



**REPUBLIC OF KENYA**

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

**ELC NO. 263 OF 2017**

**RAPHAEL AKHIM OKELLO.....PLAINTIFF/APPLICANT**

**VERSUS**

**THOMAS MBOYA AMOLLO.....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff/applicant filed an application by way of a Notice of motion dated 7/3/2017 on 7/3/2017 under Order 40 Rules 1, 2A and 9 of the Civil Procedure rules and Order 51, Rules 1, 2 & 3 of the Civil Procedure rules, 2010 & Section 1A, B 3A & 3A & 63 (e) of the Civil Procedure Act & Section 68 of the Land Registration Act No. 3 of 2012 & Section 150 of Land Act, No. 2 of 2012 & Section 13 & 19 of the Environment and Land Court Act No. 19 of 2011 & Article 159 (2) (d) of the Constitution, 2010 & the inherent jurisdiction of the Honourable court. He is seeking against the defendant the following orders;-

**a. Spent.....**

**b. THAT, pending the hearing and determination of this application, the Honourable Court be pleased to grant an order of injunction restraining the Defendant /Respondent either by himself his agents/servants from entering upon cultivating, trespassing onto and/or otherwise interfering or dealing howsoever with that parcel of land known as LR. NO. WEST KASIPUL/KOTIENO KOCHICH/971 (*hereinafter referred to as the suit property*).**

**c. THAT, pending the hearing and determination of this suit, the Honourable court be pleased to grant an order of injunction restraining the Defendant/Respondent either by himself, his agents/servants from entering upon cultivating, trespassing onto and/or otherwise interfering or dealing howsoever with the suit property.**

**d. THAT pending the hearing and determination of this suit, the Honourable court be pleased to grant an order of eviction and permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the Defendant from entering into, re-entering, trespassing onto, building structures, cultivating, abusing the plaintiff's rights, interfering with and/or in any other manner, dealing with the suit property.**

**e. Costs of this application be borne by the Defendant/Respondent.**

2. The application is anchored on a 15 paragraphed supporting affidavit sworn on 7/3/17 by the applicant and a copy of title deed to the suit property issued on 15/11/2016 marked RAO 1(a) and a certificate of official Search dated 9/2/2017 for the suit property marked RAO 1(b). The grounds of application render further support to it. The grounds include that;-

**a. The plaintiff/applicant has at all material times been the registered proprietor of the suit property**

**b. It is in the interest of justice that the instant application be granted.**

3. The Defendant/respondent in his replying affidavit sworn on 21/6/2017, opposed the application. He termed it devoid of merits and sought its dismissal. He averred, among others, that the application is misleading and constitutes deliberate misrepresentation that the said suit property was bought by his late father in 1972 and he has stayed thereon over 20 years. He attached to his affidavit, the suit property record and an affidavit in support of petition in a Succession cause.

4. Learned counsel Mr, Wilkins Ochoki is on record for the plaintiff/applicant. There is no appearance for the defendant/respondent. On 15/3/2013, learned counsel Mr. A. Kerario requested for time to enter on record formally for learned counsel, Mr. Odingo for the defendant/respondent. The court granted the request but no counsel has entered on record for the defendant/respondent to-date. The court also ordered that the prevailing status quo on the suit property to be observed and maintained by the parties pending the hearing and determination of the instant application.

5. On 25/7/17, this court directed that the application be argued by way of written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice direction No. 33 (a) of the Environment and Land Court Practise Directions, 2014**. In that regard, only the plaintiff/applicant's counsel filed submissions dated 21/9/2017. He urged the court to allow the application and he relied on the following authorities:-

- a) **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358** on the three conditions for grant of injunction.
- b) **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 1215** in regard to prima facie case in a civil application.
- c) **Olympic Sports House Ltd –Vs- School Equipment Centre Ltd (2012) e KLR**.
- d) **Robert Ng'ang'a Marabu & Another –vs- Julius Mboya Munyora & 3 others (2015) e KLR** on mandatory injunctions.

6. I have carefully considered the entire application, the replying affidavit and submissions by the plaintiff/applicant's counsel. The issue for determination at this stage are whether:-

- a) **The plaintiff/applicant has satisfied the well settled conditions for grant of injunction and**
- b) **The plaintiff/applicant is entitled to the orders sought in the application.**

7. The application is based on his supporting affidavit sworn on 7<sup>th</sup> March, 2017 by the plaintiff/applicant. He averred, inter alia, that he will suffer irreparable loss and that this court is enjoined to protect and/or vindicate his rights and/or interests. He further annexed documents marked RAO 1a (b) to the application. The documents are prima facie evidence that the plaintiff/applicant is the owner of the suit property pursuant to **Section 26 of the Land Registration Act, 2012** that subject to exceptions (a) and (b) of the section, certificate of title to registered land is to be held as conclusive evidence of proprietorship.

8. The defendant/respondent has offered an explanation that his late father bought the suit property in 1972 and that he has stayed on it for over 20 years. Record of the suit property shows that the plaintiff/applicant is its current owner. The explanation fails to thwart prima facie case of proprietorship made out by the plaintiff/applicant as held in **Mrao case** (Supra).

9. The plaintiff/applicant claimed that he is bound to be deprived of or denied his ownership benefits of the suit land hence suffer irreparable damages. **Article 40 of the Constitution of Kenya, 2010** provides for the right to protection of property. I am inclined to concur with the view of Mabeya J, in **Olympic Sports House Ltd case** (supra) that the statutory rights of the plaintiff/applicant have been violated by the defendant/respondent's actions on the suit property hence an injunction should issue to aid the law in the current circumstances.

10. On a balance of convenience, the plaintiff/applicant stated that the defendant/respondent has barred him from accessing the suit property. The actions of the latter are likely to dispossess him the suit property. Therefore, I find that the balance of convenience tilts in favour of the plaintiff/applicant.

11. The plaintiff/applicant sought an order of eviction and a permanent injunction against the defendant/respondent in payer number 4 of the application. He sought the same orders in his plaint dated 7<sup>th</sup> March, 2017. The orders are final in nature and have to await the hearing and determination of the suit. Those orders are not suitable at this stage of the proceedings as they may be prejudicial to the defendant/respondent. I am inclined to disallow them accordingly.

12. In a nutshell, the application has satisfied the conditions for grant of an interim injunction sought as laid down in **Giella case (supra)**. I uphold the able submissions by the plaintiff/applicant's counsel.

13. A fortiori, I find the application by the plaintiff/applicant partially merited.

14. Accordingly, I order as hereunder:-

- a) **I grant an interim order of injunction sought as order 3 in the application for part of the property in use and or occupation by the plaintiff/applicant.**
- b) **I decline an order of eviction and permanent injunction sought as order 4 in the application.**
- c) **Costs of the application shall be in the cause.**

**DELIVERED, SIGNED and DATED** in open court at MIGORI this 1<sup>st</sup> day of **MARCH, 2018**.

**G.M.A. ONGONDO**

**JUDGE**

In the presence of :-

Mr Omotto, learned counsel holding brief for Mr Ochoki, learned counsel for the plaintiff/applicant

Tom – Court Assistant