



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

**Civil Suit 48 of 2006**

**KIPLELE A. KAPLELACH.....PLAINTIFF/APPLICANT**

**VERSUS**

**SAMWEL CHEPTIGIT ROTICH.....DEFENDANT/RESPONDENT**

**RULING**

This is an application made by the Plaintiff under the Provisions of **Order XXXIX Rules 1(a), 2A(1) and 3(1) of the Civil Procedure Rules** seeking an order of temporary injunction to restrain the defendant, by himself, his agents or servants from interfering, demarcating, disposing off, putting up new developments or otherwise adversely dealing with land parcels No.**Kericho/Kapkatet/70 & 1125** (*hereinafter referred to as the suit properties*) pending the hearing and determination of the suit. The plaintiff has further sought an order of this court to compel the Land Registrar Kericho/Bureti District to remove the cautions which have been placed by the defendant in the land register in respect of the suit properties. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Kiplele A. Kaplelach, the plaintiff. The application is opposed. The defendant, Samuel Cheptigit Rotich has sworn a replying affidavit in opposition to the application.

At the hearing of the application, Mr. Bii, learned counsel for the plaintiff submitted that the plaintiff was the registered owner of the suit properties. He submitted that the defendant, had, without the authority of the plaintiff taken occupation of the suit properties and commenced developments thereon. He submitted that the defendant had frustrated the plaintiff in his bid to distribute his properties to his dependants. Mr. Bii submitted that the plaintiff was married to three wives, two of whom are now deceased. He submitted the plaintiff had settled the children of his late two wives save for his last and youngest wife. He submitted the defendant, a son to one of his late wives, had frustrated him from transferring the suit properties to his 3<sup>rd</sup> wife yet he (*the plaintiff*) had already settled all the children of his other wives (*who are now deceased*) including the defendant. He submitted that the defendant had cautioned the two properties and had succeeded in frustrating the plaintiff from effecting the transfer to his 3<sup>rd</sup> wife, even though he had secured the consent of the Land Control Board to effect the said transfer. The plaintiff therefore urged this court to grant him the order of injunction sought so as to enable him distribute his properties to his family members.

Mrs. Oangé, leaned counsel for the defendant opposed the application. She submitted it was not true that the plaintiff had distributed any of his properties to his thirteen sons, including the defendant. The defendant submits that he has been in occupation of parcels No.**Kericho/Kapkatet/70** and even buried his mother, wife and son on the said parcel of land. The defendant submitted that he had constructed a permanent house on the said parcel of land and even planted more than 3000 bushes of tea on the said parcel of land. She submitted hat if the plaintiff is allowed to transfer the said parcel of land to his 3<sup>rd</sup> wife, the defendant would be rendered landless. Learned counsel for defendant submitted that the defendant was not opposed to the plaintiff distributing his properties to his beneficiaries but was opposed to the suit properties to be distributed to the 3<sup>rd</sup> wife of the plaintiff because she has not resided on the suit properties since she was married. The defendant urged the court to dismiss the application for injunction with costs.

I have carefully considered the rival submissions made before me by the parties to this application. I have

also read the pleadings filed by the parties in support of their respective cases in this application. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the order of injunction sought. The principles to be considered by this court in deciding whether or not to grant the order of injunction sought are well settled. The plaintiff must establish that he has a prima facie case with a high probability of success; that if the order sought is not granted, he is likely to suffer irreparable damage or loss which may not be compensated by an award of damages and finally, in the event that there shall be doubt, the court would consider where the balance of convenience lay in determining the application (**See Giella vs Cassman Brown [1973] E.A 358**)

In the present application, the issues in dispute is a land dispute between a father and his son. The suit properties are registered in the name of the plaintiff. From the pleadings filed, it is apparent that the plaintiff is now aged. The defendant in his affidavit swore that he was the 1<sup>st</sup> born son of the plaintiff. He is sixty (60) years. The plaintiff is polygamous. He owns several parcels of land. He was married to three wives. Two of his wives are now deceased. He is remaining with his 3<sup>rd</sup> and youngest wife. According to the submissions made before court, the plaintiff has thirteen (13) sons who are apparently all of the age of majority. The plaintiff settled his three wives in different parcels of land. According to the defendant the suit properties, which are the subject of this suit, used to be occupied by his late mother. The plaintiff however intends to transfer the suit properties to his 3<sup>rd</sup> wife, who apparently does not reside on the two parcels of land. The defendant has deponed that he has resided on the suit properties since his mother died. This fact has not been denied by the plaintiff.

My evaluation of the facts of this case is that it is apparent that the relationship between the plaintiff and the defendant is not good. The plaintiff attempted to hit the defendant where it hurts most by transferring the suit properties to his 3<sup>rd</sup> wife. It is apparent that the said transfer of the suit properties by the plaintiff was not made in his bid to distribute his properties to his dependants. The plaintiff has not distributed his other properties to his beneficiaries;- all his said properties are still registered in his name. The defendant has established by affidavit evidence that he resides on one of the suit properties. He has also established that the 3<sup>rd</sup> wife has never resided on the suit properties but resides on another parcel of land where the plaintiff has set a matrimonial home for her. It is apparent that the said proposed transfer has been made with some ulterior motive. Although this court is aware that a registered owner of a property can transfer it as he deems fit, the circumstances of this case disclose that there is a possibility that a trust may have been created whereby this court, during the full hearing of case, may possibly determine that the plaintiff holds the suit properties in trust for the defendant.

It is therefore clear from my above evaluation of the facts of this application that the plaintiff has failed to establish a prima facie case. An injunction may not issue where the chances of the plaintiff succeeding in his case is highly unlikely. The issues in dispute in this suit should be canvassed and determined in a full hearing. The grant of an injunction would interfere with the status quo already existing on the ground. The application for injunction lacks merit and is hereby dismissed with costs.

**DATED at KERICHO this 2<sup>nd</sup> day of November, 2006**

**L. KIMARU**

**JUDGE**