



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC NO. E004 OF 2020

JOHN KIPKORIR RUTO (*suing as the personal representative*

of the estate of KIPRTO ARAP MAINA (deceased).....**PLAINTIFF/APPLICANT**

VERSUS

COUNTY GOVERNMENT OF KERICHO.....**1st DEFENDANT/RESPONDENT**

CHIEF LAND REGISTRAR.....**2nd DEFENDANT/RESPONDENT**

THE DIRECTOR SURVEY.....**3rd DEFENDANT/RESPONDENT**

THE HON ATTORNEY GENERAL.....**4th DEFENDANT/RESPONDENT**

RULING

1. The applications before me is one dated 13th October 2020 filed pursuant to the provisions of Section 3 and 3A , of the Civil Procedure Act, the Lands Act(sic) Order 40 Rule1, 2, 3, 4 of the Civil Procedure Rules, and all the enabling provisions of the law wherein the Applicant seeks for orders as follows:-

i. Spent

ii. That pending the hearing and determination of this application, the honorable court be pleased to issue an order of injunction against the 1st Defendant by itself, its agents, from unlawful entry, fencing, developing, sub-dividing, transferring, selling and/or doing any other act that prejudices the Plaintiff's right to pursue this matter legally to its logical conclusion.

iii. That a declaration that all that parcel of land known as LR No. Kericho/Kapsuser/4683 and previously known as Kericho/Kapsuser/1112 lawfully belongs to the estate of Kipruto Arap Maina (deceased)

iv. That a declaration that the title currently held by the County Council of Kipsigis in respect to the same property is null and void.

v. That an order directing the Chief Land Registrar and the Director of survey to cancel the mutation sub-division of the subsequent title deed issued to the County Council of Kipsigis and revert the title deed to Kipruto Arap Maina (deceased)

vi. That Costs of the application be provided for.

2. The said application is supported by the grounds on its face and the sworn affidavit of John Kipkoriri Ruto, the Applicant herein on the 13th October 2020.

3. There was no response to the said application by the Respondents herein.

4. The second application is dated 11th January 2021 brought under the provisions of Section 1, 1A, 1B and 3A, of the Civil Procedure Act, Order 10 Rule 8 of the Civil Procedure Rules, and Section 13 & 16 of the Government Proceedings Act wherein the Applicant seeks that judgment in default be entered against the 1st Respondent/Defendant for not entering an appearance or defence within the time prescribed by the court's summons. The said application is also supported by the grounds thereof and the affidavit of the Applicant herein.

5. This application was opposed by the 1st Respondent via a Replying affidavit of 23rd April 2021, sworn by Gideon Mutai the County

Attorney Kericho County, to the effect that there was no proper service of the said pleadings upon the County Attorney's office. That the 1st Defendant had instructed the firm of Kemboi Chambers Advocates to represent its interests in this matter on the 22nd and January 2021 which firm had subsequently filed its notice of appointment on 2nd February 2021. That due to the second wave of the Covid-19 pandemic, the process of ascertaining the facts alleged by the Applicant were delayed and therefore the 1st Respondent is yet to file its defence. That further the 1st Defendant/ Respondent was not served with the previous court orders and therefore were not aware when the matter was coming before court and/or the directions issued thereof. The 1st Defendant/Respondent also sought for leave of 14 days to file a response to the application dated the 13th October 2020.

6. By the orders of 25th February 2021, the court directed that both the Applications be canvassed through written submissions to which only the Applicant and the 1st Respondent complied.

7. The Applicant summarized the background to the matter in issue to the effect that the original suit property herein Kericho/Kapsuser/1112 measuring 1.9 hectares had originally belonged to his deceased father the late Kipruto Arap Maina. That subsequently sometime in the year 1998 through a meeting of 12th October 1998 held by the then Councilors in the defunct Kipsigis County Council the said parcel of land was transferred from Kericho/Kapsuser/1112 to Kericho/Kapsuser/4683 with further sub- divisions into six plots being No. 3996, 3997, 3998, 3999, 4000 and 4001 registered to the defunct Kipsigis County Council as per the Registry Map Sheet No. 7, without the original proprietor's knowledge or the knowledge of the Applicant and his siblings.

8. The Applicant herein framed the following issues to be determined by the court in his application dated the 13th of October 2020.

- i. Whether No. Kericho/Kapsuser/1112 existed and if so, who was the original registered owner?
- ii. Whether the records at the lands office changed to the disadvantage of the Plaintiff and if so were the changes proper in law.
- iii. Is the Plaintiff entitled to the orders sought?
- iv. Does the honorable court possess the power to revoke and/or reinstate the Plaintiff back to his land?
- v. Costs of the suit.

Determination.

9. Although the Application was not opposed, yet not all applications that are not opposed should not be expressly allowed. It was thus incumbent on this court to consider whether or not the Applicant had discharged the onus placed on him to establish whether he was deserving of interim orders so sought. I have therefore perused and considered the overly long submissions by the Applicant herein to which I wish to determine as herein under:

10. The Application dated the 13th October 2020 in essence seeks for interim orders of injunction against the Respondents herein. In addition the said application seeks for orders which were also sought for in the Applicant's Plaint and despite the observation by the court on the 26th October 2020 that the Application had shortcomings in that the actions complained of seemed to have taken place a long time ago, that the prayers in No. 3, 4 and 5 were the same prayers that had been sought in the suit to which if granted then there would be nothing to be heard in the suit, the Applicant did not deem it fit to amend the said application and therefore the court will proceed to make its determination on the same as filed.

11. The issue for determination by this court is whether the Applicant has established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

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 Applicants 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. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

12. In the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, a prima facie case was described 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 latter."

13. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue a temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the orders sought. The Court is not required to determine the merit of the case as framed in the Applicant's issues for determination and the subsequent submissions.

14. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.

15. First in consideration of the Applicant's submission, I have considered all the material facts placed before me and find that although the Applicant has claimed that his late father late Kipruto Arap Maina was the proprietor of the suit land No. Kericho/Kapsuser/1112 there has however been no supporting evidence provided by him proving proprietorship/ownership of the suit land. What is on record is the green card to the resultant sub divisions of parcel No Kericho/Kapsuser/4683 in the name of County Council of Kipsigis.

16. The Applicant having failed to establish proprietorship of the suit land, I find that he had failed to establish that **there existed a right to the suit property which right was apparently infringed by the Respondents herein**. Section 26 (1) of the Land Registration Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship.

17. Secondly, the Applicant has also submitted that he had filed a Succession Cause wherein he had obtained letters ad litem to this suit. The court notes that there is neither the citation of the Succession Cause nor supporting documents annexed to the application to support the said statement. Since parties are bound by their pleadings, the court is not even sure as to whether or not the Applicant has the locus to file the present suit.

18. Third and lastly it is not in doubt looking at the pleadings and submissions hereto the present Application that the cause of the alleged action complained of occurred sometime in the year 1998 through a meeting of 12th October 1998 held by the then Councilors in the defunct Kipsigis County Council where apparently the Applicant's late father's parcel of land No Kericho/Kapsuser/1112 was transferred to the Kipsigis County Council and registered as Kericho/Kapsuser/4683 and subsequently sub-divided into Plots No. 3996, 3997, 3998, 3999, 4000 and 4001 as registered in the name of Kipsigis County council in the year 2009.

19. Section 7 of the Limitation of Actions Act is clear to the effect an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. The said provision provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

20. This simply means that the Applicant who is claiming ownership of the suit land could seek to recover the same from the Respondents but only if he did so within twelve years from the date on which the right of action accrued to him.

21. The court having put all the above captioned issues into consideration finds the Applicant herein has not established a prima facie case against the Respondent and therefore I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

22. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

23. Turning to the second Application dated the 11th January 2021. The Applicant seeks for judgment in default to be entered against the 1st Respondent/Defendant for not entering an appearance or defence within the time prescribed by the court's summons.

24. The Applicant's submission is to the effect that when the 1st Defendant/ Respondent despite service failed to enter appearance and/or file their defence, the application dated 11th January 2021 was filed against them wherein he framed his issues for Determination as follows;

- i. Did the Plaintiff comply with order 10(sic) and Section 13 and 16 of the Government Proceedings Act, in respect to the set procedure on summary judgment against the government?
- ii. Was the first Defendant served with the application as ordered by the honorable court?
- iii. Costs of the application.

25. The Applicant's submission on their issues for determination was that they had complied with the requirements of the law, pursuant to the provisions of Order 10 of the Civil Procedure Rules and Section 13 and 16 of the Government Proceedings Act, wherein they had electronically served the 1st Defendant on 27th January 2021, as directed by the court in its orders of 21st January 2021, through the process server, who had filed their return of service in court. That judgment should therefore be entered against the 1st Defendant, the County Government of Kericho for failing to enter appearance and/or file its defence to the Applicant's pleadings on time as required by the law. They placed their reliance on the decided case in **David G Katiba vs District Land Registrar, Muranga [2012] eKLR** and **Gulf Fabricators vs County Government of Siaya [2020] eKLR**. That having complied thereof the 1st Defendant to pay costs.

26. In response to the second application, the 1st Respondent framed two issues for determination being;

- i. Whether there was proper service of the pleadings.
- ii. Whether the failure to comply with the court's direction were as a result of the 1st Respondents fault.

27. The 1st Respondent has submitted that there had been no proof of receipt of the documents from the e-mail address to which the Applicant claims to have sent his pleadings. That further the affidavit of service herein relied upon by the Applicant made reference to service of a bill of costs dated 24th June 2020 and did not state the date and time of service of documents as is stipulated under Order 5 Rule 15(sic). There was therefore no proper service upon them. Reference was made to the case of **Gulf Fabricators** (supra).

28. That the failure to effect proper service of the Plaintiffs pleadings as well as the court's directions and the necessary notices on the 1st Defendant had left the 1st Defendant in the dark to which it could not be blamed for the Applicant's inadequacy. The 1st Defendant therefore sought for this application to be dismissed.

29. After going through the rivaling pleadings and submissions, I find the issues for determination herein being whether **judgment should be entered against the 1st Respondent for failing to enter appearance and file its defence within the time stipulated by the law.**

30. On 26th October 2020 when this matter first came before court on an Application dated the 13th October 2020, orders were issued for the same to be served upon parties. Vide an Affidavit of service filed in court on the 11th January 2021 the same was to the effect that the Summons to Enter Appearance together with the pleadings and application had been electronically duly served upon the 1st Respondent, under the covid pandemic court Rules, on the 15th November 2020. The email address therein used was however not indicated and neither was the copy of the email transmission of receipt annexed to the Affidavit as deponed by the Deponent.

31. No Appearance or defence was filed by the 1st Defendant to which on 20th January 2021, the Plaintiff/ Applicant filed an application for leave pursuant to the provisions of Order 10, Rule 8 of the Civil Procedure Rules seeking for judgment against the 1st Defendant/Respondent in default of Appearance and /or defence.

32. I have considered the 1st Defendant's Replying affidavit to the effect that service had not been effectively done upon them. That the e-mail used by the Applicant was a general e-mail which served all Ministries and Departments and therefore the same was loaded with all manner of mails. Could we then say that service in such circumstance was proper? I think not. In my view since the 1st Defendant/Respondent was Government, it ought to have been served in accordance with section 13 of the Government Proceedings Act.

33. Order 5, rule 9. of the Civil procedure Rules is explicit to the effect that:

(1) The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act (Cap. 40), which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.

(2) Service of a document in accordance with the said section 13 shall be effected—

(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or

(b) by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid, and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof. and in this case the Plaintiffs should have complied with Order 10 rule 8 of the Civil Procedure Code with regard seeking an interlocutory judgement against the government.

34. Having found that service of the summons to enter appearance was not properly done but that the 1st Defendant did subsequently enter appearance through the firm of Kemboi Chambers Advocates on the 2nd February 2021, I further find that no prejudice will be occasioned to the Applicant if leave is granted to the 1st Respondent to file their defence.

35. In the case of **DIG-TEC Images Limited vs Kenya Railways Staff Retirement and Benefits Scheme and 4 Others [2015] eKLR**, the court held as follows:-

“The purpose of joining a party to a proceeding is to have a necessary party for the purpose of determining the real matters in question It follows therefore that a party as long as his joinder shall assist in determination of the matter in question, can be joined at any stage of the proceeding.”

36. The upshot of the foregoing is that both the Plaintiff's applications dated 13th October 2020 and 11th January 2021 are herein dismissed. Costs be in Cause.

37. Leave is herein granted to the 1st Defendant to file their defence within 14 days of delivery of this ruling. Thereafter parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF MAY 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE