



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

ELC. CASE NO. 49 OF 2016

**MARGARET YEGON (Suing on behalf of the estate
of PAUL KIMUTAI YEGON- Deceased.....PLAINTIFF**

VERSUS

MILLICENT CHEPNGENO.....DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the Notice of Motion dated 3rd November, 2017 which seeks an injunction to restrain the Defendant from trespassing onto, remaining on, using, possessing, selling disposing of, cultivating or howsoever interfering with land parcel number KERICHO/KIPSONOI/288 pending the hearing and determination of this suit.
2. The application is based on the grounds stated on the face of the Notice of Motion and the Plaintiff's affidavit sworn on the 3rd November, 2017.
3. Despite being served with the Notice of Motion, the defendant did not file any Replying Affidavit.
4. In her Supporting Affidavit the Plaintiff avers that she is the widow and administrator of the estate of Paul Kimutai Yegon –Deceased. She has annexed a copy of the Certificate of Confirmation of Grant issued to her in Nakuru HC Succession Cause No. 225 of 2009 which shows that she is a beneficiary of the estate of the deceased.
5. She avers that the defendant is the daughter of the deceased's former wife. She further avers that while she was away in Germany, the defendant trespassed onto her land and cultivated a portion thereof without her consent. She states that despite her efforts to stop the defendant from interfering with her parcel of land, she has been unsuccessful. She avers that unless the defendant is restrained from interfering with her land the Plaintiff shall suffer irreparable loss.

Issue for Determination

6. The main issue for determination is whether the Plaintiff is entitled to a temporary injunction.

Analysis and Determination

7. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the

conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

8. The first issue that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one 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”

9. The Plaintiff has demonstrated that she is a beneficial owner of the suit property by virtue of being the administrator of the estate of the late Paul Kimutai Yegon. The Certificate of Confirmation of Grant lists the suit property as one of the assets of the deceased but does not list the defendant as one of the heirs. In the Plaint is pleaded that the defendant is the daughter of the deceased former wife but she was not sired by the deceased.

10. This does not automatically entitle her to the estate of the deceased unless she can demonstrate that she was a dependant of the deceased. In the absence of Replying affidavit to that effect, there is no material before the court to make such an inference.

11. Consequently, I find and hold that the plaintiff has established a *prima facie* with a probability of success.

12. Moving on to the second test, the plaintiff has stated that the defendant’s continued unlawful use of land will cause her to suffer irreparable loss. There is no evidence in rebuttal nor do I have any reason to doubt her.

13. In the circumstances, it is my finding that the plaintiff has proved that she is entitled to the orders sought and I therefore grant the application and make the following orders:

a. That an injunction be and is hereby granted restraining the defendant by herself, her agents or servants or otherwise from entering, trespassing, remaining on using, possessing, cultivating, selling or disposing of land parcel number KERICHO/KABARTEGAN/288 pending the hearing and determination of this suit.

b. The costs of this application shall be borne by the Defendant.

Dated, signed and delivered at Kericho this 2nd day of March, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Koech for Mr. Mitey for the Plaintiff/Applicant.

2. Court Assistant - Rotich