



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO 35 OF 2019**

**DANIEL KIMASE KIPSOI.....PLAINTIFF**

**VERSUS**

**PROTUS KIPLAGAT CHERUIYOT.....1<sup>ST</sup> DEFENDANT**

**ALVIN CHERUIYOT.....2<sup>ND</sup> DEFENDANT**

**VINCENT KIPKURUI CHERUIYOT.....3<sup>RD</sup> DEFENDANT**

**JUNE JELIMO CHERUIYOT.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed the Motion dated 8<sup>th</sup> March, 2019 seeking for temporary injunction restraining the *“defendants, their servants and or agents and or assigns and or anybody acting under their authority and or instructions from in any way dealing and or interfering with the plaintiff’s quiet possession and or use and or enjoyment and to stop unlawful interfering and or ploughing and or planting and or transferring and or subdividing and or wasting and or doing any act that is inconsistent with the plaintiff’s right as in respect of 13.97 acres or thereabout in the land parcel L. R. No. Tingwa Farm Plot No. 133 pending the hearing and determination of the main suit”*, and costs. The application is based on the eight (8) grounds on its face marked (a) to (h) stating among others that he bought 13.97 acres of the said land from the defendants’ father and grandmother and that the defendants have laid claim on that portion and wanted to take possession. The application is supported by the affidavits sworn by the Plaintiff on the 8<sup>th</sup> March, 2019 and 29<sup>th</sup> May, 2019 and that of William Kipkemboi Kiprono sworn on the 29<sup>th</sup> May, 2019.

2. The application is opposed by the Defendants through the replying affidavit sworn by Protus Kiplagat Cheruiyot, the 1<sup>st</sup> Defendant, on the 9<sup>th</sup> May, 2019.

3. That directions on filing and exchanging written submissions were given following which the submissions dated the 29<sup>th</sup> May, 2019 and 20<sup>th</sup> August, 2019 were filed by the learned Counsel for the Plaintiff and Defendants respectively.

4. The following are the issues for the court’s determinations;

***(a) Whether the Plaintiff has satisfied the principles laid down in the celebrated case of Giella Vs Cassman Brown & Company Ltd [1973] E. A. 358 to show that he deserves the temporary injunctive order at this interlocutory stage.***

***(b) Who pays the costs?***

5. The court has carefully considered the grounds on the Motion, the affidavit evidence by both sides, the pleadings, learned Counsel’s written submissions and the decided superior courts’ decisions thereon, and come to the following conclusions;

(a) That from the affidavit evidence and pleadings presented by the Plaintiff and Defendants, the land described as Tingwa Farm Plot No. 133, out of which the Plaintiff claims a portion of 13.97 acres, the suit land, belonged to the late Kipkosgei Sigor, who had purchased it from Tingwa Co-operative Society. That the said Kipkosgei Sigor was the husband to Kobilo, Eunice and Esther and that he passed on in 2001. The said Kipkosgei Sigor was also father to William Kipkemboi Kiprono, the father to the Defendants herein.

(b) That upon the death of Kipkosgei Sigor in 2001, his three widows namely Kobilo Rotich, Esther Sambu and Eunice Rotich obtained grant of letters of administration in Eldoret High Court Succession Cause No. 92 of 2003 which was confirmed on the 27<sup>th</sup> March, 2006. The certificate of confirmation has the schedule containing the details of the immovable properties of the estate and the way it was to be

distributed. That the immovable properties described at numbers 1 to 9 are only Plot No. 91/Ainabkoi North, Plot No. 10, Plot No. 158 Chesubet and Soy Kibsomba Block 1 (Tarakwa). The suit land, Tingwa Farm Plot 133, is not among the immovable properties or assets of the late Kipkosgei Sigor distributed under Eldoret High Court Succession Cause No. 92 of 2003.

(c) That though the Plaintiff claim the suit land is on the basis of four sale agreements between him as purchaser on one part, and William Kipkemboi Kiprono and Eunice Aiyobei Rotich as Vendors, there is no documentary evidence from the Land Registrar's office or any other source recognized in law, that has been availed to the court to confirm that the two named Vendors are the proprietors of the said land, and that they have a good title capable of being transferred to the Plaintiff. That if the administrators of the estate of the late Kipkosgei Sigor had forgotten to include Tingwa Farm Plot No. 133 among the assets at the stage of confirmation for whatever reasons, they have no choice but to go back to the Succession Court for appropriate orders on distribution of the same before they could have capacity to sell or distribute. That to deal with the said property without such an order would contravene **Section 82 of the Law of Succession Act Chapter 160 of Laws of Kenya** and could be tantamount to intermeddling of the property of a deceased person contrary to **Section 45 of the said Act**.

(d) That while the Plaintiff may have entered into the said four sale agreements with the persons named, the availed evidence shows that the Plaintiff is yet to obtain any title documents over the said land. That it is required of the Plaintiff in an application like this to establish a prima facie case for the court to exercise its discretion to issue the injunctive orders pending the hearing and determination of the suit. The fact that the Plaintiff has not exhibited any title document recognized in law to confer ownership of the suit land, and considering that the persons who allegedly sold the land to him do not appear to have had title to the land leads the court to conclude that the Plaintiff has failed to set out a reasonable case with a probability of success at this stage. **[See Giella Vs Cassman Brown & Company Ltd (1973) E. A. 358 and Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125]**.

(e) That the Plaintiff is also required to show that he stands to suffer irreparable loss if the temporary injunction order is not issued at this interlocutory stage. That it is clear from the affidavit evidence availed that the Defendants have been in occupation of the suit even by the time the sale transactions between the Plaintiff and the two named Vendors, who are not parties in these proceedings, were taking place. That the Defendants have continued to be in possession and even buried their late mother on it after she passed on in late 2018. That as the Plaintiff entered into the sale agreements while aware the Defendants were on the land, and did not demand from the Vendors that they first ensure the land was vacant, then he must have been prepared to deal with the matter of their occupation until he gets vacant possession. There is therefore no evidence presented to show that the Plaintiff would suffer irreparable loss if injunctive orders are not issued at this stage.

(f) That the affidavit evidence availed specifically by the Plaintiff, through the affidavit of William Kipkemboi Kiprono and that of 1<sup>st</sup> Defendant, shows that some of the Defendants are school going and or minors. That further, and considering that the mother to the Defendants passed on late last year, and that their father lives away from the suit land where they reside, the balance of convenience tilts to allowing the Defendants to continue residing and using the suit land as the suit is heard and determined.

(g) That as the Plaintiff has failed in all of his prayers, he should pay the Defendants costs of the application as provided for under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

6. That for the reasons set out above, the Plaintiff's Notice of Motion dated 8<sup>th</sup> March 2019 is unmeritorious and is hereby dismissed with costs.

Orders accordingly.

**Dated and delivered at Eldoret this 13<sup>th</sup> day of November, 2019.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

Absent - Plaintiff.

Mr. Cheruiyot for Defendants.

Christine: Court Assistant