



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO. 16 OF 2018

JULIUS KIPRONO SEREM.....PLAINTIFF

VERSUS

FRED SIELE.....1ST DEFENDANT

PAUL KOSKEI.....2ND DEFENDANT

MICHAEL NGETUK.....3RD DEFENDANT

JULIUS KORIR.....4TH DEFENDANT

ALFRED TERER.....5TH DEFENDANT

STELLA CHEMUTAI.....6TH DEFENDANT

RULING

Introduction

1. The application before me is dated 9th April 2018. The said Notice of Motion which is brought pursuant to order 40 Rules 1 and 4 of the Civil Procedure, sections 3 & 3A of the Civil Procedure Act seeks the following prayers:

- a) Spent
- b) Spent
- c) THAT the Respondents either by themselves, their agents, representatives and/or any other persons acting in their names be restrained from building further structures, disposing, alienating, wasting and/or in any other way adversely dealing with any part of part of that land parcel known as UNS COMMERCIAL PLOT NO.75 AINAMOI MARKET pending the hearing and determination of this suit.
- d) That the OCS Nyagacho Police Station and the In-Charge Ainamoi Police Post be directed to enforce the orders herein and maintain peace and order within the suit property
- e) THAT the status quo be maintained pending determination of this suit
- f) THAT necessary directions be given
- g) THAT costs be provided for

2. The said application is anchored on the grounds stated in the affidavit and the plaintiff's affidavit sworn on the 9th April 2018. In the said affidavit, the plaintiff deposes that he is the registered owner of land an Unsurveyed Commercial plot at Ainamoi Market measuring 0.22 hectares. He has annexed a copy of the letter of allotment from the County Council of Kipsigis. He deposes that on or about the 28th day of March 2018, the 1st, 2nd and 5th Defendant /Respondents trespassed onto the suit property, destroyed the plaintiff's property and commenced

constructing some structures without his permission.

3. The plaintiff sought the intervention of the OCS Nyagacho Police Station but he did not receive any assistance as the police officer told him that they could only act upon being served with a court order since they were aware that there was a dispute in court over the said plot.

4. The plaintiff further depones that as a result of the defendants' illegal activities on his land he has been denied the use and enjoyment thereof.

5. The application is opposed by the defendants through the Replying affidavit of Paul Koskei, the 2nd defendant sworn on the 11th April 2018 in which he states that the plot referred to by the plaintiff is different from one in respect of which he seeks the order of injunction. He further states that both plot no. 75 and 76 are public utility plots and the applicant cannot claim ownership in respect thereof. He denies that they have constructed any structures on the suit property and states that no evidence has been tendered to that effect.

6. The parties canvassed the application by way of written submissions and their respective advocates filed their submissions.

Issue for Determination

7. The main issue for determination is if the plaintiff is entitled to injunctive relief.

Analysis and Determination

8. 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 the application on a balance of convenience.”

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”.

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”

9. 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 Vs Jimba Credit Corporation Ltd (1988) KLR1**, 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,”

10. In the instant case, even though the plaintiff has attached an allotment letter which appears to be prima evidence that he is the owner of the suit property, the defendants allege that the said allotment letter was issued in respect of a public utility plot. This is a matter that can only be determined after a full hearing. I am therefore constrained to decide the matter on a balance of convenience. This would seem to carry the lower risk of injustice should I turn out to be wrong.

11. In the circumstances I decline to grant the order of injunction in the terms stated by the applicant in his application and direct that the status quo be maintained pending the hearing and determination of this suit. For the avoidance of doubt the status quo means that none of the parties ought to carry on any developments on the suit property until the case is heard and determined.

12. The costs of the application shall be in the cause.

Dated, signed and delivered at Kericho this 30th day of May 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Adams Chelule for Mr. Mutai Joshua for the Plaintiff
2. No appearance for the Defendant
3. Court Assistant - Rotich