



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC CASE NO.79 OF 2019
AND
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF LAND PARCEL NUMBER NANDI/MUTWOT/11
BETWEEN
LILIAN CHEPKORIR LELEI.....APPLICANT/PLAINTIFF
VERSUS
RICHARD KIPCHIRCHIR NYANGO.....RESPONDENT/DEFENDANT
RULING

This ruling is in respect of an application brought by way of Notice of Motion dated 13th April 2021 by the plaintiff/applicant seeking for the following orders:

- a. Spent
- b. THAT a temporary injunction be issued against the Defendant/Respondent restraining him by himself , agents servants and/or any other persons acting under his authority from selling, leasing, transferring, encumbering, alienating, cultivating ,and/or in any other manner dealing with ,demolishing structures and/or interfering with one acre curved from land parcel No.Nandi/Mutwot /11 or thereabouts.(hereinafter referred to as the "suit property" situate within Nandi County and occupied by the Applicant herein pending hearing and determination of this application inter partes and subsequently pending hearing and determination of this suit.
- c. THAT OCS Kapsabet Police Station be directed to oversee compliance.
- d. The Respondent be condemned to pay costs.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

It was the applicants case that the defendant is the beneficiary and or legal representative of the estate of the late Jepkemoi Kobot who was the registered proprietor of the suit property measuring 2.75 HA. The applicant averred that on the 20th January 1999, she bought one acre curved out of the suit property from the respondent's mother and took possession of the same to date.

The applicant further averred that she invested colossal amounts of money in developing her land including by building her home, fencing the property, planting trees and living there alongside her family and workers.

It was also the applicant's case that she has lived peacefully in the said parcel of land up to the year 2017 when the defendant attempted to sell the one-acre portion with the intention of evicting her which prompted her to seek the court's intervention via this cause. She further averred that the defendant/respondent threatened to physically harm her if she tried to stop him from selling that land.

The applicant deponed that on the 8th April 2021, during the pendency of this cause, the respondent in collusion with goons demolished one side of the house and fence with ulterior motives to defeat her claim for adverse possession. She reported the same to the area Police vide OB No.04/8/4/2021 but stated that she was not assisted.

Mr Kagunza counsel for the applicant filed submissions and stated that the applicant has met the threshold for grant of temporary injunction hence the orders should be granted as prayed. That the action by the respondent to demolish the house, cut down trees shows that she has a prima facie case against the respondent.

Counsel submitted that the applicant will suffer irreparable injury if the injunction is not granted and cited the case of **Francis Githinji Karobia vs Stephen Kageni Gitau Civil Case 53 of 2005** (unreported) and submitted that the substantial investments will go to waste if the orders are not granted.

Counsel also relied on the case of **Church of Christ of Latter-Day Saints-Kenya Registered Trustees vs John Ndirangu & 2 others Nairobi ELC Case No.16 of 2011** and submitted that the order of injunction should be issued by the court to protect the substratum of the case.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that it is not in dispute that the Respondent is the beneficiary/legal representative of the estate of the late JEPKEMOI KOBOT JEPKOLUM the registered proprietor of land parcel No: NANDI/MUTWOT/11. That it is the respondent's case that the applicant is not and has never been in occupation of the suit land and if indeed the Applicant claims to have bought the parcel of land, then she ought to sue the beneficiaries of the Estate of PAULINE CHEBOKWONY NYANGO in that parcel of land known as Mutwot/11/ and not the beneficiaries of the estate of JEPKEMOI KOBOT JEPKOLUM in that parcel known as Nandi /Mutwot/11.

Mr Chemwok, counsel for the respondent further submitted that the applicant has not come to court with clean hands since the applicant withdrew her case in ELC No. 155 of 2017 wherein orders were given on 1st March 2021 and issued on 16th March 2021 and then proceeded to file an application dated the 13th April 2021 barely a month after withdrawal of the suit.

It was counsel's submission that the applicant has not met the threshold for grant of orders sought for injunction as no prima facie case has been established. That whereas the applicant purports in this application and suit that she has been in occupation of the suit property, in the previous suit she claimed encroachment by the defendant and further withdrew that suit in which she was seeking same orders between the same parties.

Counsel relied on the cases of **Suleiman vs Amboseli Resort Ltd [2004] eKLR 589** and **Yego vs Tuiya & another [1986] KLR 726** and submitted that the application should be dismissed with costs to the respondent.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicant has met the threshold for grant of injunctions. Order 40 Rule 2 of the Civil Procedure Rules 2010 which provides as follows:

2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

The threshold and the principles for grant of temporary injunctions are well settled as per the case of **Giella vs Cassman Brown & Company Limited [1973] E A 358**, . A party seeking such orders from the court must show that he/she has a prima facie case with a probability of success, that he/she will suffer irreparable harm, that an award of damages would not be adequate compensation and finally that if the court is in doubt, it will decide on a balance of convenience.

Looking at the current case, it was the applicant's case that she bought the suit land from one Pauline Chebokwony Nyango on the 20th of January 1991 as per the sale agreement dated the 20th January 1999 and that the said Pauline Chebokwony is the mother to the respondent herein. The agreement shows that the consideration was Kshs 68,000 which was paid in full.

It is further on record that the certificate of official search indicates that the suit property is registered in the name of Jepkemoi Kobot Jepkolum who is deceased. It follows that the suit property was registered and belonged to the deceased Jepkemoi Kobot Jepkolum at the time it was allegedly sold by the late Pauline Chebokwony to the applicant herein.

The applicant must prove that she has a prima facie case against the respondent by giving a clear picture of the facts of her status as a buyer/owner/occupation of the suit land and why the court should exercise its discretion in her favour.

The applicant has not satisfied the court that she is either in occupation or that she deserves the orders of injunction. The issue as to whether she ought to have sued the beneficiaries of the estate of the deceased is pertinent and cannot be wished away. The official search indicates that the title is still in the name of a deceased person and that the case has not been filed against the legal representatives of the deceased. An explanation for this at the interlocutory stage would have assisted in mounting a prima facie case against the respondent.

The applicant had also filed the same case and withdrew it and proceeded to file this current application seeking for the orders that she had previously sought. I find that this application lacks merit and is therefore dismissed with costs to the respondent.

DATED AND DELIVERED AT MALINDI ELECTRONICALLY THIS 21ST DAY OF SEPTEMBER 2021

M. A. ODENY

JUDGE