



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

ELC CASE N0.43 OF 2020

MUSA K KIBUSIA.....PLAINTIFF

-VERSUS-

RICHARD KAPLAWAT CHEMJOR.....1ST DEFENDANT

ADAM KIPKURUI KAPLAWAT.....2ND DEFENDANT

RULING

This ruling is in respect of a notice of motion dated 29th July 2020 by the plaintiff/applicant seeking for the following orders:

- a) Spent
- b) That pending inter-parties hearing an order of temporary injunction be issued restraining the defendant/respondents either acting by themselves, their agents, servants and or employees from evicting the applicant, alienating, advertising for sale, offering for sale, selling, taking possession leasing, transferring, encroaching and or otherwise disposing off that parcel of land known as BARINGO/SALAWA/2715.
- c) That pending hearing and determination of this application and the main suit an order of temporary injunction be issued restraining the defendant/respondents either acting by themselves, their agents, servants and or agents from evicting the applicant, alienating, advertising for sale, offering for sale, selling, taking possession, leasing, transferring a, encroaching and or otherwise disposing off that parcel of land known as BARINGO/SALAWA/2715
- d) That the Honourable Court do issue an order of inhibition stopping further dealings, registration and transactions over that parcel of land known as BARINGO/SALAWA/2715 pending hearing and determination of this suit.
- e) That costs of this application be borne by the defendants/respondents.

Counsel agreed to canvas the application vide written submissions which were duly filed.

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel submitted that the applicant relies on the grounds on the face of the application, the supporting affidavit and the annexures thereof.

It was the applicant's case that 1st defendant/respondent vide a written sale agreement dated 26th January, 2010 sold 15 acres curved from the suit parcel of land known as BARINGO/SALAWA/2715 to LUKA KIPANG CHEBURET who is now deceased.

That deceased paid the entire purchase price of the parcel of land and took possession immediately after purchase. The applicant also deponed that the deceased later sold the land vide written sale agreements dated 30th September, 2015 and 30th June, 2015 respectively to the plaintiff/applicant who paid the full purchase price. That the defendants have admitted in their affidavit that the plaintiff has been in occupation since 2015.

It is counsel's submission that the defendants have threatened to encroach into the suit property by forcefully erecting barbed wire fence with the sole purpose of frustrating the substratum of this application.

The applicant further states that he has no title to the property since at the time of transaction in 2015, land adjudication process was ongoing and as a result did not get a title deed. However, he submits that on following up on the progress of his title, he found that the suit property had allegedly been fraudulently registered in the 2nd defendant's name.

Mr. Kibii counsel for the applicant submitted that the issue for determination is as to whether the applicant deserves the orders sought in the application. Counsel reiterated the submissions that the applicant is a bona fide purchaser for valuable consideration hence his rights ought to be protected.

Counsel submitted that at the time filing of these proceedings the defendants were not in occupation of the suit property as admitted in their replying affidavits but the said respondents have commenced erecting a fence as demonstrated by the photographs dated 15th October, 2020 and annexed to the supplementary affidavit.

It was counsel's submission that unless conservatory orders are granted, the 2nd respondent shall continue developing, wasting, and or dispose off the suit property to 3rd parties rendering these proceedings nugatory whereby no amount of damages can compensate the applicant.

Mr Kibii urged the court to grant an order of inhibition to protect the suit property from being disposed by the 2nd defendant to other parties. Counsel relied on the case of **Ngungi Nthukire 3 others v Joseph Mbugi Neari 6 others [2019] eKLR** held in part that;

"13. The court has considered the prayer for an order of inhibition to preserve the suit properties pending the hearing and determination of the suit. The court is inclined to make an order for preservation of the suit properties in order to accord the Applicants a chance to ventilate their case at the trial. In the case of Shivabhai Patel Vs Manibhai Patel [1959] EA 907 it was held, inter alia, that;

...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so.

If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid..."

Although the court has declined to grant an order of injunction, the court is inclined to make an order for the maintenance of the existing status quo pending the hearing and determination of the suit"

Mr Kibii also cited the case of **Victoria Wangui Oganga Ogada v Mwangi Kihara & 2 others [2018] eKLR** where the court stated at paragraph 8 stated that;

"8. Pursuant to paragraph 32 of Gazette Notice No. 5178 titled "Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts", this court has jurisdiction to order maintenance of status quo so as to preserve the suit property pending hearing and determination of the main suit. The said paragraph provides:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

9. So as to preserve the suit property and to maintain status quo pending hearing and determination of the suit, I order that an inhibition be registered in respect of Nakuru Municipality Block 2/114 pending hearing and determination of this suit. Costs in the cause."

Counsel therefore urged the court to allow the applications prayed.

DEFENDANT'S SUBMISSIONS

It was the defendant respondent's submission that the sale agreement dated the 26th January 2010 between the 1st Defendant and the deceased is a forgery and therefore fraudulent. The 1st defendant however submitted that he sold the deceased 10.5 acres of a different piece of land namely BARINGO/SA1AWA/2847 on the 23rd October 1987 which is separate and distinct from the suit property. It is further the 1st defendant's case that the deceased had no legal capacity to dispose of the suit property as he never had any interest in the first place.

The defendant respondent raised issue for determination for the main suit and not for the current application. Those issues shall be dealt with during the main hearing of the suit.

ANALYSIS AND DETERMINATION

I have considered the application, the submissions and find that the issues that arise for determination are as follows

- a) Whether the Plaintiff has made out a case for the grant of an injunction/preservation order.
- b) Whether the Plaintiff has made out a case for the grant of an inhibition.

The main issue for determination is whether the court ought to grant the temporary injunction sought by the Plaintiff/applicant. The three requirements that must be established by the applicant are as per the **Giella v Cassman Brown [1973] EA 348**. The court held that the

plaintiffs must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.

In the case of **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in **Giella v Cassman Brown (Supra)**. It further clarified that they are to be applied as separate, distinct and logical hurdles which an applicant is expected to prove.

The evidence before the court is that the plaintiff/applicant is in occupation of the suit land which is admitted by the defendant. What is in dispute is who between the plaintiff and the defendant has proprietary interest over the suit property. The plaintiff has also submitted before court sale agreements' showing sale of the suit property between the plaintiff and the deceased Luka Kipsang and the deceased and the 1st Defendant which he relies on to prove that he acquired proprietary interest over the suit property in 2015. These documents, though disputed by the defendants as fraudulent, establish the possibility that the plaintiff has an arguable case with chances of success. At this interlocutory stage however, the court is not required to make any conclusive findings on the merits of the Plaintiff's claim. This shall be dealt with during the full trial of the case.

The applicant stated that the defendants have started erecting a barbed wire fence hence encroaching on the suit land. This has been demonstrated by annexing photographs which have not been controverted by the defendants. The applicant is apprehensive that if the injunction sought is not issued by the honorable court, the defendants may further fence and or develop the suit property and dispose it off and ultimately evict the plaintiff from the suit property.

From the pleadings and the submissions, I am satisfied that this is a case where a temporary injunction is merited and hereby do so.

On the issue of an order of inhibition on the suit title, the purpose of an order of inhibition is to preserve the suit property pending the adjudication of the rights of the parties. The court has a duty to preserve property which is the subject of a dispute until the rights of the disputing parties are conclusively resolved as was held in the case of **Shivabhai Patel v Manibhai Patel [1959] EA 907**.

Section 68 (1) of the Land Registration Act provides for the power of the court to make an order of inhibition in the following manner: -

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, generally until a further order, the registration of any land lease or charge.”

Further in the case of **Dorcias Muthoni & 2 others v Michael Ireri Ngari [2016] eKLR**, the court held that

‘an order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off.’

As a result, the Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.

Similarly in the case of **Films Rover International & Others vs Cannon Films Sales Ltd 1986 3 All E.R 772** it was held that the court should always take the course that carries the lower risk of injustice. The High Court in **Dorcias Muthoni & 2 others v Michael Ireri Ngari (Supra)** affirmed this position with the learned judge holding that

‘the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case.’

In conclusion I find that the plaintiff/applicant has made a case for grant of an order of inhibition to preserve the suit property pending the hearing and determination of the suit. The application for a temporary injunction and order of inhibition are hereby allowed as prayed with costs pending the hearing and determination of this suit.

DATED and DELIVERED at ELDORET this 4th DAY OF FEBRUARY, 2021

M. A. ODENY

JUDGE