



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO. 3 OF 2018**

**EDWIN KIPKOECH BIEGON.....PLAINTIFF**

**VERSUS**

**PETER KIPNGETICH RONO.....1<sup>ST</sup> DEFENDANT**

**RAYMOND KIPKEMOI RONO.....2<sup>ND</sup> DEFENDANT**

**GEOFFREY KIPKEMOI RONO.....3<sup>RD</sup> DEFENDANT**

**MARYLYNE CHEPNGETICH.....4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. By a Notice of Motion dated 10<sup>th</sup> January, 2018 brought under the provisions of Order 40 Rule 3 (1) and Order 51 of the Civil Procedure Rules as well as sections 1, 1A, 3 and 3A of the Civil Procedure Act the Plaintiff/Applicant seeks the following prayers:

*a) Spent.*

*b) Spent.*

*c) That this honourable court do issue an order of temporary injunction restraining the defendants, their servants, agents, employees, representatives, heirs and assigns, from encroaching onto, cultivating, grazing animals, cutting down trees and/ or doing any acts that are detrimental to the plaintiff's peaceful right of occupation, possession and use over land parcel no. KERICHO/KIPKELION/BARSIELE BLOCK 2 (KAPLABA) 202 measuring 6.87 Hectares pending the hearing and determination of the main suit.*

*d) That the Officer Commanding Station (OCS) Kipkelion Police Station be directed to enforce the said orders.*

*e) That the costs of this application be borne by the defendant.*

2. The application is based on the grounds stated in the Notice of Motion and the Plaintiff's affidavit sworn on the 10<sup>th</sup> January, 2018.

3. In the supporting affidavit the Plaintiff depones that he is the registered proprietor of land parcel

number KERICHO/KIPKELION/BARSIELE BLOCK 2 (KAPLABA)202 through transmission as the husband and administrator of the estate of Priscillah Chepkurui Biegon, pursuant to the Certificate of Confirmation of Grant issued in KERICHO HCC Succession Cause No. 35 OF 2015. He has annexed a copy of the Grant to his affidavit.

4. He depones that the defendants who occupy an adjacent parcel of land have encroached into his land and have been cutting down trees, grazing their animals and disrupting his quiet and peaceful occupation of the suit property.

5. In opposing the application, the defendants rely on the affidavit of Peter Kipngetich Rono, the 1<sup>st</sup> defendant in which he depones that they have been occupying the suit property for the last 34 years. He depones that the suit property which initially measured 156 acres was purchased jointly by Anne Maina (the grandmother of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) and Wilson Kenduiywo between 1976 and 1983. He depones further that in 1984 the said Anne Maina requested the Wilson to curve out the 50 acres belonging to her after paying the necessary fees for mutation but even though he agreed, Wilson kept procrastinating until Anne died in 2012. He depones that while Anne was sick Wilson took advantage of the situation and started selling portions of the suit property to third parties including the plaintiff.

6. The parties agreed to canvass the application by way of oral submissions.

7. In his submissions learned counsel for the Plaintiff summarized the plaintiff's affidavit and submitted that the Plaintiff had satisfied the principles in the case of **Giella V Cassman Brown and Company Ltd 1973 E.A 358** and is therefore entitled to a temporary injunction in order to protect his constitutional rights to property.

8. He further submitted that the defendants do not deny that the suit property belongs to the plaintiff as they own an adjacent parcel of land and in case they are not sure of the boundary, a surveyor ought to be sent to the ground to ascertain the same.

9. Learned counsel for the defendant submitted that the plaintiff's application is defective but did not elaborate. He submitted that the defendants are the grandsons of one Anne Maina while the plaintiff is the son-in-law and they have been living on the suit property for the last 34 years and have even buried some of their kin on it. He confirmed that the suit property was purchased jointly by the said Anne Maina and Wilson Kenduiywo but Wilson failed to transfer Anne's portion measuring 50 acres to her.

### **Issues for Determination**

10. The main issues for determination are as follows:

- i. Whether the plaintiff has satisfied the conditions in the case of **Giella V Cassman Brown**
- ii. Whether the plaintiff is entitled to the orders sought
- iii. Who should bear the costs of this application

### **Analysis and Determination**

11. 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 it will decide the application on a balance of convenience.”*

12. 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”.*

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

14. 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”*

15. The Plaintiff has annexed a title deed and certificate of official search to show that that he is the registered proprietor of the suit property. This is *prima facie* evidence of ownership in accordance with section 22 of the Land Registration Act.

16. The said section 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 and indefeasible owner thereof”.*

17. Granted that the defendants dispute the manner in which the plaintiff acquired the said title, at this juncture I am not required to delve into the merits of the case.

18. It has further been submitted by the plaintiff’s counsel that if the application is not granted the applicant shall suffer irreparable loss. In the case of **JM Gichange V Cooperative Bank of Kenya (2005)** 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 in damages. I hold the view that damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach.”*

19. Based on the above authority I am persuaded that the plaintiff has satisfied the second condition for the grant of a temporary injunction.

20. The court has however been cast into some doubt owing to the defendant’s assertion that they have been residing on the suit property for the last 34 years and the submission by the plaintiff’s counsel that there may be need to ascertain the boundary between the plaintiff’s parcel of land and that of the defendants. In the circumstances I am inclined to decide the application on a balance of convenience. Consequently I will apply the test in the case of **Films Rover International** which held that:

*“the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”*

21. Furthermore, issuing an injunction in terms of the prayers sought by the plaintiff may amount to evicting the defendants before the suit is heard on its merits. From the pleadings it is not clear when the encroachment started and when Priscilla Chepkurui Biegon from whom the Plaintiff derives his title purchased the suit property as this would help the court ascertain when and how the encroachment happened. These are issues that can only become clear at a full hearing.

22. The role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties cases. This was so held in the case of **Mbuthia v Jimba Credit Corporation 1988 KLR** where the Court stated as follows:

*“In an application for interlocutory injunctions, the Court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases”*

23. Consequently, I am disinclined to grant the orders sought in absolute terms but in the interest of justice I grant a temporary injunction in the following terms:

- a) That pending the hearing and determination of the suit herein the defendants, are restrained from cultivating, grazing animals, cutting down trees or in any manner whatsoever interfering with the plaintiff’s land parcel number KERICHO/KIPKELION/BARSIELE BLOCK 2 (KAPLABA) 202 measuring 6.87 Hectares. However the Defendants shall continue occupying their houses.
- b) The OCS Kipkelion Police Station shall provide security during the survey exercise.
- c) For the avoidance of doubt I direct that the District Surveyor, Kericho visits the suit land to ascertain the boundary between the plaintiff and the defendants and file his report in court within the next 21 days. The costs of the said survey shall be borne equally by the parties.
- d) That the parties herein shall comply with order 11 of the Civil Procedure Rules within the next 21 days so as to expedite the hearing of this case.
- e) The costs of this application shall be in the cause.

**Dated, signed and delivered at Kericho this 19th day of March, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Koko for the Plaintiff
2. Court Assistant - Rotich