



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CIVIL SUIT NO. E055 OF 2021

JOSEPH NALUTORI LEPISH.....1ST PLAINTIFF

CHRISTOPHER TOPOIKA LEPISH.....2ND PLAINTIFF

-VERSUS-

KELVIN KOITALEL LEPISH.....DEFENDANT

RULING

This ruling is on the Notice of Motion dated 7th September, 2021.

The motion which is under **Order 40 Rules 1, 2 and 3 and Order 50 Rule 1 Civil Procedure Rules, Sections 3, 3A and 63 (e)** of the **Civil Procedure Act** and all other enabling provisions of the Law seeks one main prayer.

The prayer sought is number 4 which is for a temporary injunction restraining the Defendant by himself, servants, legal representatives and agents from entering into, chasing away workers, blocking, trespassing, alienating or in any other manner interfering with or wasting the Plaintiff's property being title No. KAJIADO/KITENGELA/27282 situated in Kajiado pending the hearing and determination of this suit.

The application is supported by an affidavit sworn by the Plaintiffs in which they depose that they are registered as the proprietors of the suit land and that the Defendant has on three (3) occasions attempted to invade the land and to subdivide it into smaller parcels. This was on 31st August, 2021 and 1st September 2021.

The Plaintiffs reported the attempted invasion at Oloosirkon Police Station and Tuala Police Post. The Defendant was repulsed but he plans to come back with young men armed with bows and arrows to subdivide the land as intended.

The Plaintiffs add that they do not know the Defendant personally and they do not understand what his claim is over their land. Only an order of injunction will ensure that there is peace and that the Plaintiffs enjoy their property without interference from the defendant.

Annexed to the supporting affidavit is a copy of the Title Deed for the suit land dated 16th November, 2015, seven photographs and a copy of a stamped document issued by Oloosirkon Police Station dated 2/9/2021.

The Plaintiffs filed a Supplementary Affidavit dated 30th November in which they acknowledge that the Defendant is their step brother and that there has been previous litigation which do not relate to the suit land.

The said cases are;

- (a) Kajiado Succession No. 95/2015.
- (b) Kajiado Succession No. 68/2018.
- (c) Constitutional Petition No. 9/2020.

The application is opposed by the Respondent who has sworn a replying affidavit dated 1/12/2021 in which he says that he is in occupation of the suit land. The occupation has been for 23 years.

The Defendant adds that the Plaintiffs got registered as owners of the suit land fraudulently and that the suit property herein is one of the many subdivisions of L.R. KAJIADO/OLLOITIKASHI/KITENGELA 8838 which is subject of litigation in Succession Cause No. 95 of

2015 and Succession Cause No. 68 of 2018 both of which are pending at the High Court at Kajiado.

The Defendant also said that contrary to the deposition by the Plaintiffs in paragraph 10 of the supporting affidavit that they do not know him, he is in fact their half-brother.

Counsel for the Plaintiffs filed written submissions on 7th December, 2021. I have not seen any submissions by the Defendant's Counsel.

I have carefully considered the application in its entirety including the affidavits, annexures and submissions.

It is trite law that an order of injunction will not issue unless the Applicant satisfies three conditions namely;

- (a) *Prima facie case with a probability of success,*
- (b) *Proof of loss that cannot be adequately compensated by an award of damages,*
- (c) *If the Court is not sure of the above, then it should look at the balance of convenience.*

This was laid down in the famous case of **Giella –vs- Cassman Brown 1973 EA 358**.

I find that the Plaintiffs have not established a prima facie case with a probability of success. This is because two key things they have said have been successfully disproved by the Defendant.

The first one is to be found in **paragraph 10 of the Supporting Affidavit dated 7/9/2021** where they say that they do not know the Defendant personally. Later in **paragraph 10 (1) of the Supplementary Affidavit dated 30th November, 2021**, they depose that he is indeed their step-brother.

The two contradictory paragraphs are on oath.

Secondly, in **paragraph 11 of the plaint dated 7/9/2021**, the Plaintiffs aver;

“There is no other suit pending and there have been no previous proceedings in any Court between the Plaintiffs and the Defendant over the same subject matter.”

Surprisingly, in **paragraph 10 (v) of the Supplementary Affidavit dated 30/11/2021**, the Plaintiffs admit that there are three ongoing cases. Though they say that the suit land is not a subject of the three cases, there is credible evidence to the contrary from the Defendant.

The Defendant says that he has been in occupation of the suit land for 23 years and continues such occupation.

The Plaintiffs have not been able to disprove this. Neither have the Plaintiffs proved that they will suffer irreparable loss that cannot be adequately compensated by an award of damages.

Having found against the Plaintiffs on the first two grounds, I need not consider the third ground of balance of convenience.

For the above stated reasons, I dismiss the Plaintiffs application dated 7th September, 2021.

Costs to be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE