



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L CASE NO. 309 OF 2016**

**CHEROP & COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DANIEL KIPKORIR TANUI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**SUSAN CHEROP KAAI.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**RONALD KIPTANUI CHEROP.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**PAULINA JEPKETER CHEROP..... DEFENDANT**

**AND 30 INTERESTED PARTIES.....INTERESTED PARTIES**

**RULING**

**PLAINTIFF'S CASE**

Cherop and Company Ltd, Daniel Kipkorir Tanui and Susan Cherop Kaai and Ronald Kiptanui Cherop (*herein referred to as the plaintiffs*) have sued Paulina Jepketer Cherop (*hereinafter referred to as the defendant*) for a declaration that the Defendant has no right over subject properties and that the Defendant's acts of trespassing into, collecting proceeds from and interfering with the Plaintiffs' peaceful enjoyment of the subject properties are unlawful and pray for a permanent injunction restraining the Defendant from collecting proceeds from the subject properties or in any way interfering with the Plaintiffs' peaceful enjoyment of the subject properties. The plaintiff has filed an application dated 17.10.2016 seeking for injunctive orders restraining the defendant from collecting rent and for an order that the interested parties do remit all the rent collected to Cherop and Company Ltd in their KCB Bank Account NO. 1147291446.

The 2<sup>nd</sup> plaintiff states in the supplementary affidavit that he is an adult Kenyan and the 2<sup>nd</sup> Plaintiff herein and also a Director of the 1<sup>st</sup> Plaintiff hence competent to swear the Affidavit on his behalf and that of the 1<sup>st</sup> Plaintiff. That he has the authority from the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs to swear this Affidavit on their behalf hence competent to do so. The Plaintiffs/Applicants are the legal owners of the following parcels of land situated within Uasin Gishu County;

- a. ELDORET MUNICIPALITY/BLOCK7/73
- b. ELDORET MUNICIPALITY BLOCK 7/172
- c. CHEPTIRET/CHEPLASKEI BLOCK 1 (KIPCHAMO)/24

d. L.T NO. 6460; and

e. L.R NO. 11973

The plaintiffs/Applicants own a commercial building known as AMANI HOTEL which is constructed on the land parcel known as ELDORET MNICIPALITY/BLOCK 7/73. The Interested Parties herein are tenants on the above-mentioned premises having entered into a Lease Agreement with the former titleholder, the late SAMUEL KIPTNAUI CHEROP who died intestate on 6th February, 2004 leaving behind several properties including the subject properties. The beneficiaries of the estate of the late SAMUEL KIPTNAUI CHEROP commenced Succession proceedings in the year 2005 vide ELDORET SUCCESSION CAUSE O. 285 OF 2005. The Honourable Justice Mohammed Ibrahim issued Grant of Letters of Administration Intestate jointly to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs/Applicants herein. The above-mentioned Grant of Letters of Administration was subsequently confirmed vide a Certificate of Confirmation issued on 1<sup>st</sup> August, 2008. That through the above Confirmation of Grant, the suit properties were given to the 1<sup>st</sup> Plaintiff which is a company owned by the beneficiaries of the estate of the deceased.

The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs/Applicants are the only directors of the 1<sup>st</sup> Plaintiff hence the only duly authorized representatives and agents duly authorized to collect proceeds from the above-mentioned suit properties and transact any business either directly or through their duly appointed agents on behalf of the 1<sup>st</sup> Plaintiff/Applicant. The Defendant/Respondent herein has been trespassing into and interfering with the Management of the above-mentioned properties to the detriment of the plaintiffs herein and their dependents. The Defendant/Respondent has been wrongfully and unlawfully collecting rent from the tenants who are occupying the above-mentioned properties without the consent of the plaintiffs herein. The Defendant/Respondent has even gone to the extent of forging Receipt Books in the name of the 1<sup>st</sup> Plaintiff/Applicant and thereby falsely presenting herself to the Interested Parties as a bonafide agent of the 1<sup>st</sup> Plaintiff/Applicant. (Annexed and marked as 'DKT 9 is a bundle of Receipts fraudulently issued by the Respondent.) The Defendant/Respondent has been collecting rent from the tenants from the time of the death of the previous owner, the late Samwel Kiptnui Cherop. The Defendant/Respondent has unlawfully collected a total sum of Kshs 43,000,000 from the Interested Parties herein and applied it into her own use to the exclusion and detriment of the plaintiffs and their dependents. The Defendant/Respondent illegally and without the plaintiffs'/Applicants' consent leased out premises situate on land parcel number ELDORET MUNICIPALITY BLOCK 7/172 to some university students as hostels and has been receiving rent from them and applying it into her own use and she should be compelled to render an account of all those proceeds and refund the same to the plaintiffs/Applicants.

That although the Defendant/Respondent is a mother to the 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs herein she remains a stranger with respect to the subject properties and has no right to enter and collect proceeds from the tenants or accruing in any other way.

That they have tried severally to restrain the Defendant/Respondent from interfering with the above-mentioned properties but their efforts were futile for the reason that the Defendant/Respondent understands that her actions are illegal but has chosen to act with impunity to the detriment of the Plaintiffs and their Dependents.

The plaintiffs/Applicants and the other shareholders of the 1<sup>st</sup> Plaintiff/Applicant have been subject to untold suffering and hardship by the Defendant's/Applicant's act of interfering with the management of the subject properties hence denying them their only source of livelihood.

The Plaintiffs/Applicants and the other shareholders of the 1<sup>st</sup> Plaintiff/Applicant and their dependents have been rendered destitute and subjected to an indemnifying treatment due to the Defendant's offensive actions and this Honourable Court is their only remaining source of hope.

They have been forced to borrow money to pay up the rates and rent for the subject property and which debt has to be repaid urgently through proceeds from the property to avert any adverse action by the

creditors.

The defendant has not been remitting statutory outgoings over the property which exposes all the plaintiffs to an imminent criminal sanction as the legal owners of the properties.

There is an imminent danger that the above-mentioned creditors may take adverse actions against them which actions may lead to loss of the subject properties. That unless the Defendants/Respondent is restrained from collecting rent or proceeds and stopped from further interfering with the peaceful enjoyment of the subject properties, they will be subjected to irreparable harm. That the Defendant's/Respondent's actions are a great affront to the sanctity of title and should be stopped to give effect to the fundamental protections on propriety rights under the Constitution of Kenya.

### **DEFENDANTS CASE**

The defendant filed a replying affidavit stating that the 1<sup>st</sup> Plaintiff is a Company that she incorporated for the purposes of putting her children on the managerial positions. She was literally to have been the chairperson to oversee them grow into competent property managers and so forth. She informs this court that she is a disappointed mother. That the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> plaintiffs are indeed her own biological children whom she took care of with her husband, the late Mr. Samuel Kiptanui Cherop. That the properties belonged to Samuel Kiptanui Cherop (deceased) and Pauline Kiptanui Cherop (herself) That they did work hard in their lifetime to acquire the same. Indeed, tremendous effort was put by themselves to do so. That before the High Court P&A cause N O. 285 of 2005 is her application to cancel the grant which she gave to her children in good faith. That as a mother she thought it was wise to empower her children to take over from where she and their late father had left. That she even thought and sought for finances 100% finance to put up a 10 storey building for their benefit but all was in vain. That she points out to this court that indeed through their own acknowledgement she has been collecting rent in her properties and do wish to continue doing so till determination of her application before the Probate Court. That it is terrifying and disheartening when her own children call her a trespasser and a fraudster when none of them has ever contributed even a shilling to the purchase of the same.

That among her children aforementioned none of them has even a bicycle to his name and that the application before court is made in bad faith, an affront to her entitlement to her property and an attempt to gag her from enjoying what she did worked hard for her retirement. That one of her children, Ronald Kiptanui Cherop is unable to manage his own family ending up in the Children's Court Case No. 201 of 2016. That if he cannot manage his family, it's now dawning on her that he cannot manage her vast properties. That if he cannot comprehend the logic of putting up a property of 10 storeys with a loan of Kshs 100,000,000/= certainly she is indeed justified to kick them out of her properties. That if they can't utilize Kshs 500,000/= cash loan that she gave them they cannot manage her rental income so that she begs them to give her money. That she struggled with her husband to put up the Nairobi Property but the children do not know what it takes to reach where she reached. The 2<sup>nd</sup> plaintiff filed a further affidavit whose import is that the defendant cannot manage the properties in dispute and which affidavit I have considered.

### **DETERMINATION**

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) whether the applicant has demonstrated a prima facie case with a probability of success.***
- 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.***
- 3) Where the balance of convenience tilts if the court is in doubt.***

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can

be granted. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. This court finds that though the plaintiffs have established that they are the proprietors of the suit property through transmission, it is arguable by the defendant that she has unregistered rights in the property being the widow to the deceased.

**Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing.

The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

This is a unique case where the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs are sons of the Defendant and yet she was totally left out in the distribution of the property. I gave them an opportunity to address the court and though I did not record their statements in court, it came out clearly that the defendant is not one of the directors of the 1<sup>st</sup> Plaintiff and yet she is supposed by law to be one of the beneficiaries of the deceased estate and whose overriding rights or interests that are unregistered but enforceable as the widow to the deceased cannot be defeated but are likely to be defeated if the orders sought are granted. The court in distributing the property could not have intended to disinherit the widow to the deceased and could have believed that Cherop and Company Ltd was best suited to manage the Estate of the deceased but unfortunately the defendant is not one of the directors of the company. Sections 61 and 62 of the Land Registration Act Provide as follows: -

#### 61. Transmission on death of a sole proprietor or proprietor in common

(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of [deceased]" or "as administrator of the estate of [deceased]", as the case may be.

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, "**grant**" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favor of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

62. Effect of transmission on death

**(1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.**

**(2) The registration of a person as provided in [section 61](#), shall relate back to and take effect from the date of the death of the proprietor.**

The two sections envisage the fact that even after transmission, it is arguable that the overriding interests are not extinguished especially especially where the widow was neither a beneficiary nor administratrix of the estate of the deceased. Granting the orders sought would create an injustice as it will amount to disinheriting the widow to the deceased who is not one of the directors of the 1<sup>st</sup> Defendant. The plaintiffs have an option of making the defendant a director to the 1<sup>st</sup> Plaintiff. It is doubtful that the plaintiffs can enjoy the property of the Estate of the deceased without recognizing the rights of the defendant. This court being in doubt, decides this matter on balance of convenience which tilts towards maintaining status quo. Moreover, it is doubtful that the property has been properly transmitted as the overriding interests of the defendant have not been considered. The application is therefore dismissed with no order as to costs this being a family dispute.

**DATED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF JANUARY 2017**

**A. OMBWAYO**

**JUDGE**