



**REPUBLIC OF KENYA**

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

**Civil Suit 52 of 2005 (OS)**

**WILSON KIPKOECH ARAP CHERUIYOT.....1<sup>ST</sup> APPLICANT**

**TAITA KIPNGENO ARAP CHERUIYOT .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ESTHER CHEPKOECH CHERUIYOT..... RESPONDENT**

**RULING**

The applicants in this suit filed an originating motion under **Order XXXVI rule 3D** of the **Civil Procedure Rules** seeking the orders of this court that the applicants be declared to have acquired title to the whole of parcel number *KERICHO/KIPTERE/1927 (which had now been subdivided into KERICHO/KIPTERE/4581 AND 4582)* by adverse possession. Contemporaneous with filing the said suit, the applicants filed an application under **Order XXXIX rules 1, 2, 3 and 9** of the **Civil Procedure Rules** seeking to have the respondent restrained by means of a temporary injunction from entering, trespassing, fencing, occupying, sub-dividing, transferring, disturbing, annoying the applicants and their families or in any other manner dealing with parcels number *KERICHO/KIPTERE/4581 and KERICHO/KIPTERE/4582* formerly known as parcel number *KERICHO/KIPTERE/1927 (hereinafter referred to as the suit land)* pending the hearing and determination of the suit filed herein. The application is supported by the annexed affidavit of Wilson Kipkoech Arap Cheruiyot. The grounds in support of the application as stated on the face of the application are that, the applicants are contending that they are in occupation and possession of the suit land. The applicants have stated that the respondent's title in respect of the suit land was extinguished in 1986 when the applicants acquired the title to the said suit land by adverse possession. The applicant contends that the respondent had unlawfully and fraudulently caused the suit land to be sub-divided and transferred to other parties. The applicants were apprehensive that if the order of injunction sought was not granted, there would be breach of peace as the respondent intend to disturb and remove the applicants and their families from the suit land. The said Wilson Kipkoech Arap Cheruiyot swore a further affidavit in support of the application.

The application is opposed. The respondent has filed grounds in opposition to the said application. The respondent, Esther Chepkoech Cheruiyot, swore two affidavits in reply and opposition to the application filed by the applicants. In essence, the respondent has deponed that the applicants and her deceased husband (*Robert Kipkurui Cheruiyot*) are brothers. The suit land was part of a bigger portion of land which was owned by the mother of the applicants and the said deceased husband of the respondent. The respondent deponed that the said mother to the applicants caused the bigger parcel of land to be subdivided into three portions. The applicants and the deceased were each registered as owners of their respective portions of land. The respondent deponed that the suit land was registered in the name of the deceased and when he died, the respondent inherited the said parcel of land after obtaining letters of administration to administer the deceased estate. The respondent deponed that the applicants had no claim whatsoever over the suit land because each of them occupy a portion of land which they inherited from their parents, just as the deceased did. The respondent urged the court to dismiss the application filed by the applicants.

At the hearing of the application, I heard the submissions made by Mr. Siele, Learned counsel for the applicants. He submitted that the applicants were the current occupants of the suit land and had so

occupied the said parcel of land to the extent that they had acquired title by adverse possession. It was argued that the subdivision and the transfer of the suit land to the sons of the respondent was undertaken illegally as the said transfer was done before the letters of administration which had been issued to the respondent had been confirmed. The applicants contend that the said sub-division and transfer was undertaken fraudulently in a bid to defeat their claim. The applicants submitted that they have proved a case to enable this court grant them orders of interlocutory injunction. They further submitted that they would suffer irreparable loss and damage if the application is not granted.

Mr. Mageto, Learned Counsel for the respondent opposed the application. He submitted that the procedure adopted by the applicants in seeking the orders of injunction was wrong. He argued that the prayers sought in the application were not supported by any relief sought in the originating summons. He further argued that the facts of the case clearly demonstrated that the applicants had not established a prima facie case to enable this court grant the orders of injunction sought. Learned Counsel for the respondent conceded that the applicants are in occupation of the suit land but denied the applicants allegation that the said possession had entitled them to acquire title by adverse possession. He submitted that the applicants could not have acquired title by adverse possession as the suit land was at the material time owned by their father. Learned Counsel submitted that the application for injunction had been overtaken by events as the sons of the respondent had already been registered as the owners of the subdivided portions of land. He further submitted that the applicants had not proved that the said sub-division and transfer of the suit land to the sons of the respondent was undertaken fraudulently. Furthermore, it was submitted that the respondent had obtained letters of administration to administer the Estate of her deceased husband and had the said letters of administration confirmed without the applicants raising any objection. The respondent urged the court to dismiss the application for injunction with costs.

I have carefully considered the rival submissions made by the counsel for the applicants and the counsel for the respondent. I have also read the pleadings filed by the parties to this application. The issue for determination by this court is whether the applicants have established a case to enable this court grant the interlocutory orders of injunction sought. Certain aspects of the case are not disputed. It is not disputed that the applicants are in occupation of part of the suit land. It is further not disputed that the suit land was registered in the name of the deceased husband of the respondent who died in the year 1997. From the affidavit evidence on record, it is apparent that the applicants occupied the part of the said suit land with the consent of the deceased husband of the respondent. It is also not disputed that the applicants separately own two adjoining parcels of land which they apparently inherited from their deceased father.

The point of divergence between the applicants and the respondent's case is when the applicants allege that they had acquired the suit land by virtue of the operation of the law i.e. adverse possession. The respondent has submitted that the applicants could not have acquired the title of the said parcel of land by adverse possession due to the fact that they were occupying the said parcel of land by virtue of a licence of the deceased husband of the respondent. Having carefully evaluated these conflicting facts, it is clear that the applicants have been in occupation of part of the suit land for a very long time. What I cannot however discern from the pleadings filed in support and in opposition of the application is under what tenure the applicants occupied the said parcel of land. The respondent in this case obtained letters of administration to administer the estate of her deceased husband in the year 1999.

The deceased husband of the respondent was the brother to the applicants. Before the said letters of administration were confirmed by this court, the respondent had the suit land subdivided and transferred to her two sons. When the said letters of administration was confirmed by this court on the 7<sup>th</sup> of May, 2004 it was *fait accompli*. The respondent had without the confirmation of grant transferred the suit property to her sons. It is obvious that the said sub-division and transfer was illegal having been undertaken without the authority of this court. However, that is besides the point. The issue before this court is whether on the facts of this case, the orders of interlocutory injunction ought to issue. After carefully evaluating the facts of this case, it is evident that the issues in dispute between the applicants and the respondents can, and ought to be, properly adjudicated upon in the succession proceedings which granted the respondent authority to deal with the suit land. It is apparent that the applicants claim over the suit property is based on their alleged right as the sons of the original owner of the suit land who was their

father. Although the deceased husband of the respondent was registered as the owner of the suit land, there is evidence that the applicants are in occupation of the same by virtue of some right which accrued by the fact that the said parcel of land was originally owned by the deceased father of the applicants.

This court cannot therefore adjudicate on the dispute between the applicants and the respondent in an application for interlocutory injunction in a suit filed for adverse possession. The applicants sought relief in the wrong forum. This court would advise the applicants to have their dispute with the respondent ventilated in the succession cause in respect of the late Robert Kipkurui Cheruiyot's Estate.

For the reasons stated this applicant must fail. It is dismissed with costs to the respondent.

**DATED at KERICHO this 2<sup>nd</sup> day of December 2005**

**L. KIMARU**

**JUDGE**