



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC PETITION CASE NO. 4 OF 2019**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF**

**ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40(1), 25(c), 10(1)(2)(b)(c)  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS  
PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**MERCY C ROTICH.....PETITIONER/APPLICANT**

**VERSUS**

**J.O ODIDI, DEPUTY COUNTY COMM BOMET EAST.....1<sup>st</sup> RESPONDENT**

**MINISTRY OF INTERIOR AND CO-ORDINATION**

**OF NATIONAL GOV'T.....2<sup>nd</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....3<sup>rd</sup> RESPONDENT**

**SARAH CHEMUTAI YABAN.....4<sup>th</sup> RESPONDENT**

**ROBERT KIPRONO CHERUIYOT.....5<sup>th</sup> RESPONDENT**

**JOHN KIPRONO CHERUIYOT.....6<sup>th</sup> RESPONDENT**

**RULING**

1. Pursuant to an Application by way of a Notice of Motion under certificate of urgency dated the 11<sup>th</sup> June 2019, the Applicant/Petitioner sought for the following orders -:

**i. Spent**

ii. That a conservatory order be issued preserving the Petitioner's beneficial ownership, occupation and use of 0.7 of an acre in title No. Kericho/Kongotik/947 and in particular the 4<sup>th</sup> Respondent be restrained from carrying out further constructions, cultivating and/or interfering with the Petitioner's occupation and use of the said land, and the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents be prohibited from assisting, giving protection and security to the 4<sup>th</sup> Respondent so as to continue with the occupation and use of the said land.

iii. That pending the hearing and determination of this petition, this honorable court be pleased to issue interim orders in terms of

paragraph (ii) herein above.

#### **iv. Spent**

v. That costs of this Application be provided for.

2. The Application was supported by the grounds on its face and on the Affidavit, dated the 11<sup>th</sup> June 2019 sworn by Mercy C Rotich the Applicant/Petitioner herein.

3. The application was opposed by the 4<sup>th</sup> Respondent on behalf of the 5<sup>th</sup> Respondent through a replying affidavit of an undated day in June 2019 to the effect that the application did not meet the requirements for granting injunctive orders as the Applicant/Petitioner had not adduced any evidence of ownership of the parcel of land No. Kericho/Kongotik/947 to which she sought conservatory orders. That further the 4<sup>th</sup> Respondent was neither in occupation or constructing on the suit land.

4. The Hon Attorney General, on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents through Replying affidavit dated the 18<sup>th</sup> June 2020 deponed that following a dispute between the Applicant/Petitioner and the 4<sup>th</sup> Respondent who were wives of the deceased David Rotich, the 1<sup>st</sup> Respondent had been called in to arbitrate on the matter wherein the family members of the deceased adopted their resolution (as per the annexed minutes of the meeting of 24<sup>th</sup> April 2019, marked as 'JOO 1') as to how the deceased's estate was to be administered by the two widows.

5. That if the Applicant/Petitioner was dissatisfied with the family decisions, then she ought to have sued her family members and not to include the Government in this matter as his role was only as an arbitrator whereby he had no interest at all in the matter. The averments in the Applicant's Affidavit were denied in toto wherein the Court was asked to dismiss the Application.

6. On the 26<sup>th</sup> September 2019, there were interim conservatory orders issued in terms of prayer (ii) above, pending the hearing and determination of the Application inter-parties, by way of written submissions.

7. As I write this ruling, the court has only received the Applicant's written submissions to which she had framed her issues for determination as follows;

i. Whether the Petitioner/Applicant's application meets (sic) threshold for grant of temporary injunction

ii. Whether the Petitioner have (sic) suffered loss and damage as a result of trespass and interference of her land by the 4<sup>th</sup> Respondent and with the aid of the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents.

8. On the first issue for determination, the Applicant submitted that it had been through her labor and industry that she had acquired the pieces of land measuring 0.7 acres comprised under title No. Kericho/Kongotik/947 by way of purchase as evidenced in her supporting affidavit. That the 4<sup>th</sup> Respondent did not dispute the existence of the said parcels of land and although she had denied having constructed a house therein or being in occupation of the land, there was sufficient evidence exhibited via the Applicant's annexures(pictures) in her supporting affidavit depicting that there was interference of the suit land. That this interference had been aided by the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents who had provided the 4<sup>th</sup> Respondent with security to illegally construct a house on the Applicant's piece of land.

9. That the letter written by the 1<sup>st</sup> Respondent to the area Chief asking him to ensure that the 4<sup>th</sup> Respondent was settled on the Applicant/Petitioner's land estopped him from denying the fact that he had wielded his authority to have the 4<sup>th</sup> Respondent settled on the Applicant/Petitioner's land.

10. That it was in this regard, the Applicant submitted, that she had demonstrated that the Respondent's intervention in her property had resulted in her suffering constitutionally in regard to her proprietorship rights and therefore she had established a threshold for issuance of injunctive orders as laid down in the famous case of **Giella vs. Cassman Brown & Company Ltd [1973] EA 358**.

11. On the second issue for determination, the Applicant submitted that as evidenced by the annexed photographs in her supporting affidavit, the same had proved that the 4<sup>th</sup> Respondent had indeed erected structures on her suit property thereby destroying her crops and further denying her use of her land to which effect she had suffered great loss and damage. That if the Respondents were not restrained, she would continue to suffer irreparable loss and damage which may not be adequately compensated by an order for damages.

12. The Applicant further submitted that she had high chances of success in the Petition and that the balance of convenience tilted in her favour. She thus sought for the application to be granted so as to preserve the suit property pending the hearing of the main Petition.

#### **Determination**

13. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction and which conditions shall also form the issues for determination herein to wit;

i. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success,

ii. secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial,

iii. And thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

14. In the present case there is no dispute going by the Applicant/Petitioner's averment in her supporting affidavit to the Application dated the 11<sup>th</sup> June 2019 as well as the annexures marked as MCR1-3 that prima facie she had acquired the suit parcels of land through a sale agreement.

15. From the annexures marked as MCR 4 the Applicant has demonstrated that the 1<sup>st</sup> Respondent through his letter dated the 2<sup>nd</sup> May 2019, had instructed the area Chief to ensure that the 4<sup>th</sup> Respondent was settled on the Applicant/Petitioner's land.

16. Lastly the Applicant through the photographs annexed as MCR 5-7 demonstrated that indeed there had been interference on the suit land wherein there had been a construction of a house underway.

17. The 4<sup>th</sup> Respondent has argued and asserted that the Applicant's sale agreement was not admissible in evidence as they had not been attested by an advocate and further that the maker was not indicated and therefore cannot be deserving of protection under the law. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Petitioners' sale agreement but the mere fact that she holds the same which on the face of it were properly acquired, is sufficient to lead the Court to hold that she has established a prima facie case for the grant of the reliefs for the protection of her property rights sought in the Petition.

18. The Court of Appeal in the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR** held that:

*'It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property'.*

19. Having found that a prima facie case was established, I must consider whether the other prerequisites in **Giella vs Cassman Brown Co. Ltd (supra)** were met, which is, whether the Petitioner/Applicant stands to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and she is successful at the trial.

20. It is not in contention that the 1<sup>st</sup> Respondent did in fact write a letter to the area chief asking him to ensure that the 4<sup>th</sup> Respondent was settled on the Petitioner/Applicant's land. It is also not in doubt that following the said directives the 4<sup>th</sup> Respondent embarked on constructing on the disputed Petitioner's property **thereby dispossessing the Petitioner/Applicant** of the said portions of the suit properties. **The** Petitioner has submitted that should **orders sought not be granted, she would suffer damage and loss** as a result of trespass and interference of her land by the 4<sup>th</sup> Respondent.

21. In the case of **Pius Kipchirchir Kogo vs Frank Kemeli Tenei [2018] eKLR**, the Court held as follows;

*".....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'.*

22. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the Respondents have not indicated whether they would be in a position to compensate the Petitioner by way of damages if the Court finds that the Applicant deserved the grant of the injunction. Indeed there was nothing submitted on this point by the Respondents that there would be an adequate remedy to which they were capable of paying. I therefore find in favour of the Applicant in that she would suffer irreparable damages should the Court not grant the orders sought.

23. Having found as I did herein above, I find that the balance of convenience, favors the Petitioner/Applicant. In essence therefore and in fashioning a suitable remedy for the situation before the Court, I find that since the Applicant/Petitioner is in possession of the suit property, that it would be in the interest of justice for the Court in giving effect to the Petitioner's right over the suit property on conservatory basis to direct that the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are hereby prohibited from assisting, giving protection and security to the 4<sup>th</sup> Respondent who together with her agents or servants shall not commit any acts on the suit land that would interfere with the Applicant/Petitioners' occupation and use of the suit properties, pending determination of the Petition.

24. The Notice of Motion dated the 11<sup>th</sup> June 2019 herein succeeds to that effect with costs.

It is so ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF APRIL 2021**

**M.C. OUNDO**

