REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. E96 OF 2020

PETER KIHIKA NG'ANG'A.....PLAINTIFF/APPLICANT

VERSUS

AMOS KIMELI CHAMDALA.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application by the plaintiff/applicant dated 4th November 2020 seeking for the following orders:

a) Spent.

b) That pending the hearing and determination of this application inter partes there be orders of injunction restraining the defendant by himself, his servants, agents or relatives from entering, cultivating, grazing or in any way interfering with the plaintiff's quiet possession of LR UASINGISHU/KONDOO SCHEME/347.

c) That pending the hearing and determination of this suit there be orders of injunction restraining the defendant by himself, his servants, agents or relatives from entering, cultivating, grazing, or in any way interfering with the plaintiff's quiet possession of LR UASIN GISHU/KONDOO SCHEME/347.

d) That the OCS Tarakwa Police Station do assist in evicting the defendant/respondent.

e) That costs be provided for

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

PLAINTIFF/APPLICANT'S SUBMISSIONS

It is the applicant's case that he is the registered owner of the suit land parcel No. LR UASINGISHU/KONDOO SCHEME/347 pursuant to a grant which confirmed him as a beneficiary of the estate of his late mother.

The applicant averred that respondent trespassed on his suit land and constructed a permanent house, continues to till, cultivate and graze animals on the suit property, which acts have denied the applicant the right to quiet possession and enjoyment of his property.

The applicant also stated that efforts to arbitrate the matter before the area chief have not born any fruits hence the filing of this suit. The applicant disputes the respondent's claim that he secretly obtained grant of letters of administration intestate vide Nakuru Succession Cause No.269 of 2012 with the intent of disinheriting the other beneficiaries.

Counsel for the applicant submitted on the principles for grant of temporary injunctions as per the **Giella Casman Brown Case** and stated that the applicant has established a prima facie case having produced a title deed in his name.

It was counsel's further submission that the respondent has exhibited two sale agreements between him and a Mr. Kamau Ngángá and one Mary Wacheke Kamau and that the land being agricultural land, the transactions did not benefit from the mandatory Land Control Board consent.

Counsel relied on the case of **Gabriel Makokha Wamukota v Sylvester Nyongesa Donati [1987] eKLR** where the Court of Appeal held that " An agreement to be a party to a controlled transaction becomes void for all purposes at the expiration of 3 months after the making of the agreement if consent of the Land Control Board has not been made within that time. It was further counsel's submission that any person who remains in possession of property in furtherance of a voided transaction is in breach of the Act and is subject to a penalty.

Ms Njoroge submitted that it is on record that the respondent has admitted that the applicant obtained the title to the suit land vide transmission from his deceased mother but the respondent has failed to show or prove that those who sold him the land were beneficiaries of the Estate of the deceased Nduta Kahiga the initial allottee of UASIN GISHU/ KONDOO SCHEME-/347.

Counsel relied on Section 76 (l) of the Law of Succession Act where a confirmation of grant can be annulled by the court and the applicant's confirmed grant has neither been challenged nor nullified or challenged by any of his siblings or spouses. Further that if at all the people the respondent purchased the land from are genuine, beneficiaries of the estate of Nduta Kahiga, then the sale is also voidable as no transfer by transmission had been effected to the persons who sold the land to the respondent.

Ms Njoroge further cited the provisions of Section 45 (i) of the Law of Succession Act Chapter 160 of the Laws of Kenya which states

"Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

Any person who contravenes the provisions of this section shall:

a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;

b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled.

On the second limb as to whether the applicant will suffer irreparable harm if the orders are not granted, counsel submitted that the applicant has been forced out of his land and is currently staying on a 50 x 100 ft plot in Ndundori where he is buying food and cannot keep animals on the small parcel while the respondent enjoys using the land. Counsel therefore urged the court to allow the application as prayed.

DEFENDANT/RESPONDENT'S CASE

It was the respondent's case that the suit land belongs to his late father who purchased 1 ½ acres curved from the suit land from the plaintiff's deceased brother and annexed a sale agreement to buttress his point. The respondent also admitted that the applicant is the registered owner of the suit land but states that the applicant acquired the same illegally.

The respondent further deponed that upon purchasing the suit land, he took possession and began developing the land including construction of a permanent structure and has been cultivating part of the land for his subsistence.

It was the respondent's case that he reads mischief in the applicant's suit as it was instituted shortly following the demise of the respondent's father with the sole intention of unlawfully ejecting them from their rightfully acquired land.

Counsel submitted that the orders sought for are untenable as orders of eviction cannot be granted at an interlocutory stage as it risks rendering the suit nugatory. Counsel therefore urged the court to dismiss the application as the respondent has been in occupation for a period of 8 years.

ANALYSIS AND DETERMINATION

The issues for determination in an application for injunction are well settled and we need not reinvent the wheel. The applicant must meet the threshold for grant of interlocutory injunction and establish a prima facie case with a probability of success, that he or she will suffer irreparable harm if the order of injunction is not issued and lastly that if the court is in doubt then it should rule on a balance of convenience.

The current application is anchored under Order 40 Rule 1(a***)*** of the Civil Procedure Rules which provides:-

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b)….. the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

In the case of **Kibutiri vs Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, the Court held that: -

"*The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might 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."*

Further in the case of **Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi HCCC No. 1128 of**

2001(Unreported), the court held that an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages.

The applicant attached a copy of the title deed in his name which indicates that he is the registered owner of the suit land. This is prima facie evidence that he has proprietary interest in the suit land. The issue whether he acquired it legally or illegally is a matter that will be adjudicated upon at the trial of the main suit.

As to whether the applicant will suffer irreparable harm, the applicant stated that he moved to Ndondori where he is staying on a plot measuring 50 by 100 feet where he is forced to buy food and not able to keep livestock. This can be monetized and be compensated by way of damages. This is harm that does not fit the bill for irreparable harm which is not capable of being compensated by way of damages.

In the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR** the court described irreparable harm as:

> *"irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."*

This position was also stated 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 Mbuthia 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".*

On the last limb on which the balance of convenience tilts, the applicant stated on oath that he left the suit land in 2009 and thereafter the defendant took possession of the suit land. The applicant further stated that he reported the matter to the area chief in 2010 but did not get any assistance. It is also acknowledged by both the applicant and the respondent that the respondent has built permanent structures on the suit land as evidenced by the photographs attached. In this case, which side would the balance of convenience lie?

In the case of **Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another (2019) eKLR**, the court held that: -

> *"The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."*

This limb of the principle for grant of temporary injunction is actually a test of inconvenience caused to either party to the suit. Who will suffer the most if the orders are either granted or denied. Where the effect of denial of the injunction sought results in an inconvenience to a successful plaintiff/applicant, the court ought to issue the relief sought. Similarly, where the resulting inconvenience is greater to the defendants than the applicant/plaintiff, then the court should not issue an injunctive relief.

The fact that the respondent has proved that he is in occupation and has established that he has constructed permanent houses on the suit land does not necessarily mean that he is the rightful owner of the suit land. The ownership issue is to be established at the trial and the issue of legality of the title challenged by the respondent.

The applicant also sought for eviction of the respondent and the assistance of the police to effect the eviction. The applicant has sought for a permanent injunction and a declaration that the applicant is the registered owner of the suit land in the plaint and has not sought for eviction of the respondent in the main suit.

It seems that the applicant is seeking for a mandatory injunction against the respondent to be evicted at this stage of the application. In the case of **Locabail International Finance Ltd –v- Agro – Export & Another (1986) I ALLER 901** the court stated that:

> *"A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory Injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that required for a prohibitory injunction."*

If the court orders for eviction at this interlocutory stage and later the plaintiff's case is dismissed, the court would not have done justice but injustice in its discretion to grant or not to grant a mandatory injunction.

It should also be noted that courts have been reluctant to grant mandatory injunctions at the interlocutory stage as was held in the case of **Nation media Group & 2 others vs John Harun Mwau (2014) eKLR** where the court of Appeal stated: -

> **"***It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.*
>
> *Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."*

Having said that, I find that the applicant has not demonstrated any special circumstances for the grant of a mandatory injunction. The applicant should have taken action immediately when he came to the realization that the respondent had taken occupation and started construction on the suit land.

It is not all gloom as courts cannot countenance illegalities and fold their arms and say that their hands are tied. When there is a clear-cut case where special circumstances have been established, courts will definitely grant orders of mandatory injunctions as was held in the case **Katana Kahindi Fondo suing as the legal representative of the Estate of Kahindi Gona Fondo (Deceased) v Nelson Ajulu & 10 others (2018) eKLR,** The court is to ensure that justice is meted out without the need to wait for full hearing of the entire case as one should not benefit from breach of law.

In the case of **Kenya Electricity Transmission Company Limited v Kibotu Limited [2019] eKLR** this court held that the main purpose of an injunction is to protect the substratum of the suit pending the hearing and determination of the suit without prejudicing any party.

Consequently, after consideration of the application, the submissions by counsel and the relevant authorities, it would be in the interest of justice to order the maintenance of the status quo with the respondent being restrained from interfering with the substratum of the case. Costs of the application in the cause.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE