REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ELC NO 108 OF 2019

CHRISTOPHER CHEPKIYENG.....APPLICANT/RESPONDENT

VERSUS

RAPHAEL AYABEI SEREM.....1ST RESPONDENT/APPLICANT

VINCENT LELEI.....2ND RESPONDENT/APPLICANT

NELSON CHEPKIYENG.....3RD RESPONDENT/APPLICANT

JOSEPH KIBET.....4TH RESPONDENT/APPLICANT

RULING

This ruling is in respect of an application dated 8th December 2020 by the respondents/applicants seeking for the following orders:

a) Spent

b) That there be an order a of temporary injunction to restrain CHRISTOPHER CHEPKIYENG, his servants or agents and his sons EVANS KIPRONO KIPLAGAT and OLIVER KIPRUTO KIPLAGAT, or any other person acting on his behalf from trespassing, ploughing, planting, building, developing and or in any way dealing with the land parcel known as LELAN/KAPTALAMWA/261, KAPSAIT AREA pending the hearing and determination of this application and pending the hearing of this application inter partes.

c) That there be an order of a of temporary injunction to restrain CHRISTOPHER CHEPKIYENG, his servants or agents and his sons EVANS KIPRONO KIPLAGAT and OLIVER KIPRUTO KIPLAGAT, or any other person acting on his behalf from trespassing, ploughing, planting, building, developing and or in any way dealing with the land parcel known as LELAN/KAPTALAMWA/261, KAPSAIT AREA pending the hearing and determination of this application and pending the hearing and determination of this suit.

d) That the OCS Kapcherop Police Station to secure compliance with the order.

e) That costs of this application be provided for.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

RESPONDENT/APPLICANT'S SUBMISSIONS

The gist of the application is that upon the dismissal of the applicant's application for injunction and for leave, the respondent through his sons unlawfully trespassed on the suit land on 26th November 2020 seeking to take possession and evict the applicants.

Counsel submitted that unless the respondent is restrained form interfering with the suit land he will alienate the property. Further that the applicant has admitted in pleadings filed in ELC 77 of 2019 that he resides in Iten and has no valid reasons to trespass on the suit land.

It was counsel's submission that the applicants have demonstrated that they have a prima facie case as they are in possession of the suit land as per the annexure. Counsel further submitted that the applicant's possession is buttressed by the chief's letter dated 2nd February 2021 to the replying affidavit sworn on 1st February 20 21 which further confirms that Oliver Kipruto Kiplagat visited the suit property with the area

chief and took photos of the structures on the suit land.

Ms Cheso counsel for the applicant submitted that the respondent has granted Evans Kiprono Kiplagat and Oliver Kipruto Kiplagat Power of attorney over the suit property vide annexure VLK6 which upon perusal indicates:

> *"To be my attorney and generally in relation to my interest in the above mentioned title to do anything that I myself could do, and for me and in my name to execute all such instruments and to do all such acts, matter and things as may be necessary or expedient for carrying out the powers hereby given"*

That the same makes the applicants apprehensive that the powers may be abused to their detriment.

Ms Cheso also submitted that the issue of who is buried on the suit land and whether the respondent has been in possession of the suit land for 12 years is a question to be determined by evidence during trial.

Counsel also cited Halsbury's Laws of England, 4th Edition, Vol. 28 Paragraph 768 which provides that, no right to recover land accrues unless the land is in possession of some person in whose favour the period of limitation can run.

On the issue as to whether the applicant will suffer irreparable injury not capable of being compensated by damages, counsel relied on Robert Shape in "Injunctions and specific performance Robert Sharpe injunctions and specific performance loose-leaf (Aura on Canada Law Book 1992) page 2-27 where it was stated that:

> *"irreparable harm has not been given a definition of universal application its meaning takes shape in the context of each particular case".*

Counsel also relied on Halsbury's Laws of England Volume 21, Paragraph 7392 Page 352 states that an irreparable injury is-

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if this rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."*

Ms Cheso therefore submitted that the respondent has admitted in the pleadings that he is not in possession or occupation of the suit land hence he will not suffer any damage if the orders of injunction are granted. Counsel cited the case of **Macharia Mwangi and Others v Davidson Mwangi – civil Appeal No. 26 of 2011** where the court noted that;

> *"This court is a court of law and a court of equity; equity shall suffer no wrong without a remedy; No man shall benefit from his own wrongdoing and equity detests unjust enrichment."*

Counsel therefore urged the court to find that the applicant will suffer irreparable injury if the order is not granted as the respondent being a registered owner may interfere with the suit land by alienation.

On the issue on which side the balance of convenience lies, counsel cited the case of **NGURUMAN LTD VERSUS JAN BONDE NIELSEN (2014)** where the court had this to say about balance of convenience:

> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted."*

Similarly, counsel referred the court to the case of **R.J.R. MACDONALD V ATTORNEY GENERAL (1941) 1 S.C.R 311** where the Court held that-

> *"in determining the balance of convenience, the court which party will suffer greater harm from granting or refusing the remedy pending a decision on merits; that a court needs to weigh relative strengths of the parties' case."*

Ms Cheso therefore urged the court to allow the application as prayed to preserve the substratum of the case.

RESPONDENT'S SUBMISSIONS

The respondent relied on the replying affidavit in response to the application and stated that the applicant's application is anchored on a judgment which has not been executed since 28th August 1996. That the same subject matter is the one pending for hearing and determination.

Counsel submitted that the judgment is statutorily barred by dint of sections 7, 17 and 4(4) of the Limitation of Actions Act. That the applicants did not take possession of the suit land when the judgment was pronounced and the respondent has been in occupation of the land.

Counsel relied on the principles for grant of injunctions and submitted that the applicant has not met the threshold for grant of the orders sought for injunction That the orders restraining himself and his sons from the property amount to constructive eviction and shall expose him to irreparable loss. Counsel therefore urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues for determination in an application for injunction are well settled as per the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** as follows:

> *"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."*

Have the applicants established a prima facie case with a probability of success. The applicant in the main suit seeks for a declaration of legal ownership of the suit land. The applicant in this application in the supporting affidavit has annexed a judgment in Eldoret HCC 87 of 1990 wherein the court ordered that the respondent herein have his name deleted from the register and the same be substituted in the names of Chepkiyeng Kimosop Kipyomos. Further, annexure VL5 proves that the 2nd respondent was appointed the representative of the deceased ad litem. What is in contention is the validity of the orders granted in Eldoret HCC 87 of 1990 as they were not enforced after being granted. The respondent argues that the claim is time barred and as such the 2nd respondent cannot claim title on behalf of the estate as such claim is statutorily barred.

The court is of the view that it cannot determine the validity of such orders at this juncture as it would be tantamount to summarily determining the suit in its entirety. I therefore hold that the applicant has established a prima facie case.

On the second issue as to whether the applicant will suffer irreparable harm, in the event that the respondent does any act that changes the property in this case by either transferring, entering into a sale agreement, subdivision then this suit will be an academic exercise. Courts do not give orders in vain. They are meant to be executed and not to be filed away in the shelves.

It is therefore necessary and just that the suit property be preserved awaiting the finalization of the main suit where the rights of the parties will be determined. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR,(supra)** the Court of Appeal stated as follows in this regard: -

> *"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. "*

The injury that the applicants will suffer is not speculative but tangible and demonstrable by the nature of the apprehension that the respondent may do an act that may change the status of the suit land in terms of ownership. The respondent has threatened with photographic evidence taken on site as per the replying affidavit and the letter by the chief annexed to the affidavit.

On the issue of balance of convenience, the case of **Amir Suleiman v Amboseli Resort Limited [2004] eKLR,** where Ojwang, . J (as he then was), elaborated on what "balance of convenience" means by stating that: -

> **"***The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice."*

The court must look at the application and the case in its totality and assess which side the lower risks tilts. In this case the respondents are in occupation of the property and granting the orders restraining the respondent from trespassing of the property would amount to constructive eviction and as such it would not be in the interest of justice.

Having considered the application, the submissions by counsel. I find that the best order that the court can grant is that the status quo be maintained with the respondent restrained from transferring, leasing or changing the character of the suit land pending the hearing and determination of this case. The costs of the application be in the cause.

DATED and DELIVERED at ELDORET this 17TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE