



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 29 OF 2020 (O.S)

WILSON KIBILO KIPSASUR.....PLAINTIFF

VERSUS

ANN CHEPNGETICH CHERUIYOT.....1ST DEFENDANT

THE LAND REGISTRAR NAKURU.....2ND DEFENDANT

RULING

1. The plaintiff commenced proceedings herein through Originating Summons dated 15th April 2020 in which he averred that he has been in continuous occupation of the parcel of land known as Nakuru/Sirikwa/44 (the suit property) since the year 1993. He seeks judgment that he be registered as the proprietor of the suit property in place of the first defendant who he avers is the current registered owner. Simultaneously with the Originating Summons, he also filed Notice of Motion dated 15th April 2020, which is the subject of this ruling. He seeks the following orders in the application:

1. *Spent*

2. *Spent*

3. *That pending the hearing and determination of this suit this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st respondent by himselfe (sic), his agents, servants, brothers and/or sisters from entering, grazing, transferring, alienating, disposing, tilling, cultivating, selling, leasing or in any way from interfering with the subject parcels of land known as Nakuru/Sirikwa/44 and a copy hereof be served upon the OCS Njoro Police Station for effective compliance.*

4. *The costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that he and his family have been in occupation of the suit property since the year 1993 and that he has erected his homestead on it. He added that the first defendant has been interfering with his quiet possession of the suit property. Consequently, he wrote a letter to the District Land registrar Nakuru in the year 2014 and another to the National Land Commission in the year 2015. He later on learnt that the first defendant had been issued with a title deed in respect of the property. He added that his occupation of the suit property is adverse to the ownership of the first defendant and therefore urged the court to grant the orders sought.

3. Although served, the first defendant neither responded to the application nor attended court at its hearing. On his part, counsel for the second defendant indicated to the court that he does not oppose the application. The application is therefore unopposed. Counsel for the applicant relied on the material on record and urged the court to grant the orders sought.

4. I have carefully considered the application and the affidavit filed in support. The law relating to interlocutory injunctions is settled. An applicant seeking such an order must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. For the application to succeed, he must establish a *prima facie* case with a probability of success. Even if he establishes a *prima facie* case, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant must surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

5. From the material on record, it is apparent from the annexed copy of the title deed that the first defendant became the registered proprietor of the suit property on 4th September 2012. The applicant's contentions that that he and his family have been in occupation of the suit

property since the year 1993, that he has erected his homestead on it and that the first defendant has been interfering with the property are not controverted. In particular, I note that the first defendant became registered owner during the period when the applicant claims to have been in possession. In the circumstances, I am persuaded that the applicant has established a *prima facie* case with a probability of success and that damages will not be an adequate remedy to him. I will therefore grant him the injunction sought.

6. I note that the applicant has included a prayer that the injunction order “*be served upon the OCS Njoro Police Station for effective compliance*”. Such prayers have of late become common in injunction applications. Litigants must be reminded that injunction orders are fully addressed by the Civil Procedure Act and rules made thereunder, complete with ample provisions for enforcement. Unless there are proven special circumstances such as threat to life or property which cannot be secured by enforcing court orders through the usual procedures such as citing contemnors for punishment, civil proceedings should be kept purely civil. I am not alone in this thinking. Hancox CJ stated as follows in **Kamau Mucuha v Ripples Ltd [1993] eKLR**:

Before concluding this judgment I would refer to paragraph 4 of the formal order extracted on 22nd September 1992. It says that police assistance may be enlisted to ensure that the plaintiff (ie the respondent) is reinstated in the premises. I have not been able to find any such order in Mwera J’s ruling, but it would, in any event be unlawful to utilize the police in a civil action for the purpose of effecting or aiding private evictions or reinstatements. ...

7. Later in the same judgment, Kwach JA echoed those sentiments as follows:

The only valid criticism of the order of the judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in such matters as there is specific provision for the enforcement of an injunction under order 21 rule 28 of the Civil Procedure Rules.

8. Indeed, **Order 40 Rule 3** of the **Civil Procedure Rules, 2010** makes provision for consequences of breach of an interlocutory injunction. I will therefore not grant the aspect of the prayer seeking to involve the police in the matter.

9. In the end, I make the following orders:

a) An injunction is hereby granted restraining the 1st defendant by himself, his agents, servants, brothers and/or sisters from entering, grazing upon, transferring, alienating, disposing, tilling, cultivating, selling, leasing or in any way interfering with the parcel of land known as Nakuru/Sirikwa/44 pending the hearing and determination of this suit.

b) The plaintiff shall have costs of the application.

10. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's “Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic” (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 3rd day of July 2020.

D. O. OHUNGO

JUDGE