



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C NO 34 OF 2019

KIPNGETICH KALYA KONES

(Suing as the Administrator of the

estate of Kipkalya Kiprono Kones (deceased).....PLAINTIFF/APPLICANT

VERSUS

WILSON KIPLANGAT KONES.....DEFENDANT/RESPONDENT

RULING

1. The application for determination before me is a motion on notice dated 27th May, 2019. It was filed contemporaneously with a suit of even date. The disputants are **KIPNGETICH KALYA KONES** and **WILSON KIPLANGAT KONES**, who are applicant and respondent in the application, and plaintiff and defendant in the suit. The application is brought under Order 40 Rules 1, 2(1), 3(1), Order 51 Rule 1 of Civil Procedure Rules, Sections 3A and 63 of Civil Procedure Act (Cap 21, Laws of Kenya), and all other enabling provisions of law.

2. The application has five (5) prayers on the face of it but prayers 1 and 2 are now moot, having been considered at the exparte stage. The prayers for consideration are now three – prayers 3,4 and 5 - and they are as follows:

Prayer 3: *That pending the hearing and determination of the suit, an order of injunction do issue restraining the defendant/respondent by himself, his employees, agents, and/or servants or whosoever claiming through him from entering, planting tea, cultivating, erecting structures/developments, defacing boundaries/fences and/or committing any acts of trespass or other acts which are prejudicial to the plaintiff's property interest in the property L.R No.9932/3.*

Prayer4: *That costs of the application be borne by the defendant/respondent.*

Prayer 5: *That the necessary directions be made.*

3. The application is anchored on the grounds, inter alia, that the applicant is the legal representative of his late father, who owned shares in **SAMBUT TEA LIMITED**; that the respondent was only a licensee allowed by the applicant's late father to use the land; that the respondent has abused and/or misused his status as a licensee by committing acts of trespass, refusing to vacate the land, and/or engaging in illegal planting of tea; that the respondent will suffer irreparable loss if the orders asked for are not granted; and finally that it is necessary to safeguard the interest of the estate of the applicant's late father, hence the need to grant the restraining orders.

4. The supporting affidavit that came with the application generally amplifies the grounds advanced.

5. The respondent first responded to the application in two ways viz: replying affidavit filed on 10th June, 2019 and grounds of opposition filed on the same date. The respondent's response elicited the filing of a further affidavit by the applicant on 3rd July, 2018 and this in turn impelled a response by the respondent vide a supplementary affidavit filed on 9th July, 2019. These responses and counter responses are actually competing affirmations of claims of ownership, with the applicant reiterating the ownership of the land by his late father while the respondent averred that he is on the land as its owner.

6. The application was canvassed by way of written submissions. The applicants submissions were filed on 2nd September, 2019. After giving an overview of the case as presented by both sides, the applicant submitted that he has met the threshold set in the Locus Classicus case of **GIELA VS CASSMAN BROWN & Co. LTD (1973) EA 358**. The threshold entails establishing a *prima facie* case with a probability of success; demonstrating the likelihood of suffering irreparable loss that cannot be compensated with damages; and/or invoking the balance of convenience where the court is in doubt as to suitability of the first two requirements.

7. According to the applicant, it is well shown that it is his late father, and not the defendant, who is the shareholder of the disputed portion of

land. This, he submitted, was well shown in the further affidavit he filed. This is proof of *prima facie* case, he submitted. In contrast, the respondent was said to have availed nothing to demonstrate his claim of ownership. As regards irreparable loss, the unauthorised planting of tea by the respondent and his manifest intentions to continue planting more were said to constitute irreparable loss that damages would not suffice to compensate. The balance of convenience was also said to favour the applicant, particularly because he has shown the necessary connection between the disputed property and himself. The court was urged to grant the orders sought as the respondent “*has overstayed his welcome and has started acts of wanton misuse and damage to the property.*”

8. The respondents submissions were filed on 30th September, 2019. Like the applicant, the respondent gave an overview of the case and submitted, in light of **Giela's case**(*supra*), that the required threshold to warrant a grant of restraining orders has not been met. He submitted, inter alia, that he has been on the disputed land since 1997 and has extensively developed it. He faulted the applicant's supposed evidence of ownership and averred that the necessary form from the Registrars of Companies showing who the shareholders are would have served as better evidence.

9. The respondents further submitted that no likelihood of irreparable loss was shown. The applicant is said to have merely complained that the respondent is a licensee who has no mandate now to utilize the land. He submitted that he has been in long and uninterrupted occupation of the land and has planted trees, tea, other agricultural crops, and engaged in rearing of dairy cows thus making him the one likely to suffer irreparable loss if restraining orders are issued. To the respondent, the applicant “*is just trying luck and playing malice as a result of successful farming activities*” of the respondent. He urged the court to issue an order for maintenance of Status Quo pending the hearing of the suit. He asked the court also to note that he was the one on the disputed land.

10. I have considered the application, the various responses and counter-responses, rival submissions, and the pleadings as generally filed. I find it well shown that the respondent is the one on the disputed land. He was left on the land by the applicant's late father and has been using it. His response to the application showed reasonably well that he has developed the land in various ways. In contrast, it is clear that the applicant is not on the land. He does not seem to have ever used it. He talks of likelihood of suffering irreparable loss but honestly I don't understand how that can arise in connection with land that one has never used or developed.

11. He also talks of having established a *prima facie* case on the basis of a letter from a firm of advocates showing his late father as owner or shareholder. But the respondent countered this well by pointing out that a more authoritative source of shareholding or ownership would have been the office of Registrar of Companies where an authentic document showing the names of shareholders or owners can be provided. I agree with the respondent on this issue. I am hesitant to place reliance on a letter written by a firm of advocates which first intimated inability to get the relevant file but still proceeded to provide names presumably contained in the same file.

12. But even assuming that the applicant had sufficiently demonstrated ownership, I would still take note of the fact that such ownership is disputed by the respondent. I would then choose to be guided by the Court of Appeal's decision in **MUNYU MAINA VS HIRAM GATHIMA (2013) eKLR** where it held, inter alia, that where a registered proprietor's title is under challenge, it is not enough to dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title. Ownership is disputed in this case and the court should be wary of treating ownership documents as the basis for establishing a *prima facie* case.

13. It also appears to me that the restraining orders as sought would visit extreme hardship on the respondent. I make these observations because the orders even seek to restrain the respondent from entering the land. One may wonder what would happen to the respondent's tea, trees, and cows on the land if the respondent is restrained from entering the land and taking care of them. And given that the respondent is already in occupation, how would one restrain entry without first evicting him? If issued in the manner sought, the order would be ruinous to the respondent yet the case is still to be determined.

14. The respondent himself made a suggestion which I consider reasonable. The suggestion was that an order for maintenance of Status Quo be issued to run until the suit is determined. I understand the Status Quo to mean that he should remain on the land and continue with his farming activities pending determination of the suit. I have already pointed out that the respondent is on the land carrying out the same activities. In **Otieno Vs. Ougo & Another (No. 2) (1987) KLR 400** the court held, inter alia, that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action. I consider that the restraining orders sought by the applicant seek to upset the prevailing Status Quo and may not serve to preserve the subject matter pending trial of the action. The proper order to achieve that in my view is that of maintaining the Status Quo.

15. I also think that given that the respondent is also claiming the disputed land and is indeed the one in occupation, the applicant should have undertaken to pay damages if it ultimately turns out that he is not entitled to ownership. In **GATI Vs BARCLAYS BANK (K) LTD (2001) KLR 525** the court held, inter alia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

16. Given what I have said heretofore, it is clear that the orders sought by the applicant are not grantable. I therefore make a finding that the application is unmeritorious and dismiss it. I make no order as to costs. In the interests of justice, I make an order that the Status Quo be maintained until the suit is heard and determined. And the Status Quo referred to in this order is as captured elsewhere in this ruling. Further, the respondent himself is ordered to desist or restrain from making new developments and/or investments or even expanding those already in place. He should concentrate on upkeep and/or maintenance of those that are already in place. He should not take advantage of his occupation to do more than he has already done.

Dated and signed at Kericho this 15th day of November, 2019.

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A. K. KANIARU

JUDGE