



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

E & L CASE NO. 75 OF 2018 (OS)

KIPKEBUT CHEBET (Legal Representative of

Kabon Chepsergon).....1ST PLAINTIFF/APPLICANT

DANIEL CHEPKONGA KIYAI.....2ND PLAINTIFF/APPLICANT

=VERSUS=

SALINA KIPSOTO (Administrator and Representative of

CHARLES KIPTORUS NGABO.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 19th October 2020 brought by the plaintiff/applicants seeking for the following orders:

a) Spent.

b) That an order of injunction be issued against the defendants herein whether by themselves, their agents, servants and or persons acting under their instructions from possessing, occupying, leasing, letting, constructing, wasting and or developing the Plaintiff's property known as **BARINGO/KAPCHOMUSWO "A" 1324** (suit property) situated at Orokwo, Baringo County or otherwise alienating or dealing with the same in excavating, or disposing, registering or transferring any interest to themselves and or any other party thereof till the hearing and determination of this application.

c) That an order of injunction be issued against the defendants restraining the defendant acting by themselves, their agents, servants and or persons acting under their instructions from possessing, occupying, leasing, letting, constructing, wasting and or developing the Plaintiff's property known as **BARINGO/KAPCHOMUSWO "A" 1324** (suit property) situated at Orokwo, Baringo County or otherwise alienating or dealing with the same in excavating, or disposing, registering or transferring any interest to themselves and or any other party thereof till the hearing and determination of this suit.

d) That an eviction and or vacant possession order be issued against the defendant or any other persons unlawfully occupying the Plaintiffs' property **BARINGO/KAPCHOMUSWO "A" 1324** situated at Orokwo Baringo County.

e) That the costs of the application be provided for

The court gave directions on the hearing of the application and counsel agreed to canvass the application by way of written submissions which were duly filed.

Plaintiff/Applicant's Case

The plaintiff's case is that the defendants have begun excavating, wasting and or harvesting building blocks and stones from the suit property, without the consent of the plaintiff and with full knowledge of the pending suit before court. That they have been in occupation of the suit land for over a long period of time and despite efforts to address the same with law enforcement agencies at Kabarnet Police Station, the plaintiff is yet to be assisted.

The plaintiff deponed that the defendant/respondents have taken advantage of the Covid-19 pandemic especially restriction of movement and curfew hours to excavate/harvest stones from the suit property at night and transport the same for sale as per the annexed photographs.

The plaintiff further deponed that 1st plaintiff/applicant has sent warning letters to the defendants/respondents to stop their actions but the same has been met with non-compliance. To this end, the 1st plaintiff/applicant avers that he reported the matter to Kabarnet Police Station vide **OB Number 18/29/8/2019** but he was dismissed by police officers who claimed the matter is before court.

The 1st plaintiff/applicant is therefore apprehensive that unless the defendants/respondents are restrained by an order of this honorable court, the applicants shall be exposed to irreparable loss and damage, being that the suit property is ancestral land and they depend on it as a source of livelihood. The applicant prayed that the court grants an order of injunction.

Defendants/respondents Case

The defendant/respondent opposed the application and relied on the replying affidavit of Salina Kipsoto, sworn on the 14th of November 2020 and deponed that the 1st Plaintiff does not reside on the suit property but lives in Seretunin. The defendant deponed that the suit property is located in Kabarnet Mosop location and not Orokwo Location as claimed by the 1st Plaintiff and further, that the defendant and her family are ones in possession of the suit property.

The defendant respondent annexed a copy of a search to show that he is the registered owner of the suit land and a copy of google map showing the exact location of the suit property which indicates that there are no houses erected on the property.

The defendant also stated that at the moment, no one is occupying the suit property but that her family has all through been in possession and using the same as grazing land. She averred that there is a plan hatched by the 2nd plaintiff to disposes her off the suit property and there is no basis for the plaintiffs to seek an order to bar her and her children from lawfully using their land.

The defendant avers that she has no intention of selling, transferring or leasing the land or in any manner alienating the same and admits that her sons have been harvesting the stones from the suit property as the suit property is duly registered as theirs and as such, they are entitled to use the land for profits.

ANALYSIS AND DETERMINATION

The principles governing the grant of the injunctive orders were laid down in the case of **Giella vs. Cassman Brown (1973) E.A 358**. In this case the court held;

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

The applicant therefore must demonstrate that;

- a) He/she has prima facie case with a probability of success against the defendant.
- b) He/she stands to suffer irreparable loss and harm unless orders sought are granted.
- c) That in the event of doubt, the court is to decide the matter on a balance of convenience.

The Court of Appeal in the case of **Mrao Ltd vs First American Bank Of Kenya Ltd & 2 Others** held that: -

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The court must therefore look at the evidence availed by all parties prior to granting the orders sought. The court must not only look at the strength of the applicant’s claim but also the strength of the defence before making a determination as to whether or not to grant the orders sought. This position finds support in the case of **Central Bank Of Kenya & Another vs Uhuru Highway Development Ltd & 4 Others**, where the Court of Appeal held: -

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

If the applicant fails to establish through material placed before court that he/she has a prima facie case, the court cannot proceed with granting the injunctive relief sought. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that:

*“With reference to the establishment of a prima facie case, Lord Diplock in the case of **American Cyanamid vs Ethicon Limited [1975] AC 396** stated thus,*

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

In the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**, the Court of Appeal further expounded and stated that:

*“In **HABIB BANK AG ZURICH V. EUGENE MARION YAKUB, CA NO. 43 OF 1982** this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:*

“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

In the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** John M. Mativo J noted:

“With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald Vs. Canada (Attorney General) [Supra] “Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial.

The second test is whether an applicant will suffer irreparable loss. In **Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi HCCC No. 1128 of 2001(Unreported)**, the learned judge noted that an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages.

This position was affirmed by the court in **Tritex Industries Limited & 3 others vs National Housing Corporation & Anor (2014) eKLR**, where the court held:

“This adequacy of damages test is common denominator in the prima facie test of Geilla v. Casman Brown and the balance of convenience test of American Cyanamid because under both tests an injunction will not be granted if the injury or loss complained of may adequately be remedied by an award of damages. As held in Mbutia v Jimba Credit, supra, in matters of land it is usual to grant injunctions to protect the parties’ profound interest in ownership of land whether as a residential property or as capital asset of production”.

The golden Rule in applications for injunctions is to maintain status quo.” That is, the purpose of any injunction sought is to preserve the suit land and maintain *status quo* on the suit land before a case is heard and determined.

Having looked at the principles for grant of injunction it is now imperative to apply the same to the current case. The plaintiff has stated that he has been in occupation and is laying a claim on adverse possession. The defendant claims that the plaintiff is not in occupation and admits that they have been excavating stones from the suit property as it belongs to them as the registered owners. The defendant also confirms that he will not sell or part with possession of the suit land during the pendency of this suit.

From the application I notice that the applicant is seeking for final orders in an interlocutory application namely an order of eviction and/or vacant possession be issued against the defendant for unlawfully occupying the suit land. These are orders that cannot be issued at an interlocutory stage before hearing the parties.

The annexed photographs do not show any occupation and the same is buttressed by a copy of google maps annexed by the plaintiff. This alone knocks out the plaintiff applicant on the limb of prima facie case as the case is based on adverse possession. Is the plaintiff in occupation or possession of the suit land? What type of activities is he engaged in to show occupation or possession at this preliminary stage without going into the merits of the case?

The plaintiff has also not proved that he will suffer any irreparable harm if the order of injunction is not issued.

Finally, as regards the third test, balance of convenience and without getting into the merits of the claim. I find that the balance of convenience tilts in favour of not granting a temporary injunction having found that the applicant has not established a prima facie case. In the interest of justice, I order that the defendant does not part with possession of the suit land pending the hearing and determination of the suit.

Costs to abide the outcome of the case.

DATED and DELIVERED at ELDORET this 23rd DAY OF FEBRUARY, 2021.

M. A. ODENY

JUDGE