



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 39 OF 2011**

**SIRGOI TEA ESTATES LIMITED ..... PLAINTIFF**

**VERSUS**

**PAUL KIBII CHERIRO ..... DEFENDANT**

**RULING**

This is an application by the plaintiff brought under Order 40 Rule (1) and (2) read with Order 51 Rule (1) of the Civil Procedure Rules and Section 1A, 1B, 3 and 3A of the Civil Procedure Act.

The Order sought is a temporary injunction against the defendant/respondent restraining him, his family, servants/agents from trespassing, destroying fences, uprooting beacons, ploughing, planting, harvesting, grazing, transferring, selling, leasing and/or in any other way dealing with land parcels No. **NANDI/KABOI/857, 858, 859 and 861** pending the hearing and final determination of this suit.

The grounds for the application are contained in the Notice of Motion dated 14<sup>th</sup> March 2011. These are supported by the facts contained in the supporting affidavit dated 14<sup>th</sup> March 2011 and supplementary affidavits dated 16<sup>th</sup> May 2011 both deponed by respective directors of the plaintiff Company.

In the said affidavits, the plaintiff contends that it is the registered owner of the aforementioned parcels of land but on several occasions the defendant has trespassed thereon and gone to the extent of uprooting official boundary beacons unlawfully and without authority of the Government Surveyor. It is also contended that the defendant has proceeded to graze his livestock on the parcels of land and ploughed other parts thereby unlawfully and unjustifiably depriving the plaintiff of its lawful and peaceful use of the parcels which were purchased for commercial growing of tea.

The plaintiff further contends that the defendant is a stranger without any right to proprietorship of the parcels which were purchased from one **FREDRICK KIMGENY CHERIRO** (now deceased) and registered in the Plaintiff's name on 21<sup>st</sup> April 1997.

The plaintiff says that the late Fredrick Kimgeny Cheriro filed suits at the Kapsabet Court and the Eldoret High Court in relation to the parcels of land but the suit at Kapsabet was dismissed by the Court while that at the High Court Eldoret being HCCC. No. 25 of 2003 was never followed up.

The plaintiff contends that apart from grazing his cattle on the parcels of land the defendant is not

in occupation but has planted maize crop without carrying out any developments on the parcels. Further, the defendant merely claims that the parcels belonged to his late father and has not indicated in what capacity is he attempting to forcefully take away the parcels from the plaintiff.

Learned Counsel, **MR. OTIENO**, argued the application on behalf of the plaintiff. He reiterated what the plaintiff stated in its affidavits and contended that the defendant is a trespasser and has no right of claim over the suit parcels of land. Further, the defendant's replying affidavit is deposed by a person not a party to the suits mentioned therein which suits were against a director of the plaintiff while the plaintiff is a separate legal entity with its own identity. Learned Counsel contended that the defendant is a busy body in this matter and prayed for the orders sought herein against him.

In support of the application, learned Counsel, filed a list of authorities dated 14<sup>th</sup> March 2011.

In response to the application, the defendant filed a replying affidavit dated 6<sup>th</sup> May 2011 in which he says that he is the son of the late Fredrick Kingeny Cheriro who died on 4<sup>th</sup> July 2004 and was the registered proprietor of the disputed parcels of land. Further, at the time of his demise, the late Fredrick Kingeny Cheriro had several cases in Kapsabet and Eldoret against Bethuel Kipkemboi Kemei ( a director of the plaintiff Company).

The defendant contends that the said cases resulted from a breach of a sale agreement entered between his late father and the said Bethuel Kipkemboi Kemei over the material parcels of land. It is the defendants contention that Bethuel Kipkemboi Kemei fraudulently transferred the parcels of land to himself and since there was a risk of the parcels being sold by a Bank over an outstanding loan, the defendant's late mother Afra Chesang Cheriro filed Eldoret HCCC No. 138 of 2007 to prevent the intended sale.

The defendant also contends that he negotiated with the bank and paid off the outstanding loan but in a scheme to complicate the matter and with the intent of depriving the rightful owners off the parcels of land, Bethuel Kipkemboi Kemei and Susan Koech formed the plaintiff Company and registered the parcels in its name.

The defendant further contends that he has been in occupation of the parcels of land even prior to the death of his parents and that he has never destroyed any fence nor wasted the property. He therefore prayed for the dismissal of this application.

Learned Counsel, **MR. CHEPKWONY**, argued on behalf of the defendant that the plaintiff has come to Court without clean hands in that, being a director of the plaintiff, allegations of fraud have been made against Bethuel Kipkemboi Kemei who is the person who transferred the parcels to the plaintiff Company.

Learned Counsel contended that the defendant lives and dwells on the suit property and would most adversely be affected if an injunction order is issued against him. Further the transfer of the parcels of land to the plaintiff by Bethuel Kipkemboi Kemei was not genuine. Learned Counsel therefore urged this Court to dismiss the application.

All considered, Order 40 rule 1 of the Civil Procedure Rules (2010) provides instances in which a temporary injunction order may be granted. Such order is normally granted to restrain acts which may lead to the wasting, damaging, alienation, sale, removal or disposition of the disputed property pending the hearing and disposal of a suit.

Herein, the plaintiff alleges that the defendant is a trespasser on the parcels of land in as much as he has no right of claim over the property. That, his action of grazing his cattle on the parcels of land and growing maize on part thereof are interfering with the plaintiff's ownership and peaceful usage of the parcels of land.

The title deeds annexed to the plaintiff's affidavit confirm that it is the registered proprietor of the

material parcels of land (i.e. Annexures marked SK.1, 2, 3 and 4). All the said titles were issued on 27<sup>th</sup> April 2001. The certificates of search (annextures SK. 5, 6, 7 and 8) show that as at the 2<sup>nd</sup> March 2011, the plaintiff was still the registered owner of the parcels of land.

On his part, the defendant does not dispute that the parcels of land are currently registered in the name of the plaintiff. He however, contends that the plaintiff's titles are fake and were fraudulently obtained by the plaintiff through its director Bethuel Kipkemboi Kemei. The allegations of fraud are contained in the defendant's statement of defence which contains a counter claim to the extent that the register pertaining to the parcels of land be rectified by cancellation of the plaintiff's name and substitution thereof with the name of the late Fredrick Kimngeny Cheriro as the sole proprietor.

The defendant has also contended that the parcels of land are currently in his possession. He implied that he has not interfered with them in the manner suggested by the plaintiff.

From all the foregoing, it is apparent that the registration of the parcels of land in the name of the plaintiff provides it with an advantage over the defendant in showing that he may be having a good case against the defendant. However, the defendant has alleged fraud in the said registration. If this fact is ultimately proved, the titles issued in favour of the plaintiff may as well be cancelled. Consequently, it may not be easy at this stage to say that the case against the defendant has high chances of success if the defendant's "*locus standi*" is established in his favour. It is not disputed that the defendant is the son of the late Fredrick Kimngeny Cheriro who is said to have been the initial owner of the material parcels of land and who is said to have sold the same to Bethuel Kipkemboi Kemei who eventually transferred them to the plaintiff Company. It is also not disputed that the deceased's property reverted to his wife (the defendant's mother) who is also deceased. In the circumstances, the defendant's "*locus standi*" in this matter would effectively be determined at the hearing of the suit. It is at that juncture that the alleged defendant's failure to obtain a grant of letters of administration in his favour would appropriately come into the fore and a finding will invariably be made as to whether the lack of a grant would divest the defendant's alleged interest in this matter.

As to whether the loss of an interest in land is incapable of compensation by way of damages, the answer in the opinion of this Court would be in the negative. An interest in land is quantifiable in monetary terms. It is therefore capable of compensation by way of damages.

In sum, it may safely be stated that the plaintiff has failed to satisfy the first two conditions for the grant of a temporary injunction spelt out in the leading case of **GIELLA VS. CASSMAN BROWN & CO. LIIMITED (1973) EA 358**. That leaves us with the balance of convenience as a determinant factor.

The plaintiff contends that the defendant is already in occupation of the land in as much as he grazes his cattle there and has planted maize thereon. The defendant has stated that he has been in occupation even prior to the death of his parents. The balance of convenience dictates that since it is apparent that the defendant has not carried out any permanent developments on the parcels of land and is only grazing cattle and planting maize thereon, the existing status quo be maintained pending the hearing and final determination of this suit.

In the end result, this application is dismissed. Costs be in the cause.

**J. R. KARANJA**  
**JUDGE**

**[Read and signed this 23<sup>rd</sup> day of June 2011]**

**[In the presence of Mr. Otieno for applicant and M/s. Sibanda holding brief for Mr. Chepkwony for respondent]**