



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO.50 OF 2020 (OS)**

**ISAAC KIPRONO SONGOK.....PLAINTIFF/APPLICANT**

**VERSUS**

**SAMUEL KIPTINGEI**

**(The Administrator of the Estate of WILLIAM KIPTINGEI).....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AND**

**PHILEMON KIPTANUI MELLY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application by the plaintiff/applicant seeking for the following orders:

**a) Spent**

**b) That the court be pleased to grant a temporary injunction restraining the respondents whether by themselves, their agents and/or servants or any other person whatsoever from trespassing on, wasting, constructing on, alienating or selling, charging, evicting or otherwise interfering or dealing with applicant's possession property being Title Number SOY/KAPSANG BLOCK 7 (NGOISA)/66 pending the hearing and determination of this application and suit.**

**c) That the costs of this application be provided for.**

**PLAINTIFF/APPLICANT'S SUBMISSIONS**

Counsel relied on the supporting affidavit of Isaac Kiprono Songok, and stated that the applicant in both the application and the originating summons avers that he purchased the suit land sometimes in 2004 from one Wilson Kipchumba Kirwa and took possession upon the purchase. It was his averment that he has extensively developed the suit property and has been in continuous occupation for a period in excess of 12 years.

Counsel submitted that the applicant's claim is based on the doctrine of adverse possession and also relied on the provisions of section 28 of the Land Registration Act No. 3 of 2012 provide for overriding interests and provides;

***"Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may be for the time being subsist and affect the same without being noted in the register(f)rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."***

Counsel submitted that the applicant has met the threshold for grant of injunctions as he has been in occupation of the suit land for a period in excess of 12 years and is thus entitled to be registered as proprietor of the suit land by dint of the doctrine adverse possession.

It was counsel's further submission that the respondent has introduced proceedings instituted in Eldoret Chief Magistrates Court being **ELC No. 127 of 2020** where the respondent had attempted to evict the said Monica Ruto which proceedings were withdrawn. Counsel also submitted that the said proceedings do not have a bearing in this case as the case was withdrawn for lack of jurisdiction.

Counsel submitted that the applicant has extensively developed the suit property by constructing a house where he resides with his family and has been farming and relies on it as his primary source of income. That if the orders are not granted he will suffer irreparable loss which cannot be compensated by way of damages.

Counsel submitted that the applicant has annexed photographs and a valuation report to prove the kind of investments he has on the suit land which are valued at KShs. 32 million.

On the third condition on balance of convenience counsel submitted that the plaintiff is in possession, control and or utilizing the suit land a fact which is admitted by the respondents who avers in replying affidavit.

Counsel therefore urged the court to allow the application as prayed in order to preserve the suit property and avoid the same from being wasted pending the hearing and determination of the suit.

#### **DEFENDANT/RESPONDENT'S SUBMISSIONS**

Counsel relied on the replying affidavit of the defendant/respondent where the respondent deponed that the plaintiff filed this suit and application after he had filed a similar suit being **Eldoret ELC NO. 27 OF 2020** seeking to evict the defendant herein Monica Ruto who is currently in possession of the suit land.

Further that the plaintiff had also sued Monica Ruto in Eldoret Chief Magistrate's Court vide **CM ELC NO. 127 OF 2019** seeking for the same orders of eviction and illegally occupying the subject parcel but he eventually withdrew the case due to lack of jurisdiction necessitating the filing of **ELC NO. 27 of 2020** pending before the court.

Counsel submitted that it is not true that the applicant has been in possession and occupation of the suit land as Monica Ruto who is not the applicant's agent has claimed to have been in occupation on and off since there has been protracted ownership dispute pitting her against other people which has not been resolved to date.

Counsel submitted that the applicant has not met the threshold for grant of injunctions as he has not established that he has a prima facie case with probability of success. That the applicant has not disclosed material facts hence does not deserve the orders sought.

Counsel therefore urged the court to dismiss the application with costs.

#### **INTERESTED PARTY'S SUBMISSIONS**

Counsel for the interested party submitted that the suit land in issue is the property of WILLIAM KAPTINGEI KIRWA, deceased and as such a claim for adverse possession is denied due to the fact that one Monica Ruto is the one that has been in possession, not the applicant.

Counsel also submitted that several individuals are alleged to have been in use of the said land namely Monica Ruto, Wilson Kipchumba Kirwa, William Kiprono Kirwa, Nicholas Kipsongok Mitei, Simion Lomaria Ekidor and Rael Jepkorir Chebii.

It was counsel's further submission that in Monica Ruto's supporting affidavit dated 8<sup>th</sup> October 2018, where she deponed that plaintiff herein ceased having possession of the suit land and vide an agreement dated 21<sup>st</sup> June 2016 plaintiff gave vacant possession to a purchaser as per Paragraph 2 of the agreement which states that the purchaser; "shall take possession of the parcel of land upon signing."

Counsel therefore urged the court to dismiss the application with costs.

#### **ANALYSIS AND DETERMINATION**

The issue for determination is whether the applicant has satisfied the ingredients for grant of temporary injunctions.

The principles for grant of injunction are as were enunciated in the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358** and as was reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR** where the Court of Appeal held that;

***"in an interlocutory injunction application the applicant has to satisfy the triple requirements to (a,) establishes his case only at a prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) ally any doubts as to b, by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"***

The applicant claims that he purchased the suit land and has made developments thereon. He has attached photographs of the property and a copy of the sale agreement as proof of his claim to the property. The applicant also claimed to be in possession but the respondent and the interested party have stated that the applicant is not in occupation as per the sale agreement which indicates that he had given vacant possession. There is conflicting information as to the ownership and occupation of the suit land. The applicant has not cleared the issue.

It should be noted that the title to the suit property is still in the name of deceased person namely, William Kiptingei Kirwa. The applicant did not disclose that he had filed other suits in respect of the same suit land which is pending before the court. Injunctions are equitable remedies which are discretionary and hence an applicant must come to court with clean hands and should disclose all the information to assist the court in exercise of such discretion

The respondent has provided proof that there has been a change of ownership of the title through various hands vide the sale agreements annexed as SKK4 to the replying affidavit to the application. In these agreements there are transactions between the applicant and Monica Ruto whom he claims to be his agent.

I find that the applicant has failed the test of establishing a prima facie case with a probability of success which is an important hurdle to pass.

On the issue of irreparable harm, Counsel submitted that the applicant will suffer irreparable injury if the respondent is not restrained by way of an injunction. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) Eklr** the court stated that;

***“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”***

The applicant annexed a valuation report which indicated that the value of the investments are Kshs. 32Million. This means that the loss is quantifiable as per the valuation report. The applicant therefore has not established that he will suffer any irreparable loss to benefit from the orders sought.

On the issue of balance of convenience in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) EKLR (supra)** defined the concept of balance of convenience as:

***‘The meaning of balance of convenience in favor of the plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff’s’ to show that the inconvenience caused to them be greater than that which may be caused to the defendant’s inconvenience be equal, it is the plaintiff who suffer.***

***In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”***

Before the hearing of this application this application counsel for the applicant abandoned an application dated 12<sup>th</sup> March 2021 for contempt of court and the same was marked as such.

I find that the balance of convenience tilts in favour of not granting the injunction as the inconvenience to the respondents would be greater. The upshot is the application is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF OCTOBER, 2021.**

.....

**M.A. ODENY**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.