



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 38 OF 2019

REUBEN CHERUIYOT CHEBORGE (suing as the Administrator of the Estate of

ZAKAYO MAINA alias KIPSOI A. MAINA).....PLAINTIFF/APPLICANT

VERSUS

PETER KIPYEGON NGETICH.....DEFENDANT/RESPONDENT

RULING

1. I am called upon to determine a notice of motion dated 27th June, 2019 filed contemporaneously with a suit of even date. The applicant – **REUBEN CHERUIYOT** – is the Plaintiff in the suit and has sued the respondent – **PETER KIPYEGON NGETICHO** – who is the defendant, for alleged trespass into land parcel **NO KERICHO/KIPSONOI/46** (“suit land” hereafter) in the year 2017. The respondent is said to be in illegal occupation and use of the suit land. The suit is meant to permanently restrain him. In the meantime however, the applicant desires to get an interim restraining order to run for the period that the suit is not determined. That is why he filed the application now under consideration. He filed the application under Order 40 rules 1, 2(1), 4(1) and Order 51 rule 1 of Civil Procedure Rules, Sections 1A (1) (2), 1B and 3A of Civil Procedure Act (cap 21) and all other enabling law.

2. The application came with four (4) prayers but at this stage, two of the prayers – prayers (a) and (b) - are moot, having been meant for consideration at an earlier stage. The prayers for consideration are therefore two- prayers (c) and (d) – and they are as follows:

Prayer (c): That pending the hearing and determination of this suit, the honourable court be pleased to issue an order of permanent injunction restraining the defendant/respondent through himself and/or his servants, agents, and employees from entering upon, remaining, thereon, occupying, cultivating, leasing, constructing, using, interfering and/or dealing in any manner with land parcel NO KERICHO/KIPSONOI/46.

Prayer (d): Costs of this application be provided for.

3. The justification for bringing the application is to be found in the grounds on which it is anchored and the supporting affidavit that came with it. Simply stated, the applicant averred that he is the legal representative of the estate of the late **Zakayo Maina** alias **Kipsoi A. Maina**, who is the registered owner of the suit land. The respondent is said to be in occupation and use of the suit land and intends that the situation remains that way permanently. The respondent’s actions on the land are said to amount to waste and are allegedly depleting soil fertility. The applicant avers that he stands to suffer irreparable loss and damage.

4. The respondent responded to the application via a replying affidavit dated 4th July, 2019 filed in court on the same date. He deposed, inter alia, that he is on the suit land courtesy of one **Hellen C. Cheborgei**, a beneficiary to whom elders awarded one acre of the suit land in the year 2017. The respondent is a neighbor and Hellen appointed him the caretaker of the one acre. He is using the one acre belonging to Hellen, not the whole of the suit land. The applicant is said to be aware of this, for he was present at the elders meeting of 2017 where it was resolved that Hellen would get one acre. The respondent availed the minutes of that meeting and the applicant’s name appear as NO 23.

5. The application was canvassed by way of written submissions. The applicant’s submissions were filed on 29th November, 2019. He gave a highlight of both the case and the application and submitted that the issue for determination relates only to whether he has satisfied the conditions necessary for granting of injunctive order.

6. And the conditions are as expressed in **GIELA VS CASSMAN BROWN & CO. LTD (1973) EA 358**. They involve establishing a prima facie case with a probability of success; demonstrating the likelihood of suffering irreparable loss that damages cannot adequately compensate; and considering the balance of convenience where doubts arise as to adequacy of demonstration of the first two conditions. According to the applicant, a prima facie case is demonstrated “since he is the administrator of the estate of the registered owner.” He has also demonstrated irreparable loss as the respondent “continue to waste and deplete the fertility of the soil”. The balance of convenience was also said to tilt in his favour.

7. The respondent's submissions were filed on 28th January, 2020. Much of the substance in the submissions echoes what the replying affidavit filed by him contains. He stated that he is on the suit land through permissive arrangements with Hellen C. Cheborgei who is one of the beneficiaries. Hellen is evidently the applicant's brother. The position of the respondent is that the threshold for granting the injunctive orders sought by the applicant has not been met. The court was asked to dismiss the application.

8. I have had a look at the suit as filed and I have considered the application, the response made to the application, and the rival submissions. In my view, the respondent has explained his position well. He is more convincing. He has explained how he came to be on the suit land. He has shown the minutes of the meeting that awarded Hellen the one acre that he is now using. There is a written statement by Hellen on record. It was filed on 10th July, 2019. The statement is in agreement with what the respondent is saying.

9. It is wrong to say that the applicant has established a prima facie case merely because he has a grant Ad Litem in respect of the estate of the deceased registered owner of the suit land. The grant does not make him a full representative of that estate. Infact, the grant is clear that it was issued only to allow the applicant to file this suit. It is also not true to say that damages would not be an adequate remedy. The respondent is using the land in the normal way. How does that result in irreparable loss?

10. The applicant needed to come clear on his relationship with Hellen, her allegations of entitlement to one acre, and the meeting alleged to have taken place in 2017 where a resolution was made that she was entitled to one acre. He has not done that. He has instead passed over it all in silence. Yet he expects that the court is going to buy his narrative. He is wrong. He has not done a good job of persuading the court regarding the merits of his application. Without much ado, I hereby dismiss the application with costs.

Dated, signed and delivered at Kericho this 30th day of June, 2020.

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A. K. KANIARU

JUDGE