REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 1 OF 2020 (O.S)

JOSEPH KIMUTAI KIMETTO.....PLAINTIFF/APPLICANT

VERSUS

RICHARD KIPNGETICH KIMETTO.....1ST DEFENDANT/RESPONDENT

JOHN KIPKEMOI KIMETTO.....2ND DEFENDANT/RESPONDENT

RULING

1. The application before me for determination is a Notice of Motion dated 3rd January, 2020 and filed in court on the same date. The applicant – **JOSEPH KIMUTAI KIMETTO** – filed it together with an originating summons (O.S) of even date claiming adverse possession of some two (2) acres from land parcel **L.R NO KERICHO/BOITO/173**. The respondents in this application – **RICHARD KIPNGETICH KIMETTO** and **JOHN KIPKEMOI KIMETO** – are also the respondents in the Originating Summons.

2. The application's legal anchorage is expressed to be Sections 1A, 1B, 3, 3A and 63(e) of Civil Procedure Act (cap 21), Order 40 rules 1 and 2 (1) and Order 51 rule 1 of Civil Procedure Rules, 2010, and all other enabling law. The motion came with a total of six (6) prayers, all styled (a) (b) (c) (d) (e) and (f), but two of them – prayers (a) and (b) – were considered at an earlier stage and are therefore moot. The prayers for consideration therefore are (c) (d) (e) and (f) and are set out herein below *ipsissma verba*:

> *Prayer (c) That pending hearing and determination of this suit, an order of injunction do issue restraining the defendant/respondent by themselves, agents and/or servants or otherwise whosoever be restrained from evicting, cutting down trees, plucking tea, destroying the applicant's development or in any manner interfering with the applicants right of use, and occupation of the property title number KERICHO/BOITO/173.*
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> *Prayer (d): That an order of inhibition be issued inhibiting any dealings on land parcel NO KERICHO/BOITO/173 pending hearing and determination of this suit.*
>
> *Prayer (e) That the respondent bears the costs of this application.*
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> *Prayer (f): That necessary directions be made.*

3. The grounds advanced in support of the application state, interalia, that the applicant purchased two acres of the disputed land way back in 1975 and has been in possession and occupation since; that the possession and/or occupation has been exclusive, actual, open, and uninterrupted, thus giving rise to entitlement to ownership under adverse possession; that the applicant has made substantial development which include growing tea and other crops on the land; and that the applicant's two children died and were interred on the land.

4. The supporting affidavit that came with the application further explicated the grounds and gave a historical narrative concerning the claimed ownership. And the narrative is that the applicant bought the land from the registered owner – the late **SEBASTIANO MOCHI MASAE**. That happened way back in 1975 and the seller even started the process of transferring the sold portion to the applicant. That process was however not completed. The applicant however went into possession and occupation, in the process putting up his home there and planting tea. He later sank a borehole for use when tap or piped water was not available.

5. The seller died and the respondents became the legal representatives of his estate later. While applying to court to become such representatives the respondents are said to have excluded the applicant and they were subsequently issued with a grant that failed to capture or recognize the applicant's interest. The applicant later made an unsuccessful attempt to challenge the grant. According to him, he was unsuccessful largely because the court that dealt with the matter lacked jurisdiction to consider his claim of entitlement under adverse possession.

6. After the decision of that court, the respondents are said to have tried to evict the applicant from the land. They barred him from plucking his tea and even sprayed the grass on the land with some grass burning chemicals. The applicant averred that he will suffer irreparable loss and damage if his application is not allowed.

7. The respondents responded via a replying affidavit filed on 17th January, 2020. They denied the alleged purchase of the disputed land by the applicant. They denied too that the applicant is in occupation or possession or that he has built structures on the land. According to them, no borehole has been sank on the land and no children are interred there. The applicant was said to have tussled with the late owner over ownership of the same portion, with the late owner allegedly pursuing the matter through various official channels.

8. The respondents' response prompted the applicant to file a supplementary affidavit in which he reiterated the truthfulness of what he stated in his application.

9. Both learned counsel on both sides filed written submissions in lieu of oral hearing. The applicant's submissions were filed on 12th March, 2020. He pointed out that he is required to establish a prima facie case with a probability of success, demonstrate likelihood or possibility of suffering irreparable injury and, if need be, show that the balance of convenience tilts in his favour. He then submitted that he has established a prima facie case, having shown how he entered the land and having demonstrated the fact of his possession and/or occupation. The respondents were said to have indirectly confirmed this when they alleged that the late owner had complained of the applicant's trespass.

10. The applicant also submitted that he stands to suffer irreparable loss. He cited the developments he has made and the fact that his two children are also interred on the land.

11. Lastly, the applicant submitted that the balance of convenience tilts in his favour as the foundation of his case will be altered if the orders are not granted. On this note too, he submitted that it was necessary to grant an order of inhibition as the respondents are in the process of subdividing the land. The land ownership would be likely to change if that happens. The applicant's case will therefore likely be in vain.

12. The respondents' submissions were filed on 15th June, 2020. They pointed out the applicable law as enunciated in the case of **GIELLA VS CASSMAN BROWN (1973) EA 358**. It is the same law pointed out by the applicant though the applicant didn't mention **Giela's case**. The respondents faulted the applicant for not making available an agreement of sale despite alleging that he had purchased the land. According to the respondents, the documents made available do not show a valid claim to the property. Adverse possession was also said not be disclosed. All this was said to fall short of disclosing a prima facie case.

13. The applicant was also said to have failed to demonstrate the likelihood of suffering irreparable loss. His allegations of having carried out massive development on the land were said to be untrue. It was submitted that the respondents have been in use and occupation at all times and allowing the application was said to be likely to prejudice their interests.

14. The balance of convenience was also said to tilt in favour of the respondents. It was submitted that the applicants have demonstrated that they "*have at all times been the rightful owners of the suit property, they have guarded and protected their interests against the applicant's intrusion and have at no time have they (sic) neglected their property or been dispossessed"*.

15. On the issue of the order of inhibition it was submitted, interalia, that "*A grant of an order of inhibition against the suit property L.R NO KERICHO/BOITO/173 will limit the defendants/respondents legal rights thus causing an injustice"*. The respondents emphasized that the applicant has no right to the suit property. The court was asked to dismiss the application with costs to the respondents.

16. I have endeavored to understand the suit as filed. I have considered the application, the response made, and the rival submissions. As pointed out earlier the dispute herein revolves around ownership of some two acres comprised in land parcel **NO KERICHO/BOITO/173**. The applicant claims to have bought the two acres from the deceased owner – **SABASTIANO MOCHI MASAE**. It is clear that the deceased owner was the respondents' father. The respondents applied to become personal representatives of their late father's estate and while doing so, they failed to include the applicant's interest. They were issued with a grant but the applicant decided to challenge it. His efforts however came to nought partly because the court before which the challenge was taken faced jurisdictional constraints to handle the issue of adverse possession raised by the applicant.

17. To the application herein was annexed some documents showing the deceased owner engaged in the process of transferring the purchased land to the applicant. The process however seems to have stalled at some point. There is also a letter (marked JKK-7) from the area chief addressed to Konoin Land Control Board making reference to both the purchase and transfer. It also mentions that the applicant had planted tea and build a house on the land.

18. In view of what the applicant has made available, his claim to the land cannot, prima facie, be said to be a wild dream. He has laid some reasonable basis for it. I therefore do not agree with the respondents when they depose in the replying affidavit that the application herein is "*frivolous, vexatious and an abuse of the court process*".

19. It is clear that the respondents have a grant from probate and administration court. They are poised to start distribution of the estate of their late father and that might entail subdivision and even transfer of the suit land. That could complicate matters. Change of ownership might bring new persons into the equation. In my view, it is necessary to preserve the subject matter of the case. I hold the position that the applicant has established a prima facie case. In **Otieno Vs Ougo & Another (NO 2) (1987) KLR 400** the court held, interalia, that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action. That is desirable in this case. And it is desirable because if the estate is distributed and new people become owners, the case might take an entirely new trajectory.

20. I need to point out that while the court should remain guided by the principles set out in Giela's case (*supra*), these are not the only

overarching considerations. As pointed out in the case of **SULEIMAN VS AMBOSELI RESORT LTD (2004)2 KLR 519**, the court should always opt for the lower rather than the higher risk of injustice. And as further observed in the case of **JAN BOLDEN VS HERMAN PHILLIPUS STEVA: (2012) eKLR** the court is at liberty to look at the prevailing circumstances of a given case generally and consider the overriding objective of justice and the law. It is with all this in mind that I approach the matter at hand.

21. It is shown with reasonable clarity that the applicant has tea on the disputed portion. It seems likely that there could be some other developments there. The respondents denied all this but I note that the applicant even made available some photographic material to drive home his point. A mere verbal denial by the respondents was not enough. They needed to do more in order to displace the applicant's deposition. When the applicant therefore says he is bound to suffer loss, I don't think that he is making a farfetched claim. I am persuaded that an injunction is necessary in this matter. It is not an order that entitles the applicant to ownership. It is ratheran order that serves to preserve the disputed portion as the issue of ownership awaits determination.

22. An order of inhibition was also asked for. This order is normally issued where the possibility of interfering with title with a view to defeating the interest of justice is real. The courts usually try to consider whether the applicant has an arguable case. In **JAPHET KAIMENYI M' NDATHO VS M' NDATHO M' MBWI RIA (2012) eKLR**, the threshold for granting an order of inhibition was said to include a demonstration that the suit property is at risk of being transferred, alienated or disposed of; that refusal to grant the order would render the suit nugatory; and that the applicant has an arguable case.

23. In this matter, the possibility of subdividing the land and transferring it to other people is real. The land is still in the name of the deceased seller but noting that a grant has already been issued and confirmed the possibility of change of ownership is real. That might complicate things because other beneficiaries who are not parties to this suit might become owners. This, in my view, justifies issuance of an order of inhibition. I also note that the applicant has shown he has an arguable case. In fact, I have already observed elsewhere that he has established a prima facie case. A prima facie case is more than an arguable case.

24. The upshot, given what I have said heretofore, is that the application herein should be allowed in terms of prayers (c) and (d). I hereby allow the application in terms of the two prayers. Costs, which are the subject of prayers (e), will be in the cause.

Dated, signed and delivered at Kericho this 26th day of February, 2021.

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A. K. KANIARU

JUDGE