



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 87 OF 2017

GIDEON KIPROTICH TONU.....PLAINTIFF/APPLICANT

VERSUS

JOHN CHERUIYOT RONO.....1ST DEFENDANT/ RESPONDENT

GEOFFREY KIPNGETICH KORIR...2ND DEFENDANT/RESPONDENT

AND

WESLEY KIPRONO YEGON.....1ST INTERESTED PARTY

VIOLET MORAA GISEMBA.....2ND INTERESTED PARTY

RICHARD KIPYEGON TOO.....3RD INTERESTED PARTY

RULING

1. This Ruling is in respect of the Plaintiff's application dated 20th July 2017 in which he seeks the following orders:

a) Spent

b) *That pending the hearing and determination of this suit the defendants by their agents or servants be restrained from trespassing, entering, accessing and/or in any way interfering with the plaintiff's possession and utilization of the property known as Residential plot No. C –Bomet Township (Plan No. BMT/336/97/13) situate in Bomet Township, Bomet County. The OCS Bomet Police Station to assist in the enforcement of this order.*

c) *That pending the hearing and determination of this suit the defendants by their agents or servants be compelled to vacate and/or hand over possession to the plaintiff of that property known as Residential Plot No C- Bomet Township (Plan No. BMT/336/97/13) situate in Bomet Township, Bomet County .*

d) *The OCS Bomet Police Station to assist in the enforcement of this order.*

2. The application is based on the grounds stated in the Notice of Motion and on the applicant's affidavit sworn on the 20th July 2017 and supplementary affidavit sworn on 14th October 2017 and Further Supplementary Affidavit sworn on the 22nd November 2017. In the said affidavit the applicant avers that he purchased the suit property from the 1st Defendant in June 2015 at an agreed price of Kshs. 1,300,000 which he paid in full. He has attached documents in support of the payments. He avers further that after purchasing the said plot he took possession thereof but in August 2016 the 2nd defendant destroyed his fence, moved into the plot and started ploughing it followed by the interested parties who moved in in July 2017 and started digging a pit latrine.

3. The plaintiff avers that the 2nd defendants acts amount to trespass while he accuses the 1st defendant of breach of contract. He avers that as a result of the acts of the defendants and interested parties, he has been denied the use of his plot and he has suffered loss and damage.

4. The application is opposed by both defendants and the 1st Interested party. The 1st defendant filed Grounds of Opposition in which he claims that the plaintiff has no genuine claim against him to warrant the orders sought being granted. He also stated that the defendants were likely to be prejudiced if the orders were granted. He filed a Defence in which he denied having entered into any contract with the plaintiff.

5. The 2nd defendant filed an affidavit on 26th September 2017 in which he claims to be owner of approximately 0.875 acres of the suit property having bought the same from one Violet Gisemba (the 2nd Interested party) vide a sale agreement dated 20th December 2014. He further alleges to have bought an additional portion of the suit property measuring 0.125 acres together with the 1st interested party on 13th January 2013. He has attached copies of the sale agreements.

6. He avers that at the time he bought the suit property from the 1st defendant in 2014, the same was vested in John Cheruiyot Rono (the 1st Defendant) who had a letter of allotment from the Commissioner of Lands. He further avers that the said John Cheruiyot Rono agreed to have the suit property jointly registered in his name and that of the 2nd and 3rd interested parties in 2012. He avers that the 1st interested party later purchased 0.18 acres of the suit property from the 3rd interested party. He avers that when the plaintiff entered the suit property in August 2016, he (the 2nd defendant) reported the matter to the police station and the plaintiff left. He denied destroying the plaintiff's fence and stated that he has been paying the land rent and rates to the County Government of Bomet.

7. Wesley Kiprono Yegon the 1st interested party filed a Replying affidavit in which he claims to have bought a portion of the suit property measuring 50x100 feet from the 3rd interested party. He explains that the 3rd Interested party bought the portion from one John Kiprotich Yego who was one of the persons in respect of whom the 1st defendant was holding the suit property. He avers that he has been in occupation of his portion of the suit property since he bought it. He avers that he was not privy to any transaction over the suit property between the plaintiff and the 1st defendant as the alleged sale took place when he had already bought his portion.

8. The issues for determination are as follows:

i. Whether the plaintiff has met the threshold for the grant of a temporary prohibitory injunction

ii. Whether the plaintiff is entitled to a mandatory injunction

9. With regard to the first issue the principles for granting a temporary injunction were set out in the celebrated case of **Giella V Cassman Brown 1973 E.A 358** 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. 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”

11. In order to establish a prima facie case it was incumbent upon the applicant to produce title documents or letter of allotment to show that that he has a legal claim over the suit property. In the instant case the applicant has not attached any certificates of title to his supporting affidavit or further affidavits to show that he is the registered proprietors of the suit property. What he has attached is a sale agreement which has been disputed by the 1st defendant. The 2nd defendant and interested parties have also attached sale agreements showing the respective portions of the suit property purchased by them. In the circumstances, the plaintiff has not established that he has a better claim than the defendants or interested parties. Infact it is the 1st defendant who has the allotment letter in respect of the suit property. The plaintiff has therefore failed to prove that he has a prima facie case with a probability of success.

12. As the Plaintiff has failed the first test for the grant of an injunction, I need not examine the other tests. I will however comment on the second issue which is whether the plaintiff is entitled to a mandatory injunction.

13. 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”

14. In the instant case the issue of ownership of the suit property is not that clear cut as there are competing interests over the suit property and it is one that can only be resolved at a full hearing.

15. 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 plaintiff has not met the threshold for a prohibitive or mandatory injunction. 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 13th day of March 2018

J.M ONYANGO

JUDGE

In the presence of:

Mr O. Langat for Koech for the 2nd Defendant

Miss Kitur for Mr Magut for the Plaintiff

Miss Chelimo for the 1st Defendant and 1st Interested Party

Court Assistant: Rotich