Cheluget v Cheluget & another (Environment & Land Case 115B of 2020) [2022] KEELC 67 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 67 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 115B OF 2020

SM KIBUNJA, J

MAY 4, 2022

BETWEEN

DAVID KIPTOO CHELUGET ..... PLAINTIFF

AND

ABRAHAM KIPRUTO CHELUGET ..... 1ST DEFENDANT

JOHN KIPKEMBOI CHELUGET ..... 2ND DEFENDANT

(Plaintiff's Notice of Motion dated 5th December, 2020, Defendants' Preliminary Objection dated the 13th January, 2021, and Notice of Motion dated the 10th May, 2021)

RULING

1. This proceeding was commenced by the plaintiff through the plaint dated the 5th December, 2020 and filed on the 8th December, 2020 through which he seeks for "the suit property and/or parcel of land known as Kormaet Scheme Block 57 in possession, occupation and utilization of the plaintiff be reverted back to the plaintiff", and costs. That filed contemporaneously with the plaint is the notice of motion dated the 5th December 2020, and filed on the 8th December, 2020 seeking for the following prayers *inter alia*;

    a. "That the Plaintiff/ Applicant be allowed and be at liberty to sale (sic) five (5) acres of his land and her (sic) deceased wife's portion of land (currently in possession and utilization) for subsistence and maintenance pending the hearing of the application inter parties and eventually the suit.

    b. That may the Honourable Court be pleased to direct the Defendants /Applicants (sic) jointly to deposit the title deed to the suit property parcel of land known as Kormaet Scheme Block 57 measuring approximately 200acres) in Court for safe custody pending the hearing of the application inter-parties eventually the suit."

The application is based on the nine (9) grounds on its face marked (1) to (9), and supported by the affidavit sworn by David Kiptoo Cheluget, the plaintiff, on the 5th December, 2020. It is the plaintiff's case that the defendants are his children with his late wife, Annah Jemaiyo Cheluget. That during the life time of his late wife, he had registered the family land, Kormaet Scheme Block 57, in their names and those of the defendants to hold in trust. That he is using about 50 acres while the defendants are using about 150 acres out of the 200 acres parcel of land. That he is now about 93 years old and the defendants have declined to cooperate with him to enable him sell his share of the suit land to meet expenses to other family members including, school fees, and hence this suit and application.

2. That in response to the application, the defendants filed the notice of preliminary objection dated the 13th January, 2021 raising the following grounds;

    1. "That the Land Uasin Gishu/kormaet Scheme/57 which is the subject matter of this suit is jointly owned by four persons.

        a. The Fourth Joint Owner Anna Cheluget Is now deceased.

        b. An Order of whatever nature cannot be made against the Deceased without en-joining (sic) her Estate to the suit.

        c. An Order for sale of whole and/or part of the land will amount to intermeddling with the estate of the Deceased under Section 45 of the *Law of Succession Act* Cap 160. It is therefore untenable and both the Application and suit unsustainable.

        d. Further, in the encumbrance section of the Title Deed to the Property, no dealings can be transacted on the property without the registered owners' presence in person before the Lands Registrar.

    2. That the Plaintiffs' supporting affidavit to the Application and Verifying Affidavit to the Plaint fails to conform to the strict provisions of the Law that the Deponents Thumbprints has no Certification Certificate as required under Section 88 of the *Civil Procedure Act*, and as such the same should be expunged from the proceedings.

    3. That the Plaintiffs' Supporting Affidavit to the Application and Verifying Affidavit to the Plaint fails to conform to the strict provisions of Section 88 of the *Civil Procedure Act* and Order 19 of the *Civil Procedure Rules* as the same has not been Commissioned by a Commissioner for Oaths, and as such the same should be expunged from the proceedings.

    4. That the Plaintiff has attached a letter from Mr. Lawrence Boen who is the Assistant Chief of Chepkatet Sub Location, Kapsaret Location dated 17th November 2020, stating that the Deceased Anna Cheluget was a resident of his jurisdiction, however the deceased hailed from Kapsaret Location, Lemook Sub Location. The sub chief for Lemook Sub Location is Mr. Silvanus Melilei. Mr. Lawrence Boen the Assistant Chief in the Plaintiffs letter is from Kapsaret Location, Chepkatet Sub Location and not Lemook Sub Location. In the circumstances, the said letter is defective and cannot be relied upon."

    And prayed for the plaintiff's application, and the entire suit to be dismissed with costs.

3. The defendants on their part filed the notice of motion dated the 10th May 2021, seeking for the following prayers *inter alia*;

    a. "Pending the hearing of this application inter parties, this Honourable Court be pleased to issue an order restraining the Plaintiff/ Applicant, his servants, workmen, licensees, agents or

any other persons acting on his behalf from howsoever evicting, dispossessing, alienating or stopping the 1st & 2nd Defendants/ Respondents from accessing and or harassing the 1st & 2nd Defendants/ Respondents or their servants and agents or interfering with their peaceful occupation and entitlement of their portion of the parcel of land known as title number Uasin Gishu/kormaet Scheme/57.

b. A temporary Injunction be granted restraining the Plaintiff/ Applicant by himself, his agents and/or servants or any other person acting for the Plaintiff/ Applicant or with the Plaintiff/ Applicants authority, from evicting the 1st & 2nd Defendants/ Respondents or taking possession, encroaching or trespassing onto, or alienating, disposing of or in any other way whatsoever interfering with the 1st & 2nd Defendants/ Respondents portion of the parcel of land known as title number Uasin Gishu/kormaet Scheme/57 pending the hearing and determination of this Suit."

The application is based on the four (4) grounds on its face, and supported by the affidavit by Abraham Kipruto Cheluget and John Kpkemboi Cheluget, the defendants, sworn on the 10th May 2021. It is their case that they are proprietors in common with the plaintiff, Job Kipkemei Cheluget, Mike Kipkorir Cheluget and Anna Cheuget,deceased, of Uasin Gishu/Kormaet Scheme/57, the suit land. That the plaintiff wanted to sell a portion of the 50 acres of the suit land that he owns, but they objected, as he had not obtained their consent, and no probate had been carried out on the estate of the late Anna Cheluget. That the plaintiff is elderly and being influenced by other people whose interest on the suit land is unknown, as he is unable to make rational decisions. That the plaintiff has recently through agents threatened to evict the other proprietors in common, and cultivating their portions of the land, and hence the instant application.

4. The court has perused the record and there are no replying papers filed by the plaintiff in response to the application dated the 10th May, 2021.

5. That on the 8th December, 2021 directions were issued that the two applications be canvassed together through written submissions, to be filed and exchanged within the given timelines.

6. The learned counsel for the defendants filed two submissions dated the 30th November, 2021 and the 28th January, 2022 in support and opposition of the applications dated the 10th May 2021 and 5th December, 2020 respectively, while that for the plaintiff filed the submissions dated the 22nd February, 2020 in support of their application dated the 5th December, 2020.

7. That though the defendants did not seek to have their preliminary objection dated the 13th January, 2021 heard and determined first as is the practice, I intend to make a determination on it first, before moving to the notices of motion dated the 5th December, 2020 and 10th May, 2021 in that order.

8. The issues for determinations by the court in the defendants' preliminary objection are as follows;

   a. Whether the preliminary objection raises any pure point of law capable of being determined without calling evidence.

   b. Whether the preliminary objection has merit.

   c. Who pays the costs in the preliminary objection.

9. The court has carefully considered the ground raised in the preliminary objection, pleadings, submissions filed, superior courts decisions cited therein and come to the following determinations;

a. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others* cited the leading decision on preliminary objections, *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*. (1969) EA 696, where the Court held as follows:

> " a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

And in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR the Supreme Court made the following observation as relates to preliminary objections:

> " ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

b. That with the decisions in the above cases in mind I find the grounds raised in the preliminary objection herein do not raise any pure points of law that can be capable of disposing of the Plaintiff's claim in its entirety. I also note that the grounds outlined in the notice of preliminary objection would require the ascertainment of facts through evidence. That this being the case, the said preliminary objection contravenes the cardinal rules that preliminary objections ought to be raised where the facts do not need ascertainment. In *Oraro v Mbaja* [2005] eKLR the court made the following observation as relates to the grounds to be raised in a preliminary objection:

> " I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."

That in view of the foregoing, I find that the defendants' preliminary objection dated 13th January, 2021 has no merit, and is hereby dismissed.

10. The issues for the court's determinations in the notice of motion dated the 5th December 2020 are as follows;

a. Whether the plaintiff has made a reasonable case for the prayers sought to be granted at this interlocutory stage.

b. What are the consequences of failing to file a replying affidavit in opposition to a notice of motion.

c. Whether documentary evidence may be annexed to written submissions.

d. Who pays the costs in the application.

11. The court has likewise carefully considered the grounds on the application, affidavit evidence, submissions filed, superior courts decisions cited, and come to the following findings;

a. That the Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR observed as follows where a party failed to file a response to an application:

> "A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed... Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behoves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court."

That though the defendants did not file any replying affidavit in opposition to the plaintiff's application, other than the preliminary objection which the court has already pronounced itself on above, the court will proceed to consider the notice of motion herein on its merits, in view of the above decision of the Supreme Court.

b. That though the defendants did not file a replying affidavit in response to the plaintiff's application dated the 5th December 2020, I note they have annexed a copy of the certificate of lease, a copy of the search and a copy of the transfer of the undivided share to both copies of their written submissions referred to above. It is trite that documentary evidence should not be attached onto submissions. In P*yramid Hauliers Ltd v Nehemiah Kinyanjui* [2021] eKLR the Court made the following observation as relates to documentary evidence attached on to submissions:

> "... documentary evidence cannot be produced through submissions in our adversarial system. Evidence attached to submissions cannot be considered to have been properly produced for purposes of supporting a party's case."

That position having been settled, the court shall disregard the documents annexed to the 1st and 2nd Defendants' written submissions while making a determination of the applications herein.

c. That it is settled position that for a court to grant interlocutory orders, the applicant must meet the threshold outlined in *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358 at 360 where Spry J. held 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 normally be 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."

d. The Court of Appeal in *Hassan Huri & another v Japhet Mwakala* [2015] eKLR made the following observation:

> " We reiterate this Court's recent decision in Nguruman Ltd v Jan Bonde Nelson & 2 others, Civil Appeal No.21 of 2014 (UR)
>
> "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.I 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 adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without hurdles in between."

That as it is not contested that the suit land is registered jointly with the plaintiff, defendants, and the late Anna Cheluget as tenants in common, that is undivided shares. It is also clear that the plaintiff's is seeking through his application to be allowed to sell a portion of the said land before the suit is heard and determined. That as the plaintiff is obviously not the sole registered proprietor of the said land, the court is of the considered view that if the application is allowed as sought, and the Plaintiff disposes of a portion of Kormaet Scheme Block 57 at this stage or soon thereafter, that disposal would prejudice the interests of the other lawfully registered owners, as the land is the subject matter of the main suit that is still pending hearing and determination. The plaintiff has also not laid the basis for seeking to have the defendants ordered to deposit the original title document to the suit land with the court for safe custody.

e. That the court finds that it would be more prudent to give the parties a chance to either explore mediation as they are father and sons, or wait for the merit hearing and determination of the main claim, as a decision to grant the prayers sought at this interlocutory stage would result in unnecessary prejudice to the lawful proprietors of the suit land. The Plaintiff has not demonstrated that he has a prima facie case, so as to be deserving of the order sought. He has also not demonstrated that he will suffer irreparable injury in the event that the orders sought are not granted. Therefore, I find that the balance of probability tilts in favour of not granting the orders sought, as the grant of the orders would amount to making a determination of the main suit at this interlocutory stage.

f. That in view of the foregoing, the court finds the notice of motion dated the 5th December, 2020 is without merit and is hereby dismissed.

12 The issues for determinations on the defendants' notice of motion dated the 10th May, 2021 are as follows;

a. Whether the defendants' application has met the threshold for a temporary injunction to issue at this stage.

b. Who pays the costs in the notice of motion.

13. The court has carefully considered the grounds on the application, affidavit evidence, submissions, superior courts decisions thereon, and come to the following determinations;

a. That the defendants deposed at paragraph 3 of their supporting affidavit filed together with the notice of motion, that a copy of the Certificate of Lease and the transfer of undivided share annexed as "AKC 1" were annexed, no such documents are attached to the said affidavit. I note from the official court fees payment receipt issued when the application was filed on the 12th May, 2021 that the 1st and 2nd Defendants did not pay for any annexures to their affidavit. I am persuaded that the Defendants' were aware that they had not attached the said documents to the affidavit, but instead of seeking for leave to file and serve a further affidavit through which the would introduce the documents, they resolved to attach the aforementioned documents to their written submission. The court has already pronounced itself on the fate of documents attached to submission herein above.

b. The requirements to be met for the grant of temporary injunctions were set out in the decision of the Court in *Giella V. Cassman Brown & Co. Ltd* [1973] EA 358 and they can be summarized as follows:

i. An applicant must prove the existence of a prima facie case with probability of success;

ii. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages; and

iii. If the court is in doubt, it will decide the application on a balance of convenience.

c. The provision of section 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is instructive. The provision provides as follows:

> " 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The Defendants have not furnished this Court with proof of ownership rights, and or entitlements, over Uasin Gishu/kormaet Scheme/57 worth protecting by an order of temporary injunction. They have also not particularized the actions through which the plaintiff has manifested the alleged threats to evict them or cultivate their portions of the suit land. They have also failed to show the nature of the irreparable loss or damage that they are likely to suffer if the order sought is not granted. That the balance of convenience therefore tilts against issuing the order at this juncture.

d. That in the circumstances, I find that the Defendants have not proved their claim sufficiently to warrant the grant of an order of temporary injunction at this interlocutory stage.

e. That the application dated the 10th May, 2021 is therefore without merit and is hereby dismissed.

14. That as a capping in this ruling the court finds and orders as follows;

a. That the Defendants notice of preliminary objection dated the 13th January, 2021, to the Plaintiff's application dated the 5th December 2020 and the suit, has no merit and is hereby rejected.

b. That the Plaintiff's notice of motion dated the 5th December, 2020 is without merit and is hereby dismissed.

c. That the Defendants notice of motion dated the 10th May, 2021 have no merit, and is hereby dismissed.

d. That in view of the parties' relationship as father and sons, each will bear his own costs in the preliminary objection and both applications, the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.

15. Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 4TH DAY OF MAY, 2022.

S.M.Kibunja,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: Absent.....

DEFENDANTS: Absent.....

COUNSEL: Ms. Chebitok for Plaintiff

COURT ASSISTANT: *ONIALA*

S.M.KIBUNJA,J.

ELC ELDORET