



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 27 OF 2014

MARTHA CHERUGUT RUTOH.....PLAINTIFF

VERSUS

KIMIBEI A. RUTOH.....1ST DEFENDANT

ANNAH CHEKEMOI RUTOH.....2ND DEFENDANT

GEOFFREY KIPKORIR BII.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a plaint dated 18th June 2014 seeking the following reliefs against the defendants:

a) A permanent injunction to restrain the defendants by themselves, their workers, agents, servants or anybody claiming under them from entering, cultivating, developing, destroying any development, threatening the plaintiff and or her offspring with physical harm or death and/or in any other way interfering with the plaintiff's possession, occupation, use and development of half portion of the land known as KERICHO/SOSIOT/1097 and in particular from preventing her son Erick Kiplangat Bii from developing and/or planting tea bushes on the same

b) Tea seedlings valued at Kshs. 40,000

c) Costs of this suit

d) Interest.

2. Together with the Plaint, the Plaintiff filed an application for injunction and obtained a temporary injunction in the above-stated terms against the defendants pending the hearing and determination of the suit herein.

3. Despite being served with Summons to enter Appearance, the Defendants have been attending court but they have never filed any defence.

4. When the case came up for hearing the Plaintiff testified and called one witness. The gist of the Plaintiff's evidence is that she is the first wife of the 1st defendant, having got married under Kipsigis customary law in 1960. The 1st defendant later married a second wife (2nd defendant) in 1981. The 1st defendant is the registered owner of land parcel number Kericho/Sosiot/1097. The plaintiff produced a copy of the Certificate of official search as an exhibit. After he married the 2nd defendant, the 1st defendant divided the suit property into two portions and gave one to the plaintiff while the 2nd defendant was given the other portion. The plaintiff testified that she settled her son Eric Kiplangat Bii on her portion.

5. In 2013 the 1st defendant destroyed the plaintiff's house and sold the building material to villagers as firewood. In 2014 the Plaintiff's son wanted to plant some tea seedlings but they were destroyed by the 1st defendant.

6. The plaintiff called her son Eric Kiplanagat Bii as PW2. He corroborated the plaintiff's evidence and stated that the 1st defendant had shown him where to build a house on his mother's portion. In 2013 he bought some 4,000 tea seedlings valued at Kshs. 40,000 for planting on his mother's portion of the suit property but the said seedlings were destroyed by the 1st defendant. He confirmed that the plaintiff's house was demolished by the plaintiff and that the defendants had been threatening him.

7. The main issues for determination are as follows:

i. Whether the plaintiff is entitled to the exclusive use and occupation portion of land comprised in land parcel number Kericho/Sosiot/1097 given to her by the 1st defendant

ii. Whether the defendants should be permanently restrained from interfering with the plaintiff's portion of land.

iii. Who should bear the costs of this suit.

8. The Plaintiff's evidence which was not challenged is that she is the beneficial owner of half of land parcel number KERICHO/SOSIOT /1097 as the same was given to her in her capacity as the first wife of the 1st defendant. She testified that this is where her matrimonial home is and she has been enjoying quiet and peaceful possession of the same from the time she got married in 1960 until 2013 when the 1st defendant demolished part of her house.

9. In accordance with Kipsigis customary law, the 1st defendant divided his land into two after marrying the 2nd defendant so that each of his wife could have her distinct home comprising of her matrimonial home where she would live with her children. Her son Eric Kiplangat Bii who was her only witness corroborated her evidence and confirmed that indeed he was told to build his house on the said parcel of land in accordance with Kipsigis customs as this is the portion that was assigned to his mother. He also confirmed that the plaintiff's house was destroyed by the 1st defendant.

10. I therefore find and hold that the plaintiff has a beneficial interest in 1.849 acres comprised in land parcel number KERICHO/SOSIOT/1097 being the portion given to her by the 1st defendant which is ascertainable and distinguishable as per the surveyor's report dated 6th April 2017.

11. With regard to the prayer for injunction, the principles in the case of *Giella V Cassman Brown & Company Ltd* 1073 E.A 358 apply. These 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 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”.

13. 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”

14. It is clear from the plaintiff's testimony that the defendants are hell-bent on alienating the suit property from the plaintiff yet this is her matrimonial home. It is also clear that defendants have been hostile to her and her children, particularly PW2 as the defendants have gone as far as destroying the plaintiff's house, destroying the tea seedlings planted by PW2 and threatening them and unless they are restrained by injunction the plaintiff is likely to suffer irreparable harm.

15. In the circumstances, the plaintiff has proved her case on a balance of probabilities and I accordingly enter judgment for her and direct as follows:

a) That the Plaintiff has a beneficial interest in and is entitled to the exclusive use and occupation of 1.849 acres comprised in land parcel number KERICHO/SOSIOT/1097 being her matrimonial home.

b) A permanent injunction is hereby issued restraining the defendants by themselves their workers, agents, servants or anybody claiming under them from entering, cultivating, developing, destroying, any development, threatening the plaintiff and or her offspring with physical harm or death and/or in any other way interfering with the plaintiff's possession, occupation, use and development of half portion of the land known as KERICHO/SOSIOT/1097 and in particular from preventing her son Erick Kiplangat Bii from developing and/or planting tea bushes on the same.

c) The cost of tea seedlings valued at Kshs. 40,000.

d) This being a matter between a couple each party shall bear their own costs

Dated, signed and delivered at Kericho this 13th day of March 2018

J.M ONYANGO

JUDGE

In the presence of:

Miss Chelimo for Mr Onesmus Langat for the Plaintiff

Defendants present in person

C/A Rotich