



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT KERICHO

ELC CASE NO. 54 OF 2019

KERICHO MWALIMU ENTERPRISES.....1ST PLAINTIFF/APPLICANT

KIPSIGIS TEACHERS CYCLE ADVANCE COMPANY LTD.....2ND PLAINTIFF/APPLICANT

VERSUS

BAROTION FARM COMPANY LIMITED.....1ST DEFENDANT/RESPONDENT

BAROTION TEACHERS CYCLE ADVANCE COMPANY LTD.....2ND DEFENDANT/RESPONDENT

JOSEPH KIPTOO ARAP KOECH.....3RD DEFENDANT/RESPONDENT

PETER KIPYEGON KILEL.....4TH DEFENDANT/RESPONDENT

KIMALEL ARAP CHUMO.....5TH DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR.....6TH DEFENDANT/RESPONDENT

THE HON. THE ATTORNEY GENERAL.....7TH DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 22nd July 2020 brought under the provisions of Section 3A and 63(c) of the Civil Procedure Act, Order 40 Rules 1, 3(4) and Order 51 Rule 1 of the Civil Procedure Rules in which the 2nd Applicant seeks temporary injunctive orders restraining the 2nd Defendant/Respondents either by themselves, their servants, agents, assignees, representatives or nominees from collecting rent and/or selling/alienating, disposing or in any other way getting rid of all that property known as LR No. Kericho/Municipality block 5/403, pending the hearing and determination of this suit. The Applicant also seeks cost of the application.
2. The application was supported on the grounds on the face of it as well as on the affidavit sworn by Mathew Misoi the 2nd Plaintiff/Applicants' Managing Director.
3. The said application was opposed by the 3rd Defendant/Respondent on behalf of the 2nd, 4th and 5th Respondents via his replying affidavit sworn on the 9th November 2020 to the effect that parcel No. LR No. Kericho/Municipality block 5/403 was acquired by the 2nd Defendants/Respondents on 19th September 1974 at a cost of Ksh 200,000/=through their contributions which were then channeled to Kericho branch of Kenya National Union of Teachers through their employer the Teachers Service Commission on behalf of its contributors.
4. That the suit land was therefore purchased by the Kenya National Union of Teachers on behalf of its contributors.
5. That following an excess contribution, members bought Mwalimu building in 1974 which was subsequently registered as LR No. Kericho/Municipality block 631/III/29.
6. That the 1st Plaintiff/Applicant was not involved in the acquisition of No. LR No. Kericho/Municipality block 5/403 and neither did it hold the property in trust for the 2nd Plaintiff who was only registered on the 2nd August 2011. That the registration of the 2nd Respondent had been sanctioned by the members of the self-help group in the general meeting of 13th March 2020. This was after the shareholders of

Kipsigis Teachers Cycle Advance Company Limited resolved to change its name to reflect a national outfit. The annexure marked as KTCA-1 was therefore a false document as it purported to transfer land to a Company that had not been registered.

7. That the 2nd Defendant/Respondent was a lawfully recognized company as per the wishes of the members and therefore collected rent from the tenants on the suit properties on behalf of the shareholder members. Collection of rent by the Applicants was therefore against the wishes of the shareholders because members had abandoned the 2nd Plaintiff Company in favour of the 2nd Defendant/Respondent.

8. The 2nd Respondent vehemently denied the allegations by the Applicant that they were bent on selling the suit property and confirmed that all they intended to do was to change the 2nd Respondent's status from 'private' to 'public' Company, a fact which was known by all the shareholders. They sought for the Applicants' application to be dismissed

9. On the 27th July 2021, the court directed for the application to be canvassed by way of written submissions wherein by the time I write this ruling, only the 2nd Applicant had complied.

The 2nd Applicants submissions.

10. The 2nd Applicants' framed their issues for determination while relying on the principles set out in **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** wherein on the first issue for determination they submitted that they were the rightful beneficial owners as of the property known as No. Kericho/Municipality block 5/403 which had been held by the 1st Applicant in their trust and which property had been arbitrarily transferred to the 2nd Respondent.

11. That, as per the annexed rental receipts herein which were in relation to the period between February 2020 and the date of institution of the suit, it was clear that the 2nd Applicants had been and were still exercising their right of ownership which right was duly recognized by the tenants occupying the suit property.

12. That the Respondents' replying affidavit was merely composed of denials of matters without the support of any documentary evidence. There was also no denial that the Applicant had been collecting rent from the tenants occupying the suit property. That it was therefore their assertion, that they had established a Prima facie case on an undisputed fact that indeed there existed a right which had apparently been infringed by the 2nd Respondents when they, without any color of right, transferred ownership of the suit property to themselves.

13. The 2nd Applicant's submission on the second issue for determination was that the Respondents' action of neglecting/ignoring and/or willful refusal to acknowledge the rightful ownership of the 2nd Applicant and their collection of rent from the suit property would occasion them irreparable loss. That the 2nd Respondent through the 3rd to 5th Respondents had been soliciting for rent from the tenants occupying the suit property without consent of the shareholders of the 2nd Applicant which was detrimental to them because the livelihood and subsistence of the membership of the 2nd Applicant, which comprised of 816 retired teachers, was derived from the rent proceeds of the suit property.

14. Lastly the 2nd Applicant submitted that they had supported their application with documentary evidence that proved indeed they were beneficiary owners of the suit property. That the balance of inconvenience, as compared to that the Respondents, who were bent to dispose of the suit property at any moment as the same was currently registered to the 2nd Respondent, tilted in favor of the court granting the prayers sought in their application.

Determination.

15. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

16. In the present matter, there is no dispute that indeed through individual contributions of some members of the Kericho branch of Kenya National Union of Teachers (KNUT) they acquired property comprised of LR No. 631/29/III within Kericho Municipality in 1974. It is also not in dispute that subsequently the said property was transferred to the 2nd Respondent and registered as No. LR No. Kericho/Municipality block 5/403.

17. The 2nd Applicants' bone of contention herein is that whereas the 1st Plaintiff/Applicant held the suit property in trust for them, the 3rd Defendant/ Respondent fraudulently transferred the same to the 2nd Defendant/Respondent and that they were apprehensive that the 2nd Defendant /Respondent would dispose it to their detriment.

18. The 3rd Defendant/Respondents on behalf of the 2nd 4th and 5th Defendant/Respondents have refuted the Applicants' allegations stating that the suit land was transferred to the 2nd Defendant/Respondent as per the wishes of the majority members and that they had no intention of disposing it.

19. In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal explained what constitutes a prima facie case in the following terms:

“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.”

20. Applying the above principles to the present application and whilst relying on the documents adduced in evidence in support thereof wherein the Applicant has argued and asserted that they are the rightful beneficial owners of the suit property known as No. LR No. Kericho/Municipality block 5/403 and that the 2nd Respondent acquired its title illegally and unlawfully and therefore cannot be deserving of protection under the law. The court is not in a position to state for a fact that the suit property herein is registered to either parties as no title deed was annexed to either the Application or the Replying affidavit.

21. The burden was upon the Applicants to show or demonstrate that the said ownership of the suit land was challengeable within the provisions of the law, by providing the impugned register-able document as evidence of the contested proprietorship. It is not enough for the Applicant to allege that the title of the suit land was obtained through fraud. The Applicant has the onus to demonstrate and prove his allegation and even cross examined on his allegations and it would be very difficult for the court to determine the same at this stage. The Applicants have failed to establish a prima facie case herein.

22. 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”.

23. However if I am wrong, then I could also look at the second condition as stated in the **Giella case** Supra. The Applicants have contended that by the 2nd, 3rd and 4th Defendant/Respondents collecting rent from the suit property, they would suffer irreparable harm as they would be denied their source of revenue. Based on the finding in the case of **Ngurumna Ltd vs. Jan Bunde Nielsen & 2 Others [2014] eKLR**, the Applicants ought to have demonstrated how they stood to suffer irreparable harm, which damages could not be an adequate remedy. Since they had pleaded loss of revenue, I find that amongst remedies available to them was payment of mesne profits. The allegation that the Respondents intend to dispose of the suit property has not been supported by any documents like for example a sale agreement and therefore the same remains as such, an allegation. Considering all aspects as stated herein above, I do not find that the balance of convenience tilts in the Applicant’s favour.

24. I have thus balanced all the factors and circumstances in the instant application and having found that a prima facie case was not established, I believe that there being an existing state of affair in situ which the Court must keep an eye on, I do hereby, pursuant to Court’s practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k), See also **Mugah –v- Kunga [1988] KLR 748**, make an order for status quo to be maintained until determination of the case. However in the meantime, and in the interest of justice, the rent proceeds should be deposited in a joint interest earning account of both counsel which shall be **opened within thirty (30) days hereof**.

25. The application dated 22nd July 2020 is disallowed but costs shall be in the cause.

26. Parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 14TH DAY OF OCTOBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE