.

Therefore, the Plaintiff's lawyers urged the court to direct that the main suit be listed for hearing and determination.

In determining this application, the first point that must be made is that submissions can never be a substitute for factual evidence. Therefore, where a party has not put forward factual evidence, either through oral testimony or through affidavits, he cannot import facts into the case, through his submissions.

I find no factual or legal basis for accepting the Plaintiff's contention that there can arise a presumption that the suit property would be maintained until the suit was heard and determined.

From the submissions of the Plaintiff, that the party in whose favour an order was made would utilize such orders mischievously, the Plaintiff appears to be confirming the Defendants' position. He obtained orders in 1997, and has thereafter not prosecuted the main suit.

One would have expected that if the Plaintiff's claim is so straightforward as he has asserted in his submissions, he would have been very proactive in prosecuting it. But he has not done so.

Instead, he now appears keen to use the interlocutory orders to benefit himself.

Even if he was not actually selling – off the land or any portions thereof, the blocking of pathways and the paddocking of the suit land is not in consonance with the maintenance of the status quo. Those actions of the Plaintiff constitute an actual alteration of the status quo.

The Plaintiff is the registered proprietor of the suit property. That fact is not in dispute. However, the Defendants assert that the Plaintiff holds the land in trust for both himself and for the Defendants.

Indeed, the Defendants assert that there had already been a sub-division of the suit property, resulting in four (4) parcels of land. The said sub-division took place in 1996, and the resultant Title Numbers, namely 151, 152, 153 and 154 were registered to **KIPTOO KURIASES; KIBIWOTT KURIASES; MURKOMEN KURIASES** and **CHEBET YATOR**, respectively.

Of course, the Plaintiff argues that any such alleged sub-division was unlawful and fraudulent, because it would have taken place when there was a court order for the maintenance of the status quo.

The parties to this suit did sign a Statement of Agreed Issues on 30th October, 1996. One of the issues which they agreed would need to be determined by the trial court was whether or not the Plaintiff was the sole owner of the suit property. Another issue for determination was whether or not the Plaintiff held the land for himself and his brothers.

In the light of those issues, whose determination is still pending, there is a definite need to ensure that the subject matter of the case was preserved. Therefore, as the plaintiff's conduct, which the defendants have complained about, would alter the subject matter of the suit, I find that the Defendants have demonstrated a *prima facie* case with a probability of success.

Accordingly, and in order to preserve and conserve the subject matter of the suit property, I order that there shall issue forthwith an injunction restraining the Plaintiff from:-

- (a) Selling or offering for sale the whole property;**
- (b) Cultivating, leasing, allotting, using, occupying or
entering onto the portions of land currently occupied
by the Defendants.**

The intent of these orders is to safe-guard and maintain the status quo prevailing. It is not intended that any of the parties will use these orders to change their respective positions on the land, save only to the extent of enabling each of them access the parcels of land that each of them was using as at October, 2013.

The costs of the application are awarded to the Defendants.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 17TH DAY OF JANUARY, 2014.

FRED A. OCHIENG

JUDGE.