



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 101 OF 2017

JOHN KIPKOSKEI CHUMO.....PLAINTIFF

VERSUS

VINCENT BOSUBEN, PAUL CHEPKWONY & JOHN BETT

(being the Chairman, Treasurer and Secretary, KAPRORON

PRIMARY SCHOOL.....1ST DEFENDANT

JOTHAM KIPKOECH NGENO.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the application dated 23rd August, 2017 seeking *inter alia* the following prayers:

a) *That the application be certified as urgent.*

b) *Spent.*

c) *That pending the hearing and determination of this suit, an order of injunction do issue restraining the 1st defendant /respondent by himself, his agents and/or otherwise from using, grazing, livestock, possessing, selling or disposing, cultivating, entering trespassing, being in or remaining on or however interfering with the plaintiff's use of and interest in all that parcel of land formerly known as registration number KERICHO/ SEGEMIK/1401 and KKERICHO/SEGEMIK/1402 and/ or in any other manner.*

2. The application is based on the grounds stated on the face of the Notice of Motion and the applicant's affidavit sworn on the 25th August, 2017.

3. The application is opposed by the respondents through the Replying affidavits of Paul Chepkwony and Jotham Kipkoech Ngeno sworn on 31st October, 2017 and 30th November, 2017 respectively.

4. The parties agreed to canvass the application by way of written submissions and counsels for both parties filed their submissions.

5. In his supporting affidavit, the applicant avers that he was the registered proprietor of land parcel number KERICHO/SEGEMIK/142. He further avers that in 2016 he discovered that the defendants had sub-divided his land into two portions namely KERICHO/SEGEMIK/1401 and 1402 and registered one parcel in the name of the 1st defendant. He avers that he did not consent to the said sub-division of his land and that the same was done fraudulently without his consent.

6. In his replying affidavit Paul Chepkwony on behalf of the 1st defendant avers that the 1st defendant purchased the suit property from one Grace Chepkosgei who in turn bought it from David Kibii Siele who was the registered owner of the land in 1997.

7. The 2nd Respondent also swore an affidavit confirming the sale of the suit property between the plaintiff and one David Kibii Siele who in turn sub-divided the suit land and transferred parcel number KERICHO/SEGEMIK/1401 to the 1st defendant.

Issues for Determination

8. The main issue for determination is whether the Plaintiff/applicant is entitled to injunctive relief.

Analysis and Determination

9. 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 were restated in the case of **David I. Githuku V George Munyua Mbira & 2 Others (2013) eKLR** 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 it will decide the application on a balance of convenience.”

10. 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 in recognizing that *“the law has always kept growing to greater levels of refinement to cover new situations not foreseen before”* 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”.

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

12. It has been submitted on behalf of the applicant that he has established a *prima facie* case with a probability of success as he has demonstrated that he was the registered owner of land parcel number KERICHO/SEGEMIK/142 which was later sub-divided into land parcels number KERICHO/SEGEMIK/1401 and 1402. It has further been submitted that if the application is not granted the applicant shall suffer irreparable loss. This submission is based on the case of **JM Gichange V Cooperative Bank of Kenya (2005)** where the court held as follows:

“Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the plaintiff can be compensated ind damages. I hold the view that damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach.”

13. The applicant’s counsel has submitted further that the balance of convenience tilts in the applicant’s favour or in the alternative the court should invoke the doctrine of *lis pendens*.

14. In opposing the application, counsel for the respondents has submitted that the applicant is mischievously seeking a mandatory injunction by trying to restrain the respondent from continuing to occupy the suit property yet he has been in occupation for more than 3 years. This would in essence amount to seeking to have the respondent evicted from the suit property before the case is heard. I must say that I agree with Counsel's submission. I will therefore proceed to examine how the courts have treated prayers for mandatory injunction.

15. In **Bharat Petroleum Corporation Ltd V Haro Chand Sachdeva AIR 2003** Gupta J of the Delhi High Court observed as follows:

“While courts have power to grant temporary mandatory injunction on an interlocutory application is not disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on an interlocutory application, it is granted only to restore the status quo and not to establish a new state of things.”

16. Closer home in **Kenya Breweries Ltd V Washington Okeyo (2002) eKLR** the Court of Appeal held that a mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could be easily remedied, or where the defendant tried to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.

17. In the instant case, the applicant has not demonstrated that there are compelling circumstances to warrant the issuance of a mandatory injunction.

18. It has also been submitted that the applicant has not demonstrated that the suit property is in any danger of being wasted, damaged or alienated and therefore the applicant has failed to prove that he is entitled to injunctive relief.

19. I have carefully considered the pleadings, application, affidavits, annexures and rival submissions herein and on the material placed

before the court I find and hold that the balance of convenience does not tilt in the applicant's favour as the respondent has been in occupation of the suit land for a period of more than three (3) years and it would not make sense to restrain them from or remaining on it using it now. I therefore find that the application is not merited and I dismiss it with costs to the costs to the respondents.

Dated, signed and delivered at Kericho this 27th day of February, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Ngetich for the Plaintiff.
2. No appearance for the Defendant.
3. Court Assistant - Rotich