



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C SUIT NO 22 OF 2015 (O.S)

IN THE MATTER OF LAND PARCEL KERICHO/KAPTEBENGWET/450

AND

IN THE MATTER OF SECTION 36 OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

BETWEEN

GILBERT KIMUTAI KOECH.....PLAINTIFF/RESPONDENT

VERSUS

WILSON KIPNGENO KOECH.....DEFENDANT/APPLICANT

RULING

Introduction

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion dated 20th September 2018 in which he seeks the following orders:

a) Spent

b) *This Honourable court do order that the Court bailiff duly appointed by this Honourable Court do evict the respondent from the parcel of land known as L.R No. KERICHO/KAPTEBENGWET/450*

c) *The County Surveyor Bomet visits that suit property and ascertains the boundaries of the property registered under L.R No. KERICHO/KAPTEBENGWET/450*

d) *That this Honourable court do order that the O.C.S Mogogosiek Police Station provides security to enable the Court Bailiff to execute the Order of this Honourable court*

e) *This Honourable Court be pleased to issue an order of permanent injunction restraining the Respondent by himself, his agents, servants, employees or any other party through whom he may be acting from interfering with, trespassing onto, sub-dividing, selling, transferring, assigning, fencing erecting structures thereon and/or doing any other act which is prejudicial to the plaintiff/Applicant's proprietary interests in L.R No. KERICHO/KAPTEBENGWET/450*

f) *The costs of this application.*

Background

2. The application was giving rise to this Ruling made pursuant to the judgment dated 18.5.2018. The said application is supported by the applicant's affidavit sworn on the 20.9.2018. In the said affidavit the Applicant depones that he is the registered proprietor of the suit property. He depones that the Respondent herein filed suit seeking to be declared the owner of the suit property by virtue of adverse possession. The said suit was heard and the Respondent's suit was dismissed on 18th May 2018. The Respondent then applied for stay pending appeal and even though his application was granted, he opted not to file the appeal. Instead he instituted criminal proceedings against the applicant in Bomet Court claiming that the title to the suit property was forged. He further depones that the Respondent has refused to accept his fate and he is now using diversionary tactics with a view to reopening this case. He depones that the Respondent and his brothers have two other parcels of land adjacent to the suit property and it is not true that if he is evicted from the suit property, he will be

rendered homeless. He states that the Respondent has not come to equity with clean hands and he merely wants to cling to the suit property even though he has no legal or beneficial interest therein.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 19th January 2019. In the said affidavit he attacks the applicant's application as being fundamentally defective and incurable in law. He depones that he abandoned the appeal as he learnt that the applicant's title was fake. He subsequently reported the matter to Konoin Police station whereupon the applicant was charged in Sotik PM Criminal Case No.1305 of 2018 with the offence of forgery and uttering a false document. He further depones that the court did not declare the applicant as the owner of the suit property but merely found that adverse possession would not apply in the circumstances of this case.

4. He depones that his father was buried on the suit property and he fears that the applicant will sell the suit property thus desecrating their father's grave. He states that if the application is granted, him and his entire family including his mother will suffer irreparable loss and damage.

Issues for determination

5. The following issues fall for determination

- i. Whether the Plaintiff is the registered owner of land parcel number **KERICHO/KAPTEBENGWET/450**
- ii. Whether the Applicant is entitled to an eviction order against the Respondent
- iii. Whether the Plaintiff has met the principles for the grant of an injunction

Analysis and determination

6. Section 26 of the Land Registration Act 2012 provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

7. It is not in dispute that the applicant is the registered owner of the suit property. However, the respondent has instituted criminal proceedings against the Applicant claiming that he obtained the said title fraudulently. The said case is still pending in court and unless the contrary is proved, I have no reason to doubt that the Plaintiff is the proprietor of the suit property.

8. With regard to the second issue, the Respondent had been living on the suit property with the Applicant's permission before he decided to stake a claim to the suit property by virtue of adverse possession. Following the dismissal of the Respondent's suit, the Applicant was at liberty to apply for an eviction order against the Respondent in order to regain possession of the suit property. The Respondent was granted a stay of execution pending appeal on condition that he deposits security for costs in the sum of Kshs. 75,000 within 21 days failing which the order for stay of execution would automatically lapse. The Respondent opted not to pursue the intended appeal and has now filed a civil and criminal case against the Applicant in the lower court. He therefore argues that execution should be stayed pending the hearing and determination of the two cases in the lower court. This submission is not only preposterous but is untenable as it is not based on any legal principle. Having squandered his opportunity after obtaining an order for stay pending appeal, the respondent only has himself to blame. Litigation must come to an end and unless there are good grounds to the contrary, a party who has obtained judgment is entitled to the fruits of his judgment. It is therefore my finding that the applicant is entitled to an order of eviction.

9. On the last issue is with respect to the order for injunction sought by the Applicant. The conditions for the grant of an injunction are well settled.

10. In order for the court to exercise its discretion in granting injunctive relief the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

11. A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR** when he relied on the English case of **Films Rover International 1986 3 All ER 772** where the court stated as follows:

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn

out to have been wrong”.

12. The first issue that the court must determine is whether the plaintiff has established a prima facie case with a probability of success.

13. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

14. In the instant case the Applicant has proved that he is the registered proprietor of the suit property. Following the judgment delivered on 18.5.2018 it is clear that the Respondent has no legal or beneficial interest in the said property. The allegations of fraud levelled against the Applicant are neither here nor there as they have not been proved. The Respondent had a chance to prove the said allegations during the hearing but he failed to do so. He cannot reopen the issues in dispute before this court after the judgment has been delivered. In the circumstances, it is my finding the Applicant has proved that he has a prima facie case.

16. With regard to the second test, it has been submitted by counsel for the applicant that this case has been in court since 2015. Judgment was delivered in favour of the Applicant almost a year ago and he has not been able to enjoy the fruits of his judgment as the Respondent continues to occupy his property against his wish. This amounts to irreparable loss which cannot be compensated by damages.

17. On the basis of the material placed before the court, I am persuaded that the balance of convenience tilts in favour of the Applicant.

18. For the foregoing reasons, I find merit in the Applicant’s application and I grant it and make the following orders:

a) An eviction order is hereby granted evicting the Respondent from land parcel number **KERICHO/KAPTEBENGWET/450** within 60 days.

b) The County Surveyor Bomet is hereby ordered to visit the suit property for purposes of ascertaining the boundaries of the property registered under L.R No. KERICHO/KAPTEBENGWET/450 within 30 days.

c) O.C.S Mogogosiek Police Station shall provide security to enable the Court Bailiff to execute the Order of this Honourable court.

g) A permanent injunction is hereby issued restraining the Respondent by himself, his agents, servants, employees or any other party through whom he may be acting from interfering with, trespassing onto, sub-dividing, selling, transferring, assigning, fencing, erecting structures thereon and/or doing any other act which is prejudicial to the Plaintiff/ Applicant’s proprietary interests in L.R No. KERICHO/KAPTEBENGWET/450.

h) The costs of this application shall be borne by the Respondent.

Dated, signed and delivered at Kericho this 2nd day of April, 2019.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Sang for the Defendant/Applicant

2. No appearance for the Plaintiff/Respondent

3. Court Assistant- Rotich