REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 12 OF 2020

TRUPHENA J CHEMITE.....APPLICANT

VERSUS

PIUS KIPTUM YANO.....1ST RESPONDENT

REUBEN KIPKEMOI KOGO.....2ND RESPONDENT

JOSPHAT KIPROTICH KIKONO.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 27th February 2020 by the plaintiff/applicant seeking for the following orders;

a. Spent

b. Pending inter partes hearing and determination of this application, there be a temporary injunction restraining the defendants their servants and/or agents from ploughing, cultivating or felling trees from the plaintiff's parcel of land referenced as titles Nos CHERANGANY/KAPKANYOR/58 and ELGEYO MARAKWET/KAPKANYOR 59 and/or from doing anything that will and or violate the plaintiff's proprietary rights and or quiet possession over the said parcels of land.

c. Pending inter partes hearing and determination of this suit, there be a temporary injunction restraining the defendants their servants and/or agents from ploughing, cultivating or felling trees from the plaintiff's parcel of land referenced as titles Nos CHERANGANY/KAPKANYOR/58 and ELGEYO MARAKWET/KAPKANYOR 59 and/or from doing anything that will and or violate the plaintiff's proprietary rights and or quiet possession over the said parcels of land.

The defendants had filed a preliminary objection dated 23/ 3/2020 and an application dated 23/4/2020 together with submissions dated 11/3/2020 which were withdrawn. The parties therefore agreed to argue the plaintiff's current application.

PLAINTIFF/APPLICANT'S CASE

Counsel for the plaintiff/applicant argued the application and relied on the grounds on the face of the application together with the replying and supplementary affidavits by the applicant that the applicant is the absolute proprietor of the parcel of land known as **CHERANGANY/KAPKANYOR/58** and **ELGEYO MARAKWET/KAPKANYOR 59** and is therefore entitled to the exclusive possession and quiet use of the said parcels of land.

Mr. R M Wafula counsel for the plaintiff submitted that the plaintiff allowed the 2nd and 3rd defendant to have possession of 5 acres of land contained in ELGEYO MARAKWET/KAPKANYOR 59 and that the 1st defendant has been trying to grab the suit land and that on 14/2/2020 and 16/2/2020 the defendants engaged in destruction of the plaintiff's property.

Counsel further submitted that the defendants continue to trespass on the suit land and have even prepared the land for ploughing without any proprietary rights to the same That the applicant has annexed documents to show that she is the legal owner of the suit parcels of land.

The applicant deponed that her husband bought the suit land on 22nd March 1977 and produced an application for consent of Land Control Board dated the same date, transfer dated 22nd March 1977, letter of consent dated 22nd March 1977 and the title deed which were marked as annexures T.J 2(a), (b), (c) and (d).

She further deponed that after the death of her husband, the properties were subject of High Court Succession Cause 209 of 2007 and the properties were transferred to her vide transmission. She annexed the green cards and title deeds as T.J 4(a), (b) (c) and (d).

Mr. R M Wafula counsel for the plaintiff therefore submitted that the applicant has proven that the suit land was purchased by the plaintiff/applicant's late husband in 1977 and has established ownership through documents whereas the defendants have not produced any documents proving ownership. Further that the applicant has a greater chance of success in her claim as per the case of **Mrao v First American Bank of Kenya Ltd. (2003) Eklr.**

Counsel for the plaintiff/applicant submitted that the applicant uses the said land to graze cattle and has demonstrated by way of pictures that depicts wanton destruction caused by the respondents. That the defendants may trespass further into the applicant's property and this shall be impossible to quantify in damages if a temporary injunction is not granted.

On the balance of convenience, Counsel submitted that the defendants would suffer no inconvenience as the 2nd and 3rd defendants already occupy the 5 acres on the suit land and that the 1st defendant who has never been in possession of any of the said properties may move in.

Mr. Wafula further submitted that the 1st defendant does not have a house on the suit land and that they are trying to come up with a status quo that does not exist and that for the sake of peace, the 1st defendant should not be allowed to enter the suit parcel of land. Counsel also stated that the plaintiff purchased the suit land from the deceased Kimagut who caused the land to be transferred to the plaintiff's husband. That no evidence has been adduced to challenge the documents produced by the plaintiff/applicant. He further submitted that the 2nd and 3rd defendants can continue staying on the suit land pending the determination of this suit.

Counsel therefore urged the court to allow the application as prayed.

DEFENDANT/RESPONDENT'S CASE

Mr. Gikandi counsel for the respondents opposed the application and relied on two replying affidavits and submissions. Counsel gave a brief background to the case and stated that in the affidavit the respondent deponed that he purchased 12 acres of the suit land from Kikono Bon and prior to the completion of that transaction, the late husband to the plaintiff herein had taken out irregular title deeds to the suit property. Ever since the purchase he has been cultivating and using the land without any problems.

It was counsel's submission that the plaintiff has not met the threshold for grant of interlocutory injunctions as was stipulated in the case Giella Vs Cassman Brown & Company Limited [1973] EA 358.

Counsel submitted that the plaintiff was always aware of the existence of **HCCC NO. 51 OF 1991 KIKONO BON VS VINCENT CHEMITEI & KIPTANUI KIMAGET** where the defendant had sued the plaintiff's husband over the suit land but died before the same was heard and determined. That the plaintiff proceeded to acquire registration of the suit properties, which contrives the doctrine of *lis pendens*. That the plaintiff is guilty of material non-disclosure as it is trite law that a party seeking equitable remedies must come to court with clean hands.

Counsel submitted that the plaintiff has relied on the grounds that the plaintiff and her family had granted consent or permission to the defendants to take occupation of parcel No. CHERENGANY/ KAPKANYOR/59 but has not disclosed to the court under what circumstances such consent or permission was granted. That a party alleging to be a licensor must clearly disclose to the court.

It was counsel's submission that at no material time did the plaintiff or her family accord the defendants a license and or permission to occupy any part of the suit property. That the defendants 'occupation is pursuant to their status as sons of Kikono and that the suit property is family property.

Counsel cited the case of **Samuel Njoroge (suing on behalf of the Estate of the Late Geoffrey Gikaru Njoroge) v Wanje Holding Limited [2018] eKLR** where the Court of Appeal held that:

> "….the importance of a litigant who wishes for the court to exercise its discretion in its favour to disclose all material facts cannot be gainsaid. The non-disclosure could warrant a court to not only decline to issue orders sought but also set aside any orders granted simply to protect the dignity of the court. This much was restated in **Tiwi Beach Hotel Ltd vs. Stamp [1991] KLR 658** where this Court had this to say about the effect of non-disclosure:-
>
> "It matters not upon a point of this nature being taken whether the applicant was entitled to or that the Court would have granted relief sought in any event, that is to say, leaving aside the non-disclosure for it is the affront to the dignity and credulity of the Court that is in point."

Mr. Gikandi counsel for the respondent further relied on the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** where the Court of Appeal held as follows:

> "We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

Counsel submitted that the defendant having disputed how the plaintiff acquired ownership of the suit properties, the question as to whether the plaintiff holds a good title can only be answered after calling evidence and witnesses being cross examined for the court to evaluate the evidence. Counsel therefore submitted that the plaintiff/applicant has not established a prima facie case.

On the issue as to whether the plaintiff will suffer irreparable harm which cannot be compensated by monetary terms, counsel submitted that the alleged damage of clearing of bushes and cutting down of trees is capable of being quantified and compensated in monetary terms.

On the issue of balance of convenience, counsel submitted that the balance of convenience tilts in favour of the status quo being maintained in that the defendants are in occupation of the suit land. Counsel therefore urged the court to dismiss the application with costs to the defendants

ANALYSIS AND DETERMINATION

This is an application for temporary injunction by the plaintiff/applicant against the defendant/respondents. The issues for determination in such applications is whether the applicant has met the threshold for grant of an application for injunction.

The threshold for grant of orders of injunctions was established in the case of **Giella v Cassman Brown & Company Limited [1973] EA 358** wherein it was held that the applicant has to satisfy the following conditions;

a. The applicant has to establish a prima facie case

b. The applicant must show that if the order sought is denied he/she would suffer irreparable damage that cannot be adequately compensated by damages

c. Should the court be in doubt as to whether the applicant has satisfied the foregoing ingredients, then it will decide the application on a balance of convenience.

The applicant annexed copies of title deeds and green cards to demonstrate the stake that she has in the suit properties. The documents are proof that she is the registered proprietor of the suit land. She also produced copies of a sale agreement as a result of which her husband obtained the suit land. The production of a copy of a title deed is prima facie evidence that the applicant has a case against the defendants with a probability of success.

Counsel for the defendants faulted the process of acquisition of the title but as he rightly stated that the issue can only be resolved during a full hearing where witnesses will be able to give evidence to shed light on the process. I will therefore not decide whether the process was flawed or regular at this stage. I find that the applicant has established a prima facie case with a probability of success.

On the second issue as to whether the applicant will suffer irreparable harm which cannot be adequately compensated by way of damages, the applicant has produced photographs of the suit land and she has also annexed photos of the respondents' agents' destruction on the suit land. The applicant stands to lose from the damage caused by the respondents on the suit land and the same may not be quantifiable in damages. In the event she succeeds the same will not be compensated by way of damages.

In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) Eklr** in which the court stated;

"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".

From the submissions of counsel for the defendants, he states that the alleged clearing of bushes and cutting of trees can be compensated by damages. How do you quantify the sentimental value of trees that have grown over a long period of time? The damage depicted in the photos is unlikely to be adequately compensated by way of damages. I find that the applicant has met this threshold too.

In the same case cited above, the court described the meaning of balance of convenience as:

"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 favour 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 plaintiff's' to show that the inconvenience caused to them be greater than that which ma)' be caused to the defendant's inconvenience be equal, it is the plaintiff 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 which is likely to arise from granting"

The 2nd and 3rd defendants are in occupation of 5 acres of the suit land with the consent of the plaintiff and that they should continue occupying as such until the suit is heard and determined. Counsel however was categorical that the 1st defendant is not in occupation and should not take occupation until the suit is heard and determined.

I therefore find that the balance of convenience lies in favour of the plaintiff and allowing the 2nd and 3rd defendants to occupy 5 acres of the suit land that they have been occupying pending the hearing and determination of the suit. The 1st defendant is hereby restrained from interfering with the suit land in any way until the suit is heard and determined. The 2nd and 3rd defendants are also restrained from interfering with the suit land in terms of changing the substratum of the suit land. The application is therefore allowed with costs to the applicant.

DATED and ***DELI*VERED** at **ELDORET** this **29TH DAY** OF **JULY, 2020**

M. A. ODENY

JUDGE