



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 52 OF 2019 (O.S)

EZEKIEL KIPKORIR ROTICH.....PLAINTIFF

-VERSUS-

RUTH CHEPKOSKEI.....DEFENDANT/RESPONDENT

AND

JOHN MALAKWEN KOSKEI.....INTERESTED PARTY

RULING

1. I am called upon to determine the motion on notice dated 23rd October, 2019 filed here on the same date and expressed to be brought under Order 40 Rules 1, 2(1), 3(1) and 9 and Order 51 rule 1 of Civil Procedure Rules, 2010, Sections 3A and 63(e) of the Civil Procedure Act (cap 21) and all other enabling provisions of the law. The parties are three (3), **EZEKIEL KIPKORIR ROTICH** (Plaintiff) who is applicant in this application, **RUTH CHEPKOSKEI** (defendant) who is the respondent, and **JOHN MALAKWEN KOSKEI**, who is brought on board as an interested party. The dispute relates to land parcel **NO KERICHO/KIPCHORIAN/LELU BLOCK 8 (SONGONYET) 153**. In the suit, the applicant is claiming the land as an adverse possessor.

2. The application under consideration is essentially an intervening measure mainly aimed at securing some restraining orders before the suit is determined. There are five (5) prayers on the face of the application but two – prayers 1 and 2 – are already spent, leaving three – prayers 3,4 and 5- for consideration at this stage. The prayers for consideration are as follows:

Prayer 3: That pending the hearing and determination of the present suit the honourable court be pleased to issue an order of injunction restraining the defendant/respondent by herself, agents, servants, employees or otherwise from threatening to evict and/or evicting the plaintiff/applicant and the family members from the parcel of land and/or the home for the plaintiff/applicant by the defendant/respondent as if left to do it will affect and prejudice the outcome of this suit.

Prayer 4: That pending the hearing and determination of the present suit the honourable court be pleased to issue an order of injunction restraining the defendant/respondent by herself, agents, servants, employees or otherwise from entering and/or trespassing or cutting or uprooting and/or dealing in any manner the developments in the parcel of land.

Prayer 5: That costs of this application be provided for.

3. The application is anchored on grounds, inter alia, that the plaintiff is the legal occupant of parcel no. 153, measuring 15 acres and such occupation was with the consent of the respondent's deceased father – **MUSEE ARAP MOSONIK**. And the consent arose from swapping two parcels of land, the plaintiff's land parcel no. 35 with the deceased's land parcel no. 153. That happened in the year 1998 and the plaintiff has resided on parcel no.153 since then. That parcel of land is now said to have been subdivided, with the plaintiff's portion being parcel no. 256. The defendant and her step-brother are said to have instituted succession proceedings in which they excluded the plaintiff and included parcel no. 153 as one of the properties for distribution to the beneficiaries. The plaintiff averred that he has a prima facie case with probability of success and he is also likely to suffer irreparable loss if restraining orders are not granted. The supporting affidavit that came with the application generally reiterated and amplified the grounds on which the application is anchored.

4. The respondent responded to the application vide a replying affidavit dated 13th November, 2019 filed in court on the same date. She admitted that the plaintiff occupies parcel no. 153 but not for reasons stated by him but as a licensee to one **PAUL LANGAT**. That arrangement was meant to last until the distribution of the estate of the respondent's late father was done. The respondent denied that there was swapping of land between her late father and applicant.

5. According to the respondent, one Paul Langat was allowed by her late father to live as a licensee on parcel no. 153. Paul in turn agreed to swap the land with the applicant and that is how the applicant came to the land. The applicant was said to have been aware that the arrangement was not permanent. He is said to have made very little developments on the land when the respondent's father was still alive. He only changed after the death of the respondent's father in the year 2003.

6. The respondent further deposed that her late father even employed a caretaker, one John Malakwen Koskei, and wouldn't have done so if the land had ceased to be his. She also admitted to have conducted succession proceedings, which **PAUL LANGAT** tried to challenge in order to include the alleged interest of the applicant but such challenge came to nought.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 3rd December, 2019. The respondent's submissions were filed on 20th February, 2020. Both sides sought to place reliance on the celebrated case of **GIELA VS CASSMAN BROWN & CO LTD (1973) EA 358**. The principles set forth in that case as threshold for granting a temporary restraining order involve establishing whether the applicant has a prima facie case with a probability of success; Whether the applicant might suffer irreparable loss not compensable with damages; and, where the court has doubts regarding these two, the balance of convenience comes into play.

8. The applicants side of course submitted that the applicant has met the threshold. The respondents side had an opposite view and the submissions filed show as much.

9. I have looked at the case as filed, the application itself, the response made, and the rival submissions. It is true, as both sides submitted, that Giela's case (*supra*) always comes in handy in determination of applications of this nature. I have not delved much into the substance of the submissions of either side and the reason for this is that each side seem to approach the matter arising as if it is the main case that is being decided. In **SHITAKHA VS MWAMODO & 4 OTHERS (1986) KLR 445** the court gave guidance as to the correct approach as follows:

“The court should not decide substantive issues at the interlocutory application stage. This ought to be left for trial.”

Similarly, in **MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER: (1988) KLR I** the court held, inter alia, that the correct approach in dealing with an application for injunction is not to decide issues of fact, but rather weigh up the relevant strengths of each side's proposition. The lower court judge in that case was faulted for going beyond his proper duties by making final findings of fact on a disputed affidavit.

10. The principles set out in **Giela's case (supra)** are supposed to be demonstrated sequentially. You cannot succeed if you prove one and fail to prove the other. And this applies generally more to the first two as the third one – the balance of convenience – is only invoked when doubts arise regarding the first two. While referring to **Giela's case**, the court in **NGURUMAN LTD VS JAN BONDE NELSON & 2 OTHERS: CA NO. 21 OF 2014 (V.R)** expressed itself as follows:

“It is established that all the above three conditions are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd Vs. Afraha Education Society (2001) Vol. I EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondents will suffer if the injunction is not granted will be irreparable.”

The court went further and observed

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

11. I now come to the matter at hand. I have already pointed out that I have looked into the case at hand. While doing so, I realized that the applicant has made a serious omission which may even make his case flop before it is heard. And the omission is this: He has not annexed a certified extract of title to the originating summons as required by Order 37 rule 7 (2) of the Civil Procedure Rules, 2010. Order 37 rule 7(2) provides as follows:

Order 37 Rule 7 (2)

“The summons shall be supported by an affidavit to which a certified extract of title to the land in question has been annexed”.

12. This may seem a simple requirement but its importance in matter of adverse possession cannot be underestimated. It serves to satisfy the status of registered ownership and the registration details at the time of filing the suit. It helps the court to ascertain the existence and proprietorship of the land. The omission to annex the extract has led to dismissal of cases. In **KWEYU VS OMUTO (1990) KLR 709**, the court delivered itself as follows:

“...the appellants supporting affidavit to the originating summons did not have annexed to it a certified extract of the title to the parcel of land out of which the suit land was claimed. Save what the parties deposed to in their respective affidavits and the oral evidence before the superior courts, the certainty of the existence and proprietorship of the suit land could not otherwise be guaranteed. An order under Section 38 (1) of the Act was not therefore capable of being made. It is for this reason that I would dismiss the appellants appeal with costs to the respondent.”

13. The point I am making is this: A suit filed for adverse possession cannot be said to have a probability of success if the originating summons filed to commence it has not come with a certified extract of title. That is why I am saying that a prima facie case is not made out

in this case. Nguruman's case (*supra*) makes the court work easier by clearly spelling out that where a prima facie case is not established, irreparably loss and balance of convenience need no consideration. The applicant in this case only has himself to blame for failing to comply with a very simple requirement of law. His case is weak as it stands. He needs to annex title, or a certified copy of official search, or a copy of greencard to the originating summons.

14. The upshot, in light of the foregoing, is that the merits of the applicants under consideration have not been sufficiently demonstrated. I hereby dismiss the application with costs.

Dated, signed and delivered at Kericho this 29th day of April, 2020.

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A. K. KANIARU

JUDGE