



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KERICHO**

**ELC NO. E008 OF 2021**

**CHEPTOO TONU.....1<sup>ST</sup> PLAINTIFF/APPLICANTS**

**ESTHER JEPKEMBOI KOECH.....2<sup>ND</sup> PLAINTIFF/APPLICANTS**

**ANNE CHEROTICH MACHARIA.....3<sup>RD</sup> PLAINTIFF/APPLICANTS**

**JOYCE KOSGE.....4<sup>TH</sup> PLAINTIFF/APPLICANTS**

**VERSUS**

**REBECCA CHEBORE KOSKE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DAVID MULWET.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**WILLY MULWET.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MAGDALINE MULWET.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**CHARLES BIL.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, KERICHO.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Vide an application by way of Notice of Motion dated 19<sup>th</sup> March 2021 brought under *the provisions of Section 3, and 63(c) of the Civil Procedure Act and Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules, and all enabling provisions of the law, the Applicants seeks for interim injunctive orders against the Defendants/Respondents* *injunctiong them by themselves, their agents, servants, employees or any person acting under their instructions, restraining them from selling, transferring, mortgaging, charging disposing of and/or interfering with the suit lands L.R No. Kericho/Chepsir S.S/515-527 and 534-535, pending the hearing and determination of this suit.*

2. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff/Applicant, on behalf of the other Applicants, on the 19<sup>th</sup> March 2021.

3. After the above application was filed, the 1<sup>st</sup> Respondent filed her Replying affidavit with authority of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents herein in which she deponed that she was the registered proprietor of the original land parcel *L.R No. Kericho/Chepsir/346*. That the application before court was misconceived incompetent and an abuse of the honorable court process. That the Applicants herein were her daughters to whom she had given portions of the suit land for their use but that they were now bent to deny her off her rightful ownership to the land in question.

4. Pursuant to the Court's directives, parties filed their respective written submissions to which I shall summarize as follows;

**Applicants' submissions.**

5. The Applicants' in their submissions framed their issues for determination as follows;

- i. A whether or not the Applicants had satisfied the threshold required for issuance of an interlocutory injunction.
- ii. Whether all the daughters have been allocated family and/or ancestral land.

6. On the first issue for determination, it was the Applicants' submission that the 1<sup>st</sup> Respondent was one of the three wives to the late Joseph Koske who was the immediate registered owner of the suit land *L.R No. Kericho/Chepsir SS/346*.

7. That the 1<sup>st</sup> Respondent jointly with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have subsequently subdivided and allocated portions of the ancestral suit land amongst themselves and further entered into sale transactions with third parties in relation to the rest of the land to the exclusion of her children, the Applicants herein.

8. On the second issue for determination, it was the Applicants' submission that whereas the 2<sup>nd</sup> Applicant had been allocated 12 acres of family land at Olunguruone, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants had not been allocated any family land.

9. The Applicants submitted that they, being members of the same family with the 1<sup>st</sup> to 4<sup>th</sup> Respondents, were entitled to a share of the family and/or ancestral land. That they had established a prima facie case that was credible and therefore their application ought to be granted as prayed.

#### **1<sup>st</sup> to 5<sup>th</sup> Respondents' submissions.**

10. In response to and in opposition to the Applicants' application the Respondents submitted that the 1<sup>st</sup> Respondent was the absolute proprietor of the parcel of land *L.R No. Kericho/Chepsir/346* and that the Applicants were her daughters who had been allocated land by their late father and the 1<sup>st</sup> Respondent. That the Applicants not being satisfied with their shares of land had resorted to come to court to seek help to deny the 1<sup>st</sup> Respondent ownership to her land.

11. The Respondents framed their issues for determination as follows;

- i. Whether the Applicants had satisfied the threshold of requirements for issuance of an interlocutory injunction.

12. To this issue, the Applicants submitted that the jurisdiction to grant injunctions was discretionary and very wide. That as a registered proprietor of the suit land the 1<sup>st</sup> Respondent had absolute and indefeasible title and rights to the land and therefore the Applicants were strangers to the same and had no legal or equitable rights thereto.

13. That pursuant to the set down principles in the case of **Giella vs. Caseman Brown & Company Limited** (sic), the Applicants had not discharged the onus placed upon them for the grant of the orders of injunction so sought.

14. That the Applicants having not challenged the allocation of land during the lifetime of their father and the land subsequently having been registered to the 1<sup>st</sup> Respondent, this scenario, viewed from the lenses of what constituted a prima facie case, was not difficult in concluding that they had not established the same.

15. That secondly, the Applicants had not established any irreparable harm that they would suffer that could not be adequately compensated by way of damages if the application is denied, and lastly it was the Respondents submission that the Applicants had not established that on a balance of inconvenience, they would suffer more harm than the Respondents should the orders of injunctions not be issued in their favour.

#### **Determination**

16. I have considered the Application herein filed with a lot of anxiety, I have also considered both the Applicants' and the Respondent's written submissions as well as the annexures and authorities so cited.

17. 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.

18. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction 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.

19. In the present case there is no dispute that the 1<sup>st</sup> Respondent herein is the mother to the Applicants as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein, where's the 4<sup>th</sup> Respondent was her daughter in law and the 5<sup>th</sup> Respondent is one of the purchases of a portion of land which was a resultant of the sub-division of *L.R No. Kericho/Chepsir /346*.

20. There is further no dispute that the 1<sup>st</sup> Respondent was the legal proprietor of the original parcel of land being No. *L.R No.*

Kericho/Chepsir/346 which land was sub divided giving rise to the current parcels No. *L.R No.* Kericho/Chepsir S.S/515-527 and 534-535. That whereas the 1<sup>st</sup> Respondent was registered to the resultant parcel *L.R No.* Kericho/Chepsir/S.S/515 measuring 6.86 Hectares, there are no tiles herein annexed to depict the registered owners of the other parcels of land.

21. The Applicants' application seeking injunctive orders is in relation to parcels of land *L.R No.* Kericho/Chepsir S.S/515-527 and 534-535. The court finds that the Applicants' pleadings herein were poorly drafted wherein parties were unable to articulate their cases making it difficult to comprehend the remedies sought.

22. This challenges notwithstanding, the Court is still enjoined to serve justice to the parties as best as it can because that is its primary role. Having said that, I find that since *L.R No.* Kericho/Chepsir S.S/515 was registered in the 1<sup>st</sup> Respondent's name, the 1<sup>st</sup> Respondent herein is the absolute proprietor wherein pursuant to the provisions of Section 25 of the Land Registration Act she is conferred with rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act. Further, Section 26(1) of the same act provides the said certificate of title is to be taken as conclusive evidence of proprietorship.

23. The Applicants have argued and asserted that the 1<sup>st</sup> Respondent's title was procured to the exclusion of her children, the Applicants herein and therefore cannot be deserving of protection under the law. However the law under the provisions of Section 26(1) of the Land Registration Act is clear on the instances when title can be impugned and the Applicants' contention is not one of them.

24. 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”.*

25. Both the Land Registration Act section 26(1) that provide for the indefeasibility of title and Article 40(6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled.

26. The 1<sup>st</sup> Respondent having demonstrated that she was the registered owner of the suit property namely *L.R No.* Kericho/Chepsir S.S/515 and having been issued with a title, prima facie her title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.

27. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1<sup>st</sup> Respondent's title but the mere proof that she holds a duly registered certificate which on the face of it was properly acquired, and there having not been any evidence tabled as to who holds the titles to the other parcels of land herein above stated by the Applicants, is sufficient to lead the court to hold that the Applicants has not established that there is a prima facie case.

28. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. 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”.*

29. Consequently, I dismiss the application dated 19<sup>th</sup> March 2021 with costs to the 1<sup>st</sup> to 5<sup>th</sup> Respondents.

30. Parties to 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 11TH DAY OF NOVEMBER 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**