



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO. 31 OF 2010

JEREMIAH KIPRONO CHIRCHIR PLAINTIFF
VERSUS
WILLY KORIR & 5 OTHERSDEFENDANT

RULING

This is a ruling relating to the Chamber Summons application dated 5th May, 2010 filed by **Jeremiah Kiprono Chirchir**, the Plaintiff in this suit, against all the six Defendants. The application seeks injunction pending the hearing and disposal of the suit. The injunction orders sought are to restrain the Defendants from trespassing onto, occupying or ploughing or planting maize or erecting structures or cutting down trees on **land title No. Kericho/Kabianga/2407** (the suit land).

The Plaintiff avers that he is the proprietor of the suit land No. Kericho/Kabianga/2407 which measures 1.20 hectares. He further avers that the defendants did on 22nd February, 2010 trespass on the suit land by taking possession of it without his consent and by occupying it. It is the contention of the Plaintiff that the Defendants have no legal right to be on the suit land. The plaintiff therefore seeks in the suit a permanent order to evict the Defendants from the suit land and a permanent injunction to restrain the Defendants from further trespass. He also seeks mesne profits and costs.

In their statement of defence which I have perused, the Defendants admit that the Plaintiff is registered as the proprietor of the suit land but aver that he secured registration of the title to the suit land into his name fraudulently. They claim that there are 4 acres of land comprised in the title to the suit land which the Plaintiff fraudulently acquired and caused to be lumped up in the title to the suit land.

In their replying affidavit sworn by the 4th Defendant, **Lucio Chepkorir Matingwony**, the Defendants aver that the suit land is the subject of litigation in Kericho H.C. Civil Suit No. 24 of 2007. In that suit, the said deponent contends, the Plaintiff in this suit is the 2nd Defendant, while she Lucio Chepkorir Matingwony, the 4th defendant in this suit, is the Plaintiff. The contest in that suit relates to land titles No. Kericho/Kabianga/2406 and 2407 which Lucio Matingwony claims comprise 4.0 acres that belong to her.

It is patent from the application that the two parcels of land Nos. Kericho/Kabianga/2406 and Kericho/Kabianga/2407 were subdivisions of the original title No. Kericho/Kabianga/1128 which was registered in the name of Seronei Rop and was closed on subdivision of these two titles. Plot No. Kericho/Kabianga/2407 measuring 1.2 hectares was transferred by Seronei Rop to Jeremiah Kiprono Chirchir.

I have carefully perused the affidavit of Jeremiah Kiprono Chirchir sworn on 5th May, 2010 in support of the application for interlocutory injunction. I have also perused the replying affidavit sworn by Lucio Chepkorir Matingwony on 14th May, 2010 in reply to the application. Mr. E.M. Orina, learned counsel for the Applicant, urged the court to grant the orders sought. He conceded that Kericho HCC Suit No. 24 of 2007 does exist and that it involves that Plaintiff herein and the 4th Defendant and Kipkemoi Rop

Chirchir, but he submitted that the other parties to this suit are not party to that suit and are not affected by it.

Mrs. E.R. Kimeto, Learned counsel for the Defendant/Respondents opposed the application and contended that the suit herein is frivolous and vexatious and an abuse of the process of the court. She further submitted that the Applicant/Plaintiff by stating that “there is no suit pending arising from the subject matter” uttered a falsehood on oath in her affidavit sworn on 5th May, 2010 verifying the contents of the Plaint pursuant to **Order VII rule 1(2)** of the **Civil Procedure Rules**. It was the submission of Mrs. Kimeto that the 3rd, 5th and 6th Defendants in the suit herein are sons of the 4th Defendants, Lucio Matingwony, while the 1st and 2nd Defendants are nephews of the latter. It was Mrs. Kimeto’s further submission that the Applicant/Plaintiff is trying to circumvent the orders made in suit No. 24 of 2007. In her view, the applicant/plaintiff is seeking orders that may end up contradicting the orders made in Kericho HCCC No.24 of 2007. She submitted that the Respondents/Defendants have never been in possession of land parcel No. Kericho/Kabianga/2407 nor have they ever destroyed the trees or cultivated the said land as alleged. She further submitted that the Respondents/Defendants have been in possession of five acres comprised in land title No. Kericho/Kabianga/1129 and that this court had in suit No. Kericho HCCC NO. 24 of 2007 ordered the survey and ascertainment of boundaries of the five acres which were comprised in title No. Kericho/Kabianga/1129. Mrs. Kimeto opined that the suit herein was a duplication.

I have given due consideration to the submissions made by Mr. Orina and Mrs. Kimeto. The facts emerging in the application are that the 4th Defendant has already instituted against the Plaintiff and one Kipkemoi Rop suit No. 24 of 2007 in which she (the 4th Defendant) claims that a portion of 4.0 hectares of land has wrongfully and fraudulently been included in land titles No. Kericho/Kabianga/2406 and 2407. She has sought a declaration to this effect. The record placed before the court shows that land parcels Nos. Kericho/Kabianga/1128 and Kericho/Kabianga/1129 were contiguous and the 4th Defendant/Respondent contends that a portion of 4 hectares which belonged to title No. Kericho/Kabianga/1129 was included in title No. Kericho/Kabianga/1128 due to the fraud of one Seronei Rop, who is a brother –in- law of the 4th Defendant in this suit. It is patent that parcel No. Kericho/Kabianga/2407 was first transferred to Seronei Arap Rop after its excision from title No. Kericho/Kabianga/1128 and further that Seronei Arap Rop transferred it to Jeremiah Kiprono Chirchir, the plaintiff herein.

The facts emerging are controversial. Although the Plaintiff contends that he is the proprietor of land title No. Kericho/Kabianga/2407, it is plain to see that he is also involved in litigation over this land as is exemplified in suit No. Kericho HCCC NO. 24 of 2007 where he is a Defendant. Some of the parties are relatives.

Injunctions are discretionary remedies. They are granted by courts to protect legal and equitable rights. Interlocutory injunctions are intended to protect the plaintiff against injury arising from violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The principles for the grant of interlocutory injunctions are well settled. In the celebrated case of **Giella V. Cassman Brown & Co. Ltd (1973) E.A. 358** the Court of Appeal stated these principles thus: first, the applicant must establish a prima facie case with a probability of success; secondly, the applicant must show that unless interlocutory injunction is granted, the applicant will suffer irreparable injury which would not adequately be compensated by an award of damages; it is not enough for a party to show that he has sustained damnum if he has no injuria; thirdly, that if the Court is in doubt, it will decide an application on the balance of convenience.

It is also the law that concealment of material facts or lack of candour or failure to make full disclosure of material facts on the part of the person applying for injunction will disentitle such person from getting the remedy of interlocutory injunction (see **Uhuru Highway Dev. Ltd V. Central Bank of Kenya and another, Nbi C.A. Civil Application No. 140 of 1995 (65/95 UR)** (unreported).

In the circumstances of this case, I am not satisfied that the interlocutory injunction sought will serve the

interest of justice. It is my finding that the Plaintiff has not established that he shall suffer irreparable loss that cannot be compensated by an award of damages. In any case, the facts are too controversial and it is undesirable at this stage to give the orders sought. This litigation must be heard and determined on merit after oral evidence is given so that the true picture may emerge of what has happened between the parties. I decline to grant the orders sought and hereby dismiss the application with costs.

DATED at **KERICHO** this 7th day of July, 2010

G.B.M. KARIUKI, SC
RESIDENT JUDGE

Advocates

Mr. E.M Orina of Orina & Co. Advocates appeared for the Applicant/Plaintiff.

Mrs. E.R. Kimeto of Bett & Company Advocates appeared for the Respondents/Defendants