



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E019 OF 2021

SHADRACK K. CHEMIRMIR Alias

SHADRACK KIPKOECH SUGURU.....1ST PLAINTIFF

SARAH JEROP CHEMIRMIR.....2ND PLAINTIFF

VERSUS

JEREMY KIPTOO KIBOGY.....1ST DEFENDANT/RESPONDENT

THE LAND REGISTRAR,

UASIN GISHU COUNTY.....2ND DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application brought by the plaintiff/applicants dated 23rd March 2021 seeking for the following orders:

- a) Spent
- b) THAT an interim ex-parte order of temporary injunction be issued against the Defendants/Respondent and their agents and/or assignees and be restrained and/or barred from trespassing, entering, accessing, using, leasing, dealing, interfering with and/or transacting in land parcel number ELDORET MUNICIPALITY BLOCK 12/370 and the property and/or fixtures on the said parcel and not interfere with the lease agreement pending the hearing and determination of this application.
- c) THAT a temporary injunction be issued against the defendants/respondents and their agents and/or assignees and be restrained and barred from trespassing, entering, accessing, using, leasing, dealing, interfering with and/or transacting in land parcel number ELDORET MUNICIPALITY BLOCK 12/370 and the property and/or fixtures on the said parcel and not interfere with the lease agreement pending the hearing and determination of the main suit.
- d) THAT the Officer Commanding Eldoret Police Station to ensure compliance with the orders.
- e) THAT the costs of this application be provided for.

Parties agreed to canvas the application by way of written submissions which were duly filed.

PLAINTIFF/APPLICANT'S CASE

Counsel relied on the supporting affidavit of the applicant and submitted that the applicants have a prima facie case with the probability of success as the applicants are the lawful owners of the suit land demonstrated by the lease certificate, a letter of allotment dated 25th January 1993, payment receipts from Uasin Gishu County dated 2nd February 2021 and a letter from the Ministry of Lands and Physical Planning dated 28th November 2018.

Counsel further submitted that the applicants took possession of the suit land upon issuance of the lease certificate and constructed a structure which was demolished by unknown persons. Further that the official search indicates that the suit land is registered in the applicant's names.

Counsel relied on the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others (2016) eKLR** which captured the principles in *Giella v Cassman Brown* as follows;

- i. *Is there an issue to be tried?*
- 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?*

It was counsel's further submission that the test for granting of an interlocutory injunction was considered in the case of **American Cyanamid Co. vs Ethicon Limited (1975) A AER 504** where three elements were noted to be of great importance, namely;

- i. *That there is a serious issue to be tried*
- ii. *Damages are not an adequate remedy.*
- iii. *The balance of convenience lies in favour of granting or refusing the application.*

The applicants also deposed that the suit property is in danger of being wasted by the 1st Respondent as the Applicants constructed a structure which was demolished and the property placed under heavy guard preventing them from accessing the suit land. Further that the Respondents have started construction of temporary structures which are rented to tenants.

Counsel relied on the **Giella V Cassman Brown & Co. Ltd (1973) EA 358** and submitted that the applicants have met the threshold for grant of temporary injunctions and urged the court to allow the application as prayed.

1ST DEFENDANT/RESPONDENT'S CASE

Counsel for the respondent opposed the application and submitted that the respondent was issued with a title to the suit property on 15th January 2003 and has been paying land rates as demonstrated by annexures JKK11,2,3,4 and 5 in the supporting affidavit.

It was also counsel's submission that the 1st defendant has been in actual physical possession of the suit land since 2003 and has carried out developments thereto consisting of temporary structures used as the residence of his employees and the 1st defendant attached Photographs of the structures to demonstrate the same.

Mr. Kibii counsel for the 1st defendant submitted that the applicants were issued with the second title over the suit property 16 years after the 1st defendant's registration and occupation of the suit property.

It was counsel's submission that the applicants are seeking for eviction of the 1st defendant as the current application for injunctive orders amount to a mandatory injunction and final prayers which cannot be granted at an interlocutory stage.

Counsel relied on the case of **Alex Wainaina T/A John Commercial Agencies vs Janson Mwangi Wanjihia (2015) eKLR** where the court while considering the first principle in **Giella vs- Casoman Brown (1973) EA 358** and in setting aside mandatory injunction orders held:-

*“This Court has previously held that in considering the first principle, the trial court must avoid the temptation of making conclusive findings of fact before they are tested in cross-examination. A prohibitory injunction rather than a mandatory injunction which is considered on different principles is meant to forestall the happening of an event. In the case of **Stephen Kipkebut T/Å Riverside Lodge and Rooms -vs- Naftali Ogola(2009)eKLR** the court held that an order which results in the granting of a major relief claimed in the suit ought not to be granted at interlocutory stage. We have examined the record and we think, with respect, that the trial court in its analysis, fell into temptation in finding that the appellant's case stood no chance of success at the hearing. The result was that the other principles in the *Giella* case were ignored.*

*In the circumstances of this case we think the court should have gone further and examined various other factors including: the existence of disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff as was stated in the case of **Kenya Railways Corporation -vs- Thomas Ngutu and others (2009)eKLR**; the appellant having been in possession of the suit land which he developed before the respondent's rights accrued; the fact that the appellant had asserted that he was a purchaser for value without notice which was a triable issue; the nature of the inconvenience the respondent would suffer if the injunction were to be withheld and that which would be suffered by the appellant if the injunction was granted; whether the respondent could be compensated by damages for loss of use of the suit property during the pending of the litigation; the uncertain outcomes of various relevant cases before and other courts and also whether granting the relief in the manner sought would leave any issue for agitation in the main suit Furthermore, the acknowledged pending cases which had a direct bearing on the ownership of the disputed property cannot be wished away and will feature at the trial of the main suit The trial court was therefore in error when it not only made final orders at interlocutory stage but also issued an eviction order which was not part of the equitable reliefs envisaged under Order 40 of the Civil Procedure Rules, the legal basis of the application*

before the court...”

Counsel therefore submitted that the issue of registration of property shall be determined during the main hearing and granting orders sought will amount to eviction orders and shall deny the respondent any opportunity of being heard despite his registration as the absolute owner of the suit property since 2003. Counsel urged the court to dismiss the application as the applicants have not met the threshold for grant of such orders.

ANALYSIS AND DETERMINATION

The issues for determination in an application for temporary injunction are as was enunciated in the case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358**. A party must establish a prima facie case with a probability of success, that he or she would suffer irreparable loss which may not be compensated by an award of damages and finally if the court is in doubt, where does the balance of convenience lie?

Order 40 Rule 1 of the Civil Procedure Rules provides;

Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The applicants’ claim is that the suit land was allotted to him and he has produced documentary evidence on the same. He has also provided evidence that he has been making payments on the suit property. The respondent has also annexed a copy of a lease certificate for the suit plot but the applicant has further annexed a current search certificate which indicates that the suit property is registered in the applicant’s name. This shows prima facie that the applicants have a legal right that ought to be protected.

On the issue as to whether the applicants will suffer irreparable harm if the injunction is not granted, the applicant and the respondent admit that there are structures on the suit land but the dispute is the ownership of the suit land. Both applicant and the respondent have annexed photographs to show the structures on the suit land. The structures are temporary in nature and seems to have been done recently from the look at the photographs.

The purpose of a temporary injunction is to preserve the substratum of the case so as the case is not rendered nugatory when the final orders are granted. The suit land can be preserved pending the hearing and the determination of the ownership dispute. If one party is allowed to continue with construction and when the ownership dispute is determined, a party may suffer irreparably when asked to demolish permanent buildings that were constructed during the pendency of the suit.

I find that the applicants have met the threshold for grant of a temporary injunction to preserve the suit pending the hearing and determination of this case with costs.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF JULY, 2021

M. A. ODENY

JUDGE