



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2018

EDWIN KIPKURGAT KENDUIYWO.....PLAINTIFF

VERSUS

MARK KIPCHUMBA MARITIM.....1ST DEFENDANT

DANIEL KIPKOECH KURGAT.....2ND DEFENDANT

RULING

1. This is a ruling on the application dated **4th February, 2019**. The application is brought under the provisions of **Section 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act Order 40 Rule 1 of the Civil Procedure Rules**.

1. That application has been brought by the plaintiff seeking the following orders:

(a) **This matter be certified as urgent and be heard on priority basis.**

(b) **A temporary injunction be issued restraining the 1st defendant/respondent by himself, his servants and or agents from trespassing on, wasting, constructing on, remaining on, alienating, offering for sale, charging, leasing or otherwise interfering or dealing in the said property known as LR. No. CHEPSIRO/KIBUSWA BLOCK 1/KELCHINET/238 pending the hearing and determination of this application inter-partes.**

(c) **A temporary injunction be issued restraining the 1st defendant/respondent by himself, his servants and or agents from trespassing on, wasting, constructing on, remaining on, alienating, offering for sale, charging, leasing or otherwise interfering or dealing in the said property known as LR. No. CHEPSIRO/KIBUSWA BLOCK 1/KELCHINET/238 pending the hearing and determination of this suit.**

(d) **An order be hereby issued declaring the 1st defendant/respondent's action as illegal. Unlawful and amounting to trespass to land.**

2. The grounds on which the said application is made are that the at all material time to this suit, the plaintiff has been the legal owner of land parcel **LR. No. CHEPSIRO/KIBUSWA BLOCK 1/KELCHINET/238** measuring **4.11 Hectares** (herein referred as the suit property); that on the **2nd November, 2017** the 1st defendant allegedly entered into a sale of land agreement with the 2nd defendant who happens to be the biological son of the plaintiff wherein the 1st defendant purchase **LR. No. CHEPSIRO/KIBUSWA BLOCK 1/KELCHINET/238** for a total consideration of Kenya Shillings One Million Three Hundred and Seventy Five Thousand (**Kshs.1,375,000/=**) only; that the alleged land sale transaction was carried out without consent of the plaintiff herein who is the rightful owner of the suit property; that the 1st defendant moved to the suit property and fenced it using barbed wire and proceeded further to construct a store and that the plaintiff is apprehensive that the 1st defendant may adversely deal with the suit property.

3. The application is supported by the affidavit of the applicant sworn on **5/2/2019**. That affidavit reiterates the same matters set out in the grounds above.

4. In his opposition to the application, the 1st defendant filed replying affidavit dated **13/2/2019** on **21/2/2019**. In that affidavit he deponed that he has been a family friend and neighbour to the plaintiff for last eight years; that in **March, 2016** the 2nd respondent and the plaintiff approached him with a view of selling land; that the plaintiff averred that he is in the process of subdividing his land, specifically **plot No. 109**, into several portions; that he had given the 2nd respondent his portion awaiting issuance of title; that following that revelation the respondent entered into an agreement dated **20/5/2016** with the 2nd respondent who was selling his entitlement and the plaintiff witnessed the agreement and undertook to transfer **2 acres** to the 1st defendant; that he paid **Kshs. 100,000/=** out of **Kshs. 900,000/=** agreed as consideration; that the plaintiff at one time directly requested him for money to complete the conveyance fee process; that on **10/6/2016** he

paid the plaintiff and the 2nd defendant **Kshs. 900,000/=** and later in November of the same year took possession of the 2 acres and developed it; that in **January, 2017** the 2nd defendant offered to sell the 1st defendant a half acre of land and another agreement was executed; that later on, on **2/11/2017** the 1st defendant purchased another half-acre as such he avers that he is not a stranger to the plaintiff and the 1st defendant, that the plaintiff's consent to sell was sought and he was present when the contract was executed and monies paid and that fencing of the land was pursuant to terms of the sale agreement dated **2/11/2016** (here I believe he meant **2nd November, 2017**); that the demand is premised on a false basis that **Plot No. 109** did not exist and that the application is overtaken by events as the events sought to be stopped happened in **2016**. He depones that he is not a trespasser on the suit land and that the applicant has come to court with unclean hands.

5. The plaintiff filed his submissions on **11/3/2019** and the defendant on **12/3/2019**. I have considered those submissions.

6. It is not in dispute that the suit land is registered in the name of the plaintiff. The plaintiff regards the 1st defendant as a stranger. The 1st defendant on the other hand avers that the plaintiff has knowledge of how the 1st defendant came to be in possession of the suit land. In the amended plaintiff prayer no (d) is framed as follows:

“An order do issue evicting the 1st defendant from the parcel of land LR No. Chepsiro /Kibuswa Block 1 (Kelchinet) /238”.

7. By reason of the above statement this court deems the 1st defendant to be in occupation of the suit premises. There are copies of agreements between the 1st and 2nd defendant showing that there may have been sale of land between the 1st defendant and a biological son of the plaintiff, with the plaintiff as a witness thereof. It is alleged by the 1st defendant that the plaintiff's biological son was only selling, with the knowledge of the plaintiff, what the plaintiff had given him. The plaintiff has admitted his relationship with the 2nd defendant. However he has alleged particulars of fraud against him in the amended plaintiff. No particulars of fraud are alleged against the 1st defendant in that pleading.

8. The plaintiff cited **Section 26(1)** of the **Land Registration Act**, the case of **Niaz Mohammed Jan Mohammed -vs- Commissioner of Lands 1996 eKLR, J.M. Gichanga -vs- Co-operative Bank of Kenya Ltd 2005 eKLR and Aikman -vs- Muchoki 1984 KLR 353** and submits that the conditions for the grant of a temporary injunction has been satisfied and the application should be allowed with costs.

9. I find that a plausible explanation has at this interlocutory stage been provided by the 1st defendant as to why he has occupied the suit land.

10. The order of temporary injunction sought being a mandatory order in its effect, can not issue against the defendant who is in occupation of the land save in very exceptional circumstances, and especially where the respondent has sought to steal a march on the applicant. This was held to be so in the case of **Locabail International Finance Ltd -vs- Agro- Export & Another [1986] 1 ALL E.R. 901**.

11. In the case of **Beatrice Ngina Mwai & Another -vs- Gichine Mwai & Another 2010 eKLR**. In that case the court stated as follows:

“The main order sought by the Applicant is that of a mandatory order of injunction in which the Applicant has prayed for the 1st Respondent to be forcefully evicted from L. R. NO. KIINE/KIANGAI/33. Before granting an order of mandatory injunction the court must consider the well settled principles. In SHARIFF ABDI HASSAN –VS- NADHIF JAMA ADAN C.A. NO. 121 of 2005 (unreported) the Court of Appeal restated those principles at page 11 as follows:

“The law as regards the principle to be applied when considering the two prayers is different from the principles set out in Giella's case for the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction.”

12. I do not consider the applicant to have gone the extra mile to prove that the order of eviction, which will remove the 1st defendant from the suit premises before the conclusion of the instant suit, should be granted.

13. It is noteworthy that all the prayers sought exclude the 2nd defendant though he is the person admitted to be selling the land. I would have looked upon the applicant's prayers more favourably had he sought to halt the entire mischief by injunctioning his son. As things stand now the son is free to recruit would be buyers other than the 1st defendant in respect of portions of the same land.

14. I find that the plaintiff has not established a prima facie case. I also find that he would not suffer any loss that can not be compensated by way of damages. The two main conditions set out for the grant of a temporary injunction in **Giella -vs- Cassman Brown 1973 Kenya Law Reports 358**. This court does not need to assess the balance of convenience in the circumstances set out above.

15. The application dated **4/2/2019** is dismissed with costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wafula M for the 1st respondent

Gicheru absent for applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019