



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L NO. 108 OF 2019 (O.S)

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF THE LAND ACT NO.6 OF 2012

AND

IN THE MATTER OF SECTIONS 4(4), 7,17 AND SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL LELAN/KAPTALAMWA/261

BETWEEN

CHRISTOPHER AYABEI SEREM.....APPLICANT

VERSUS

RAPHAEL AYABEI SEREM.....1ST RESPONDENT

VINCENT LELEI.....2ND RESPONDENT

NELESON CHEPKIYENG.....3RD RESPONDENT

JOSEPH KIBET.....4TH RESPONDENT

RULING

This ruling is in respect of an application dated 17th September 2019 by the Applicant seeking for the following orders:

a) That the respondents, their brothers, servants, employees, assigns, agents and anybody acting for or through them be and are hereby restrained from trespassing, selling, leasing, sub-dividing, partitioning, ploughing, cultivating, constructing and erecting any structures, dumping any material of any nature, demolishing, cutting and harvesting of trees and crops or dealing with the property known as LELAN/KAPTALAMWA/261 in any adverse manner pending the hearing and determination of this application inter partes .

b) That the respondents, their brothers, servants, employees, assigns, agents and anybody acting for or through them be and are hereby restrained from trespassing, selling, leasing, sub-dividing, partitioning, ploughing, cultivating, constructing and erecting any structures, dumping any material of any nature, demolishing, cutting and harvesting of trees and crops or dealing with the property known as LELAN/KAPTALAMWA/261 in any adverse manner pending the hearing and determination of this suit.

c) That the County Commander Elgeyo Marakwet and OCS Kapcherop Police Station do supervise and effect compliance of these orders

Parties agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant gave a brief background to the case and submitted that the respondents have threatened the applicant with eviction and yet he has been in possession for more than 12 years. It was Counsel's further submission that the suit land has been registered in the applicant's name since 1996 when the judgment in **ELDORET HCC NO. 87 OF 1990 CHEPKIYENG KIMOSOP KIPYOMOS VS CHRISTOPHER CHEPKIYENG** was delivered which judgment has never been executed.

Mr. Kigen submitted that the respondents' right to the suit property has been extinguished by operation of the law. Counsel listed the following issues for determination by the court which essentially speaks to the issues for determination of the case and not the application for injunction.

If the court were to deal with the issues as framed by the applicant at an interlocutory stage then it will be tantamount to determining the whole case at this level. The issues that counsel wants the court to determine are as to whether the applicant has acquired the title by way of adverse possession, whether the applicant has proved adverse possession, when did time start running for purposes of determining rights of ownership by way of adverse possession and whether the applicant is entitled to the prayers in the application.

Counsel therefore urged the court to find that the applicant has acquired the suit property by way of adverse possession.

RESPONDENTS' SUBMISSIONS

The respondents opposed the application vide a replying affidavit and a supplementary affidavit. Counsel submitted that the issue for determination is as to whether the applicant is deserving the relief of a temporary injunction as per the laid down principles in the case of Giella Vs Casman Brown.

Counsel listed the following issues which are not in dispute:

- a) The property known as LELAN/KAPTALAMWA/261 is registered in the name of the Applicant as per the official search annexed to the application.
- b) A judgment was delivered in **ELDORET HCC NO. 87 OF 1990 CHEPKIYENG KIMOSOP KIPYOMOS VS CHRISTOPHER CHEPKIYENG** dismissing the current Applicant's claim of adverse possession.
- c) **LELAN/KAPTALAMWA/261** was awarded to **CHEPKIYENG KIMOSOP KIPYOMOS(dcd)** and **LEAH CHEPKORIR TAPSIARGA (dcd)**
- d) The Applicant herein resides in the property known as IRONG/KAPKONGA/149.
- e) The 1st and 2nd respondents are the children on **CHEPKIYENG KIMOSOP KIPYOMOS dcd)** and **LEAH CHEPKORIR TAPSIARGA (dcd)**
- f) The 1st and 2nd respondents' home is **LELAN/KAPTALAMWA/261**
- g) The judgment in **ELDORET HCC NO. 87 OF 1990 CHEPKIYENG KIMOSOP KIPYOMOS VS CHRISTOPHER CHEPKIYENG** was delivered on 28th August 1996.
- h) **CHEPKIYENG KIMOSOP KIPYOMOS dcd)** died on 17th January 2008
- i) **LEAH CHEPKORIR TAPSIARGA (dcd)** died on 1st October 2008
- j) The 12 year period for lapse of execution on judgment delivered on 28th August 1996 is on 28th August 2008

Counsel therefore submitted that from the above undeniable facts it is evident that the applicant has not established a prima facie case with a probability of success. The ingredients of adverse possession cannot be met with the facts of the case.

On the second limb as to whether the applicant will suffer irreparable injury which cannot be compensated by an award of damages, counsel submitted that the applicant in his own admission stated that he is not in possession of the suit land hence will not suffer any damage. On the last limb on if the court is doubt, to decide on a balance of convenience, counsel submitted that the same tilts in favour of the respondents.

Ms Chesio submitted that no suit has been instituted against the administrators of the estate of estate of **CHEPKIYENG KIMOSOP KIPYOMOS (dcd)**, that the suit property is charged to Kenya Commercial bank, time stopped running on 18th January 2008 when the deceased passed on and that the applicant's claim for adverse possession was heard and dismissed vide **ELDORET HCC NO. 87 OF 1990**

CHEPKIYENG KIMOSOP KIPYOMOS VS CHRISTOPHER CHEPKIYENG delivered on 28th August 1996.

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

ANALYSIS AND DETERMINATION

This is an application for injunction by the applicant seeking for restraining orders against the respondents from interfering with the suit land until this suit is heard and determined.

Counsel agreed to canvass the application vide written submissions which were duly filed. The purpose of written submissions in an application is to argue the application and put forth the case for the parties. Counsel for the applicant is aware that this is an application for interlocutory injunction and the principles for grant of injunctions are well settled. Interlocutory reliefs are meant to preserve the substratum of the case pending the hearing and determination of the suit.

In the current case counsel has argued the main claim and not the application. Counsel has jumped the gun and is seeking that the court finds that the applicant has acquired the suit land by way of adverse possession. If I give such an order then there will be no suit left for determination.

I will not belabor to go into the principles of injunctions as laid out in the Giella Casman Brown case as the applicant has not argued the case for grant of an injunction. I will also not evaluate the facts as presented as it would be deemed as determining the main claim. Consequently, I find that the application has no merit and is therefore dismissed with costs

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE