



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO.111 OF 2017**

**ERIC KIPNGENO KOECH.....PLAINTIFF**

**VERSUS**

**JOSEPH CHERUIYOT MESIS.....1<sup>ST</sup> DEFENDANT**

**NICHOLAS KIPNGENO.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. What is before me is the plaintiff's application dated 27<sup>th</sup> September, 2017 which seeks an injunction to restrain the Defendants/Respondents whether by themselves, their servants, agents or anybody acting on their behest from re-entering, trespassing, cultivating, or in any other way interfering with Plaintiff/Applicant's property known as land parcel number KERICHO/EAST SOTIK S.S/1114 measuring 0.57 Hectares pending the hearing and determination of the suit. This follows the court's Ruling dated 15<sup>th</sup> December, 2017 which set aside an earlier order granting the application after the it was heard in the absence of the respondents.

2.The application is based on the grounds set out in the notice of motion and the plaintiff's supporting affidavit sworn on the 28<sup>th</sup> September, 2017. In the said affidavit the plaintiff depones that he is the registered proprietor of all that parcel of land known as KERICHO/EAST SOTIK/1114 measuring 0.57 hectares. He depones that he acquired the suit property from one Paul K. Maritim who in turn bought it from the original owner of land parcel number KERICHO/EAST SOTIK S.S /241 Zibora Cherotich Maina and took possession soon thereafter.

3. He further depones that the defendants who are the son and grandson of Zibora Maina trespassed onto the land in November 2016, unlawfully damaged his fence and crops and disrupted his farming activities. The plaintiff subsequently reported the matter to the police and there is pending in Bomet court criminal case no. 1636 of 2016 where the 1<sup>st</sup> defendant has been charged with malicious damage to property.

4. The application is opposed by the defendants through the 1<sup>st</sup> defendant's affidavit sworn on the 19<sup>th</sup> January, 2018. In the said affidavit the 1<sup>st</sup> defendant challenges the validity of the plaintiff's title and depones that the plaintiff fraudulently registered himself as the proprietor of the suit property in collusion with the Land Registrar Bomet. He depones that Paul Maritim did not purchase the suit property from Zibora Cherotich Maina and he could therefore not have passed a good title to the plaintiff. He denies that the plaintiff has been in occupation of the suit property and states that he has been using his influence as a police officer to harass the defendants. He claims that the plaintiff's title is tainted with fraud and he has therefore not proved that he is entitled to the remedies sought.

5. The parties opted to canvass the application by way of written submissions and each of their respective advocates filed theirs.

6. In his submissions counsel for the plaintiff submits that the plaintiff has produced sufficient proof to show that he is the registered proprietor of the suit property and in terms of section 26 of the Land Registration Act, he should be deemed as the *prima facie* owner of the suit property. He submits that Joseph Mesis who is the son of Zibora Maina, the registered proprietor of the suit property sold the same to Paul K. Maritim and the said Zibora Maina signed the sale agreement and letter of consent.

7. He submits that the fact that the 1<sup>st</sup> defendant has been charged with the offence of creating a disturbance in a manner likely to cause a breach of peace shows that the plaintiff may suffer damages which cannot be compensated by damages and the 1<sup>st</sup> defendant ought to be restrained from his acts of trespass so as not to deprive the Plaintiff of his right to property.

8. On the other hand, counsel for the defendants submits that the plaintiff's title is tainted with fraud as Zibora Maina did not sell the suit property to Paul Maritim as alleged. This is borne out by the sale agreement produced in Bomet PM Criminal Case No. 1636 of 2016 which

shows that Paul K. Maritim bought the suit land from Joseph Cheruiyot Mesis and not Zibora Cherotich Maina. He submits that Paul Maritim not having purchased the suit land from the registered proprietor, did not have a good title to pass to the plaintiff. Indeed, the green card attached to the plaintiff's supporting affidavit does not bear the name of Paul Maritim. This casts doubts as to how the said Paul Maina sold the suit land to the Plaintiff. It is the defendants' submission that section 26 (1) of the Land Registration Act does not confer proprietary rights to a person who has acquired a title unprocedurally or by means of fraud.

9. He further submits that even though the plaintiff alleges to have bought the suit land in 2007 he has never been occupation thereof as it is the defendants and the family of Zibora Cherotich who have been occupying it. He has therefore not demonstrated that he stands to suffer any irreparable loss if the orders sought are not granted.

#### **Issue for Determination**

10. The main issue for determination is whether the applicant has met the threshold for the grant of a temporary injunction. 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 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.”*

11. 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”.*

#### **Analysis and Determination**

12. The first issue that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. The plaintiff has produced a title deed in respect of the suit land issued in 2015. The validity of this title has however been challenged by the defendants who allege that it was obtained unprocedurally. Suffice is to say that this is a weighty issue which can only be determined at a full hearing when all the evidence is adduced by both parties. It is also instructive that even though the Plaintiff has pleaded in his plaint that he bought the land in 2007, he appears not to have taken possession of it until his recent attempts in 2016. While section 26 of the Land Registration Act 2012 provides that the certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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; there is are two express provisos:

Section 26(a) where the title is challenged on the ground of fraud or misrepresentation to which the person is proved to be a party.

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

13. At this preliminary stage the court is not required to make any conclusions regarding the validity of the title but the fact that the case turns on this issue and the plaintiff is not in possession militates against the injunctive orders he is seeking.

14. The plaintiff has stated that he stands to suffer irreparable loss if the order of injunction is not granted but as I have pointed out earlier, he stayed for almost ten years before taken possession of the suit land and his assertion is therefore not convincing.

15. Secondly, it is common ground that the plaintiff's attempt to take possession of the suit land has resulted into violence which is the subject of Bomet PM Criminal case No. 1636 of 2016. In my considered opinion the balance of convenience tilts in favour of the Defendants as the Court will have to determine whether the plaintiff's title is valid. This is one of those situations where the court has to take the course that appears to carry the lower risk of injustice if it should turn out to have been wrong as stated in the case of **Amir Suleiman V Amboseli Resort** (supra).

16. Accordingly, I decline to exercise my discretion in favour of the plaintiff and dismiss the application for injunction. I direct that the parties comply with order 11 of the Civil Procedure Rules within 30 days in order to pave way for an expeditious disposal of the suit.

The costs of this application shall be in the cause

**Dated, signed and delivered at Kericho this 13th day of April, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of**

1. Mr. Langat for the Plaintiff/Applicant
2. Mr. Koko for Defendant/Respondent
3. Court clerk - Rotich