



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC NO. 49 OF 2019**

**JOHN K KOECH (suing as an Administrator of the Estate of TABORON**

**W/O KAPKUSUM (deceased).....PLAINTIFF/APPLICANT**

**VERSUS**

**HANNAH CHEPKIRUI MAINA AND 13 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> November 2019 brought under **the provisions of Order 40 Rule 1, 2 and 3, Order 51 Rule 1 and 2 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, and all enabling provisions of the Law**, the Applicant herein seeks the following orders:

**i. Spent**

ii. That this honorable court be pleased to grant an injunction order restraining the Defendants, their agents and whosoever claiming through them from selling, transferring, charging, disposing, entering, erecting any form of structures/developments, depositing materials, defacing boundaries/fences and/or committing any acts of trespass or other acts which are prejudicial to the interests of the estate of **Taboron w/o Kapkusum** comprised in land parcel LR No Kericho/Silibwet/1329, 1330, 1376, 5236, 5237 and 1377 (the suit properties), pending the hearing and determination of this suit.

iii. The cost of this application be borne by the Defendants/Respondents.

2. The said application was supported by the grounds on its face and an Affidavit sworn on the 5<sup>th</sup> November 2019 by John Koech, the Plaintiff/Applicant herein.

3. The application was opposed by the 1<sup>st</sup> and 12<sup>th</sup> Respondent's replying affidavit dated the 22<sup>nd</sup> January 2020 to the effect that the Applicant was not entitled to the orders sought as he was not a beneficiary of the estate of the late **Taboron w/o Kapkusum. That pursuant to the death of the deceased, the original parcel of land No. LR No Kericho/Silibwet/11** was transferred to the 1<sup>st</sup> Defendant in the year 1993 as the rightful heir of the deceased there being no other beneficiaries. That the 1<sup>st</sup> Defendant has therefore been in occupation of the said suit land with her children as the beneficiaries of the estate of the deceased and has also rented out some premises to her tenants.

4. The 2<sup>nd</sup> Defendant's affidavit dated 29<sup>th</sup> January 2020 in response to the Plaintiff's application was to the effect that the Church was an innocent purchaser of parcel **No. LR No Kericho/Silibwet/1329** having purchased the same from the 1<sup>st</sup> Defendant in the year 1990 wherein they had taken immediate possession and had subsequently acquired title in the year 1993.

5. The 6<sup>th</sup> and 7<sup>th</sup> Respondent's replying affidavit dated 29<sup>th</sup> January 2020 in response to the Plaintiff's application was that they too were innocent purchasers of parcel of land measuring 0.05 hectares which was to be excised from LR No Kericho/Silibwet/5236, having purchased the same from the 5<sup>th</sup> Defendant on or about the 15<sup>th</sup> September 2018. That upon transfer, they had immediately taken possession and have been in occupation of the same without interruption.

6. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's replying affidavit dated 29<sup>th</sup> January 2020 was to the effect that the 3<sup>rd</sup> Defendant had purchased the parcel of land from the 1<sup>st</sup> Respondent in the year 1994 which land was to be excised from LR No Kericho/Silibwet/1377. That he took possession of his portion of land and after the transfer and registration into his name, subdivided the parcel of land for the 4<sup>th</sup> Respondent who later sold a portion measuring 0.10 hectares to the 5<sup>th</sup> Respondent.

7. By consent, parties agreed to dispose of the application by way of written submissions to which only the Applicant, 1<sup>st</sup> and 12<sup>th</sup>

Respondents complied

#### **Applicant's submissions.**

8. The Applicant's submission was to the effect that the application was premised on trespass perpetrated by the 1<sup>st</sup> Respondent herein who had illegally transferred the parent suit parcel of land LR No Kericho/Silibwet/11 to herself whereby she had subsequently sub-divided it into LR No Kericho/Silibwet/1329, 1330, 1376, 5236, 5237 and 1377 thereby disposing the subsequent subdivisions to her co-Respondents who were not beneficiaries of the estate of **Taboron w/o Kapkusum and who were bent to waste away the said suit properties thus causing deterioration of the deceased's estate.**

9. The Applicant framed their issues for determination as follows:

- i. Whether the Applicant has a prima facie case with a high probability of success.
- ii. Whether the Applicant will suffer irreparable damage.
- iii. Whether the issuance of orders and convenience tilts in whose (sic). favor

10. On the first issue for determination, the Applicant relied on the decided case of **Solomon Too & Another vs Ziporah Jebichi Seroney & Another [2018] eKLR** to submit that he was the grandson and a beneficiary of the deceased **Taboron w/o Kapkusum, the original proprietor of the suit land.**

11. **That in the year 1993 after the death of Taboron w/o Kapkusum, the 1<sup>st</sup> Respondent, with the help of land officers subdivided LR No Kericho/Silibwet/11 and sold some of the resultant parcels of land to third parties (co- Respondents herein) without the requisite legal capacity thus intermeddling with the deceased's property which was contrary to the provisions of Section 55 of the Law of Succession Act.**

12. That since the 1<sup>st</sup> Respondent had no grant of letters of administration in respect to the estate **of Taboron w/o Kapkusum**, she had no power to subdivide LR No Kericho/Silibwet/11 and sell portions thereafter to other Respondents. The Applicant's submission was that it had been for this reason that he believed he had established a prima facie case with a probability of success to the effect that the estate of the deceased ought to be protected.

13. On the second issue for determination, the Applicant submitted that after the subdivision of the original suit land, the Respondents had built a garage, and car wash while and others were tilling on the land. That there had been oil spillage on the land for which the deceased's estate had suffered loss (sic) due to the Respondents' unsanctioned acts. That the damage the deceased's estate had suffered was that it had been robbed and subdivided and there was no other greater damage or injury than when a stranger took ones property.

14. The Applicant further submitted that the scale of justice called upon the court to allow the orders as prayed as the convenience tilted toward the preservation of the estate from further acts of intermeddling, waste and deterioration caused by the Respondents.

#### **1<sup>st</sup> and 12<sup>th</sup> Respondent's submissions.**

15. The 1<sup>st</sup> and 12<sup>th</sup> Respondents while relying on their replying affidavit sworn on 22<sup>nd</sup> January 2020 submitted that the Applicant's father Kipkoech Arap Maina (deceased) belonged to a different lineage from the deceased **Taboron w/o Kapkusum who had married the 1<sup>st</sup> Respondent in the year 1967 in a woman to woman marriage under the Kipsigis customary law. That together they had been blessed with five children including the 12<sup>th</sup> Respondent. That together they resided on the original parcel of land LR No Kericho/Silibwet/11 to date. That they were not strangers to the estate of the deceased as alleged by the Applicant.**

16. That the Applicant had not established a prima facie case as his relationship with the deceased **Taboron w/o Kapkusum** was in issue. That he had lied on oath knowing very well that the 1<sup>st</sup> Defendant and her children were beneficiaries of the estate of the deceased.

17. The Respondents also submitted that no loss or harm would be occasioned to the Applicant if the orders sought were not granted for reasons that he was not a beneficiary to the estate of the deceased Taboron w/o Kapkusum. That the issue on the alleged wastage of the deceased's estate were issues that required evidence and were not grounds for granting an injunction.

18. That indeed the balance of convenience tilted in their favour as injustice would be meted upon them if the injunction was granted as they had established their homes on the disputed land where they had been residing for the last 54 years.

#### **Determination.**

19. The celebrated case of **Giella vs Cassman Brown (1973) EA 358** sets out conditions for the grant of an interlocutory injunction as follows:-

- i. Is there a serious issue to be tried( prima facie case)
- ii. Will the Applicant suffer irreparable harm if the injunction is not granted;

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

20. On the first issue as to whether the Plaintiff/Applicant in this matter has made out a prima facie case with a probability of success, I am guided by the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, where 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.”*

21. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue 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 to whether the Applicant herein has demonstrated that he has a genuine and arguable case, I shall consider the provisions of Section 26 of the land Registration Act which oblige me to take a certificate of lease as conclusive evidence of proprietorship. The said section provides as follows;

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

22. The Applicant has not exhibited any document to his application to prove that he is the proprietor of any of the suit lands. On the other hand, the 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents having demonstrated that they were currently the registered proprietors of the suit properties namely LR No Kericho/Silibwet/1329, 1377, and 5236 respectively. By virtue of the fact that they had been issued with certificates of lease, prima facie their titles are indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

23. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Respondents' titles but the mere proof that they hold duly registered certificates which on the face of it were properly acquired, is sufficient to lead the court to hold that the Applicant has not established a prima facie case.

24. Secondly it has also not been disputed that the Respondents herein are in possession and occupation of the suit premises where they have established their homes and a church respectively. By granting orders of injunction so sought in a situation where the Respondents are in occupation, there could be an eviction which at this interlocutory stage would be premature as it would cause irreparable harm to the Respondents some of whom have been on the land since the 1990's.

25. Since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases as observed by Lord Diplock in **American Cyanamid Co. vs Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510** where he stated as follows:

*“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”*

26. I have anxiously considered the Applicant's application herein, I have considered the fact that the cause of action complained of by the Applicant took place in the year 1993 which was about twenty six (26) years ago and which was way beyond the limitation period stipulated under Section 7 of the Limitation of Actions Act. I have also considered the fact that the Respondents hold titles to the disputed suit lands where some of them have been residing since the 1990's and thus issuing the orders sought would amount to an eviction which is premature at this stage. To this effect, I find that the Applicant has not established a prima facie case herein.

27. That having been said, I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella 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. 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”.*

28. I find that the balance of convenience does not tilt in favour of granting the injunctive orders sought and therefore the order that best commends itself in the circumstances of this case is an order of status quo, to this effect;

i. Parties shall maintain the status quo prevailing pending the hearing and determination of the suit.

ii. Parties shall set down this matter for hearing expeditiously by complying with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days upon delivery of this ruling

iii. Costs to be in cause.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF MAY 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**