



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC PETITION CAUSE NO 17 OF 2020

IN THE MATTER OF CONSTITUTIONAL PETITION LAWS OF KENYA

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 27(1) (2) (3) (4) AND (5)

AND ARTICLE 43 (1) (B) (E) AND (F) AND SUB-ARTICLE (3) AND ARTICLE 47(1) (2)

AND (3) (A) (B) AND ARTICLE 48 OF THE CONSTITUTION OF KENYA 2010

LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF ARTICLE 20, 21, 22, 27, 40 (1) (A) (B) (2) (A) (B)

AND 47, CONSTITUTION OF KENYA 2010 LAWS OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF THE APPLICATIONS OF RIGHTS

UNDER ARTICLE 40, 47, 50 CONSTITUTION OF KENYA 2010 LAWS OF KENYA.

BETWEEN

MIRIAM JELAGAT CHERUIYOT.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

KOIBAEK SUB-COUNTY DEPUTY COMMISSIONER.....2ND RESPONDENT

DIRECTOR OF EDUCATION ELDAMA RAVINE SUB-COUNTY.....3RD RESPONDENT

MANAGEMENT COMMITTEE TIRIPKATOI PRIMARY SCHOOL.....4TH RESPONDENT

THE CHAIRMAN TIRIPKATOI LAND DEMARCATION COMMITTEE....5TH RESPONDENT

LAND REGISTRAR KOIBATEK SUB-COUNTY.....6TH RESPONDENT

LAND COMMISSION.....7TH RESPONDENT

RULING

This ruling is in respect of an application dated 16th November 2020 by the Petitioner seeking for the following orders:

- a. Spent.
- b. That pending the hearing and determination of this application the Honourable Court be pleased to issue orders restraining the respondents, their servants, agents or any person acting under them from removing the applicant from that property known as LEMBUS/TORONGO/1015 and or putting up any structure of any kind within the suit property until the determination of the application or such further orders from the Court.
- c. That the orders of the Honourable Court be enforced by the OCS Eldama Ravine Police Station.

The court granted interim orders of injunction when the applicant filed this application under certificate of urgency and ordered the applicant to serve the application within 7 days and file written submissions. Parties complied and filed submissions for the court's consideration.

APPLICANT'S CASE

The applicant relied on the supporting affidavit of MIRIAM JELAGAT CHERUIYOT sworn on 16th November, 2020 and the petitioner's supplementary affidavit sworn on 26th January, 2021 together with the annexures thereto.

It was the applicant's case that she is challenging the constitutionality, manner and process of demarcation, allocation and issuance of titles during the settlement programme of Lembus/Torongo/Tugumoi Locational Forest Reserve wherein her portion, LEMBUS/TORONGO/IOI 5, was illegally designated as a public school which already existed and given a separate and independent title being LEMBUS/TORONGO/419 .

According to the applicant the criterion for allocation was purely on allocation but the said process was marred and riddled with corruption, bias, discrimination , nepotism and favoritism wherein her portion was illegally allocated to the 4th respondent notwithstanding the fact that the 4th respondent, Tiripkatoi Primary School, already existed at the time of demarcation and currently sits in that parcel of land known as LEMBUS/TORONGO/419 which parcel of land is distinct and separate from LEMBUS/TORONGO/1015.

It was further the applicant's case that the 2 parcels of land are 5 kilometers apart from one another and that the applicant was a board member to the said school during its existence.

The applicant also stated that she has been in occupation of the suit property, LEMBUS/TORONGO/1015 with her family even before the demarcation and settlement exercise.

Counsel therefore submitted that the applicant has established a prima facie case to warrant grant of injunctive and preservative orders as per the threshold set out in the **Giella Vs. Cassman Brown[1973] EA 358 and Kenya Commercial Finance Co. Limited vs. Afraha Education Society (2001)** where the Honourable Court held that:-

"The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the Application on a balance of convenience... These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed. "

Mr Kibii cited the case of **Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125**, where the Honourable Court described prima facie case as follows:

"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 letter."

Counsel submitted that the respondents were not in occupation of the suit property but have since forcefully invaded it and are now in the process of constructing a new building as demonstrated by the photographs annexed with the intention of evicting the petitioner/applicant from the suit property and in the process deprive her use of the parcel.

Mr Kibii further submitted that unless conservatory orders are granted, the respondents shall continue developing and wasting the suit property notwithstanding the pendency of these proceedings rendering these proceedings nugatory and that no amount of damages can compensate the applicant.

Counsel urged the court to find that the applicant will suffer irreparable harm if the orders are not granted and that the respondents should be limited to the already existing school occupying LEMBUS/TORONGO 1/419.

It was counsel submission that the applicant has demonstrated the two conditions in-depth and therefore the balance of convenience tilts in her favour and cited the case of **BUNGOMA ELC APPEAL NO. 5 OF 2020, WENSLEY BARASA V IMMACULATE AWINO**

ABONGO & ANOTHER [2020] eKLR where the Honourable Court held that;

"Such a remedy is also discretionary and as was held in the case of *FILMS ROVER INTERNATIONAL .V. CANNON FILMS SALES LTD* 1986 3 ALL. E.R 776,

injustice if it should turn out to have been "wrong". The main objective should be to preserve the property in dispute as the respective rights of the parties are determined.

It is the plaintiff's case that he is the legal owner of the suit property following the decision by the Court of Appeal yet the 2nd defendant has taken possession and is investing millions of shillings in putting up a construction. The 2nd defendant's response, however, is that he is the absolute registered owner of the suit property holding a title thereto.

That he is a bona fide purchaser entitled to all the rights and privileges belonging thereto. It is clear that while the 2nd defendant holds the titles to the suit property, issued to him following a purchase in 2015, the *plaintiff, as per the Judgment in KISUMU COURT OF APPEAL CASE NO 115 of 2015 enjoyed overriding interests having been in possession since 1987.*

*The plaintiff's case is based on trust and it is the law under Section 25(2) of the Land Registration Act under which the 1st defendant's title is issued that such registration does not relieve him of any obligation to which he is subject as a trustee. That will of course be an issue to be determined at the trial and this Court must be cautious not to make any findings on contested issues at this stage, However, guided by the decision in *MRAO .V. FIRST AMERICAN BANK OF KENYA* (supra), I am satisfied that there exists a right which appears to have been infringed and therefore a prima facie case is established.*

On whether the plaintiff will suffer irreparable injury that cannot be compensated by an award of damages, the plaintiff has averred, and the 2nd defendant confirms, that millions of shillings are being invested in developing the suit property. That is likely to change the character of the said property even before this suit is heard and determined.

It is therefore important that the suit property is preserved especially bearing in mind that it has mind that it has changed ownership before. The balance of convenience would also tilt favour of the plaintiff if there was any doubt. The prayer for a temporary injunction pending trial is therefore well merited and I would allow it. "

Counsel also relied on **MOMBASA ELC 192 OF 201 7, ALI KITSAO KATANA V KASSIM MOHAMED OMAR 5 OTHERS [2018] eKLR** where the court held at paragraph 15 that;

"15. Courts have now accepted that in dealing with an Application for an Interlocutory Injunction, the Court is not necessarily bound by the three principles set out in the *Giella -v- Cassman Brown* case. The Court may look at the circumstances of the case generally and the overriding objective of the law. In the case of *Suleiman -v- Amboseli Resort Ltd* (2004) KLR 589, Ojwang, Ag. J (as he then was) stated, inter alia

"Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in *Giella -v- Cassman Brown, in 1973* cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 AA EL 772 at page 780-781: "A fundamental principle of that the court should take whichever course appears to carry the lower risk of injunction if it should turn out to have been 'wrong'... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella -v- Cassman Brown*, the Court has had to consider the following questions before granting injunctive relief:

i) Is there a prima facie case ii) Does the applicant stand to suffer irreparable harm iii) On which side does the balance of convenience lie Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general. The Court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice...i granting the Applicant's prayers will support the motion towards full hearing, then should grant those prayers. principle.

I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a larger risk of injustice if I found in favour of the defendant that if I determined this Application in favour of the Applicant. "

16. In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an Interlocutory Injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interest must be put on scales. In my view, it is only fair to make orders that safeguard and maintain the status quo until the Suit is heard and determined.

If the 3rd and 4th Defendants went ahead and transferred the suit Property to a third party, the Plaintiff would be liable in every case to be defeated by the 3rd and 4th Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings. As was stated by Madan J in *Mawji -v International University Another* (1976-80)KLR 229. "It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by fresh suit if

the property in dispute is transferred to a third party. The Court must therefore protect the status quo. "

17. I am thus satisfied that the facts presented in this case demonstrate that the Applicant has a prima facie case and the balance of convenience tilts in favour for the prevailing circumstances to be maintained. The Plaintiff has reason to seek orders to preserve the Suit Property from changing hands so that the case is not rendered an academic exercise.

18. Accordingly, I find merit in the application and grant the order for Temporary Injunction in terms of prayer 3 of the Notice of Motion dated 5th June, 2017. Costs in the cause. "

Mr Kibii therefore urged the court to allow the application as prayed and order the preservation of the suit land in the interest of justice.

RESPONDENTS SUBMISSIONS

Counsel for the respondent opposed the application and submitted that the applicant has not established a prima facie case hence the prayer for injunction is untenable. That the petitioner/applicant has only alluded to the fact that she has been residing and utilizing the suit land since childhood and sees the land as her ancestral home, that however the respondents have been able to demonstrate that the suit land was set aside as a public utility for the creation and use for the 4th respondent herein and therefore any claim as advanced by the petitioner is a non-starter as the land was not available for allocation to third parties as alleged by the petitioner.

Mr Odongo relied on the case of **Panari Enterprises Limited V Liloodi & 2 others (2014) e KLR** where the court explained the concept of a prima facie case as was laid down in the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125(supra)** Counsel therefore submitted that the applicant has not established a prima facie case as the land was reserved for public use and not available for allocation as per the replying affidavit on record.

Counsel also cited the case of **Nguruman Limited VS Jan Bonde Nielsen & 2 Others , Civil Appeal NO 77 OF 2012 (2014) Eklr** where the court held that:

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed. "

On the second limb as to whether the applicant will suffer any irreparable harm if the injunction is not granted, Mr Odongo submitted that the petitioner/applicant having failed to demonstrate what harm will befall them if the injunction is not granted the same cannot be granted as the land is public land which is not available for alienation.

On the last issue on balance of convenience, counsel submitted that from the foregoing the balance of convenience would tilt in favour of the respondents as they would suffer if the orders are granted. Further that if the orders are granted they will affect public interest as the ability of the 4th respondent to provide educational services to the community will be hampered and detrimentally affect the rights of the school going students.

Counsel relied on the case of **Lucy Wangui Gachara v Minudi Okemba Lore (2015) eKLR** in which the court of Appeal upheld the following:

"These are the three pillars on which rests the foundation of any order of injunction. interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted however strong the applicant's claim may appear at that stage.

Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

This is an application for injunction to preserve the suit land pending the hearing and determination of this petition. The principles to be applied in applications for temporary injunctions are well settled as per the *Giella Casman Brown (supra)*. A party must establish a prima facie case with a probability of success, must show that he/she would suffer irreparable harm if such orders are not granted and if the court is in doubt, then it will decide the case on a balance of convenience.

Injunctions are meant to preserve the substratum of the case pending the hearing and determination of the issues at hand so as not to render the hearing of the case an academic exercise after the subject matter has ceased to exist.

In the case of **Joel Kipkurui Arap Koech V Alice Wambui Magandu 3 Others [2018] eKLR** the court held that;

“ In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. Both the plaintiff and the 1st Defendant are claiming the suit property. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.”

There is evidence that there has been communication on the issue of this suit land which in my view has to be resolved to ascertain the issue of ownership. It is also not disputed that the petitioner has been residing on the parcel of land.

On the issue of prima facie case, it is trite that the court is not to delve into a mini trial to ascertain rights but to safeguard the substratum of the case before such rights can be adjudicated upon. I find that the applicant has a prima facie case to warrant this court to grant orders of preservation of the suit land pending the hearing and determination of the petition.

In the Court of Appeal case in **Nairobi Court of Appeal Civil Applic. No. 312 of 2005: Hutchings Biemer Ltd Vs Barclays Bank of Kenya Ltd & Another** held that:

“We have considered carefully the rival arguments and the principle we have stated hereinabove. In our view injunctive orders are meant to preserve property and maintain the status quo.”

It will therefore be in the interest of justice to order the preservation of the suit land as the applicant would not be compensated by way of damages if she is evicted from the suit land pending the determination of her rights.

On the issue as to whether the applicant will suffer irreparable harm, the court in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** stated that:

“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.

On the issue of balance of convenience the court defined it in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR (supra)** as :

‘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 favour 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 plaintiff’s’ to show that the inconvenience caused to them be greater than that which may be caused to the defendant’s inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

Further in the case of **Meru H.C.C.C. No. 12 of 2010: Thomas Mungiria & 9 others vs. Joseph Mutuma & 4 others** the court held that:

“The case can also be determined on a balance of convenience. This being an interlocutory application, I have cautioned myself that I should not make conclusive findings...The plaintiffs have deposed that they are in possession of their respective parcels of land and the defendants have not controverted that fact. The plaintiffs seek specific orders in the plaint. That ground is the precise reason why any further dealing in the lands in question should be halted or prevented in order to give the parties in the suit to be heard on the merits.”

I have considered the application, the submissions by counsel and come to the conclusion that it would be in the interest of justice to preserve the suit land pending the hearing and determination of this petition. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE