



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO 127 OF 2017**

**PHILIP KIPLANAGAT KORIR ..... PLAINTIFF**

**VERSUS**

**JOHN KIPNGENO SANG.....1ST DEFENDANT**

**ROBERT KIPNGETICH KIRUL.....2ND DEFENDANT**

**THE DISTRICT LAND REGISTRAR, KERICHO.....3RD DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4TH DEFENDANT**

**RULING**

1. What is coming up for determination is the plaintiff's application dated 20th November, 2017 in which the plaintiff seeks an order of temporary injunction to restrain the defendants by themselves, agents, servants, employees or otherwise from occupying, sub-dividing, selling, evicting and/or doing any other act which is prejudicial to the Plaintiff's quiet possession of land parcel number KERICHO/LITEIN/1793 measuring 100 X 100 ft.

2. The application is supported by the plaintiff's affidavit sworn on the 20th November 2017 and Further affidavit sworn on 6th February, 2018. The gist of the plaintiff's case is that he bought the suit property from the 1st defendant in 2008 and has been in occupation thereof since then until recently when he discovered that the 1st defendant had sold the same parcel to the 2nd defendant. He depones that the 2nd defendant obtained the title to the suit property fraudulently.

3. The application is opposed by the 1st and 2nd defendants. In the 1st defendant's Replying affidavit on 22nd December 2017, he depones that the plaintiff is not the registered owner of the suit property. He states that the plaintiff is his former tenant who has no authority to claim the suit property. He denies having entered into any agreement with the plaintiff for the sale of the suit property and wonders why the plaintiff never bothered to obtain title documents if indeed he bought the suit property.

4. On his part, the 2nd defendant filed a Replying Affidavit on 11th December 2017 in which he depones that he purchased the suit property from the 1st defendant on 18th April 2017 and thereafter had the same transferred to his name after following due process. He has attached a sale agreement, consent to transfer and a title deed.

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

**Issue for Determination**

6. The main issue for determination is whether the plaintiff is entitled to an order for a temporary injunction against the defendants.

7. 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 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”.

8. The first issue that the court must determine is whether the plaintiff has established a prima facie case with a probability of success.

9. 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”

10. The plaintiff alleges to have purchased the suit property way back in 2008 but strangely, has nothing to show for it. At paragraph 13 of his supporting affidavit, he depones that he did not enter into any written agreement with the 1st defendant and that the agreement was based on trust since the 1st defendant’s father had been their landlord and close family friend for 9 years. Unfortunately for the applicant, it is a legal requirement that a contract for the sale of land must be evidenced in writing and the law does not recognize land sale agreements based on friendship and trust.

11. Section 38 (1) of the land Act stipulates as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless

a. The contract upon which the suit is founded

i. Is in writing

ii. Is signed by all parties thereto; and

iii. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

12. From the foregoing, it is clear that the plaintiff has not demonstrated a prima facie case with a probability of success. Even though he challenges the manner in which the 2nd defendant acquired the title to the suit property, he has no documents to support his claim.

13. In the circumstances, I find no merit in the plaintiff’s application and I dismiss it.

14. The costs of this application shall be in the cause.

**Dated, signed and delivered at Kericho this 9th day of May, 2018.**

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**J.M ONYANGO**

**JUDGE.**

In the presence of:

1. Mr. Bii for the Respondent

2. Mr. Sigei for Mr. Anyoka for the Applicant

3. Court Assistant: Faith