



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 005 OF 2021

DAVID KIBET LANGAT.....1ST PLAINTIFF/APPLICANT

WILLIAM LANGAT.....2ND PLAINTIFF/APPLICANT

VERSUS

MOSES MUTAI1ST DEFENDANT/RESPONDENT

PHILIP MUTAI2ND DEFENDANT/RESPONDENT

RULING

1. Vide an Application by way of Notice of Motion dated 9th February 2021, brought under *the provisions of Section 1, 1A, 3 and 3A, of the Civil Procedure Act, Order 40 Rules 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules, and other enabling provisions of the law, the Applicants seeks for orders of temporal injunction restraining the Respondents, their employees, agents, servants, proxies or whomsoever from illegally entering, remaining upon, using, wasting erecting containers or dealing in howsoever manner with land parcel No. Kericho/Chemoiben/32 situate at Litein within Litein Sub County, pending the hearing and determination of the suit, as well as for costs of the Application.*

2. *The Application* is supported on the grounds on the face of the same as well as an affidavit of **David Kibet Langat**, the 1st Applicant herein, sworn on an equal date.

3. It is worth noting that after the Application was filed and served, the 1st Respondent with the authority of the 2nd Respondent, filed their Replying Affidavit and Grounds of Opposition dated the 1st March 2021 on an equal date to which he deponed that the application was an abuse of the court process, was brought in bad faith and had disclosed no material facts. That further, the Applicants had no locus standi to institute the suit and therefore the same should be dismissed in the first instance, with costs.

4. He deponed that all the parties herein were siblings and further that the suit property No. Kericho/Chemoiben/32 was jointly registered in the names of Ludia Chemutai Koketgei, now deceased and her step sons David Kibet Langat and William Langat the Plaintiffs herein.

5. That from the supporting affidavit, it was clear that the matter before court was a boundary dispute and hence not within the jurisdiction of the court. That they had not in any way trespassed onto the Plaintiffs' property and therefore the orders sought by the Plaintiffs were a fallacy and unenforceable in law. That the application should therefore be dismissed with costs.

6. By consent, the application was slated for inter parte hearing on the 19th July 2021, on which date only Plaintiff/Applicant attended. There was no appearance for the Defendant/Respondent. The Court directed that the matter proceeds ex-parte pursuant to the provisions of Order 12, rule 2 of the Civil Procedure Rules.

7. Counsel for the Applicant then submitted that pursuant to the service of the Application, the Respondents had filed their grounds of opposition and Replying Affidavit which had been served upon them on the 1st April 2021 wherein a hearing date was taken by consent on the 21st May 2021. That they were seeking for prayers (b) of their Application and would rely entirely on the annexed affidavit of David Kibet Langat sworn on the 9th February 2021.

8. That both the Plaintiffs were joint registered owners of land LR No. Kericho/Chemoiben/32 situated at Litein. That on the 26th January 2021, the 1st Defendant who was a chief of the area, while using his authority, and together with his brother the 2nd Defendant, chased away all the Plaintiffs' tenants from the suit property, installed four containers and fenced off the plot claiming ownership and had since refused to

vacate from the suit land. Their action had thus propelled the Plaintiffs to file the suit.

9. That they had perused the Grounds of Opposition filed by the Defendants and did not see any substance therein. That although at paragraph 10 of the Replying Affidavit, the Defendant/ Respondents had deponed that the matter was a boundary dispute, yet they had not provided any evidence to prove that their plot that bordered the Plaintiff's suit land. That they had not even demonstrated any connection with the land in dispute. That it was not true that the parties were siblings as they came from different clans.

10. The Applicant submitted that it had been more than 5 months since the suit was filed yet the Defendants had not filed their defence. They thus sought for orders that the Defendants be given a period of time suitable to the court within which to file their Defence, failure to which an interlocutory judgment be entered. Finally, the Applicants sought for orders of status quo to be maintained by parties.

Determination

11. The issue for determination by this court is whether the Applicants have established a prima facie case to enable this court grant them the interlocutory injunction orders sought. The principles to be considered by this court in determining whether or not to grant the said orders 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 Applicants 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. The court shall therefore rely on the above conditions as its issues for determination. The court has been moved under certificate of urgency, by the Applicants, to issue temporary injunctive orders against the Respondents. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine the merit of the case.

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

14. I have considered all the material facts placed before me and find that the suit land herein No. Kericho/Chemoiben/32 measuring 0.27 hectares was jointly registered in the names of the Plaintiffs and their deceased mother Ludia Chemutai Koketgei as per the annexed certificate of title.

15. The Plaintiffs have also submitted that they have been in occupation of the suit land wherein $\frac{2}{3}$ of the land is developed with semi-permanent structures used as shops while $\frac{1}{3}$ is not developed, is an open space and has been leased out to small traders to sell their wares.

16. That on 26th January 2021, the Defendants herein without color of right trespassed onto the open space part of the suit land, chased away the Plaintiffs' tenants and went ahead to install (4) four containers thereon claiming ownership of the land.

17. That Applicants have exhibited a certificate of title dated the 18th January 1984 confirming that the suit land measuring 0.27 hectares was registered jointly to them and their late mother.

18. The suit land having been registered on 18th January 1984 was governed by the repealed Registered Land Act now governed by Land Registration Act, Act No. 3 of 2012, which constitutes the Applicants as absolute proprietors and confers on them all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances are not liable to be defeated except as provided in the Act.

19. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

20. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26(1) provides:-

"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 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”.

21. The Respondents have not argued or asserted that the Applicants’ title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law and neither is there evidence that the Government has recalled and/or revoked the title.

22. The Applicants having demonstrated that they was the registered owners of the suit property namely No. Kericho/Chemoiben/32 prima facie, their title is indefeasible and the burden shifts to the Respondents to show or demonstrate that the title is challengeable within the provisions of the law. The mere proof that the Applicants hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicants have established a prima facie case.

23. The provision of Section 18(2) of the Land Registration Act serves to restrict the jurisdiction of the Court by committing boundary disputes to the Land Registrar for determination in the first instance. It is only after the Land Registrar has determined the dispute that the matter is escalated to this Court. Although the Respondents have deponed that this is a matter concerning a boundary dispute, yet they have not brought forth any evidence that the suit land herein borders their land (another plot) to constitute a dispute between the parties. Without such evidence, this line of argument should fail.

24. On the second issue for determination as to whether the Applicants might otherwise suffer irreparable injury if the injunction was not granted, I have considered the fact that $\frac{2}{3}$ of the land is developed with semi-permanent structures used as rental shops while $\frac{1}{3}$ is not developed but an open space which has been leased out to small traders to sell their wares. I have also considered that the proceeds from the rental shops provide income to the Applicants. I have further considered the fact that the Applicants’ tenants have been utilizing the suit parcel of land and therefore by not granting orders of injunction so sought in a situation where there is occupation and the Respondents are bent on dealing with the suit land, there could be an eviction at this interlocutory stage which would be premature and would cause irreparable harm to the Applicants.

25. I find that the mere fact that the Applicants have been earning their daily bread from the rent received from their tenants and further the fact that not granting an injunction would lead to an eviction, is sufficient to lead the Court to hold that the Applicants will suffer irreparable injury if the injunction is not granted.

26. On the balance of convenience, I do find that the same favors the Applicants. Although the Respondents have placed four containers and fenced off the empty space of the suit land, it is herein ordered as follows;

- i. That parties shall maintain the status quo pertaining prior to 26th January 2021.
- ii. The Applicants and their tenants shall have unrestricted access to the property being No. Kericho/Chemoiben/32 situate at Litein within Litein Sub County
- iii. The Respondents, *their employees, agents, servants, proxies or whomsoever are herein injuncted from* engaging in acts that would waste and or/degrade the suit land, pending the hearing and determination of the suit.
- iv. Costs of the Application is herein granted to the Applicants.
- v. Parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days of delivery of this ruling.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF SEPTEMBER, 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE