



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO 7 OF 2018

ANDREW KIPROTICH BARSIELE.....PLAINTIFF

VERSUS

PAUL KIPTANUI BARMASE.....1ST DEFENDANT

ELIZBETH CHELANGAT BARMASE.....2ND DEFENDANT

ALICE CHEPKURUI CHUMO.....3RD DEFENDANT

RULING

Introduction

1. This ruling is in respect of the application dated 23rd January 2018. The said application was brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks a temporary order of prohibitory injunction to restrain the Defendants/Respondents, their, agents, servants assignees, representatives or nominees from entering into, trespassing onto, transferring, hiring surveying, continuing with the process of registration of the alleged resultant parcels from the sub-division carried out on 17th January 2016 and in any other manner interfering with the Plaintiff/ Applicant's quiet use, occupation and enjoyment or dealing with all that parcel of land known as KERICHO/KIMULOT/413 (hereinafter referred to as the suit property pending the hearing and determination of this suit.

2. The application is based on the grounds stated in the Notice of Motion and the supporting affidavit of Andrew Kiprotich Barsiele. In the said affidavit, the plaintiff depones that he is the registered proprietor of the suit property having purchased it in 1974. He has attached a copy of the title document as annexure AKB 1. He further depones that he has been in occupation of the suit property since 1975.

3. The plaintiff depones that in 2015, the defendants who are his siblings hired a surveyor to sub-divide the suit property without his consent under pretext that it was family land. The said exercise resulted in his land being sub-divided into four portions namely KERICHO/KIMULOT/2277, 2278, 2279 and 2280. As a result of the said sub-division, the plaintiff avers that on 18th January 2018 he received a letter from the Bomet District Lands office informing him that the county Land officer Bomet and District Surveyor Bureti would visit his land to ascertain the exact boundaries of the alleged resultant parcels from the sub-division

4. The application is opposed by the defendants through the affidavit of Paul Kiptonui Barmase sworn on the 22nd February 2018 on his own behalf and on behalf of the other defendants. He depones that the suit land is family land which was registered in the plaintiff's name on behalf of their late father Kiprotich Barsiele to hold it in trust for the plaintiff's siblings.

5. He depones that immediately after he obtained the title deed, the plaintiff charged the suit property to Kenya Commercial Bank to secure a loan. He failed to repay the said loan and the land was sold at a public auction. He depones that thereafter their late brother William Kiplangat Chumo negotiated with the buyer and refunded him the purchase price. He further depones that the sub-division is intended to ensure that each of the siblings get a share of the suit property as it is family land. He depones that the plaintiff has filed the suit in bad faith.

6. The parties agreed to canvass the application by way of written submissions and each of the parties counsels filed their submissions.

Issue for Determination

7. The main issue for determination is whether the plaintiff is entitled to an order of temporary injunction.

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 it will decide the application on a balance of convenience.”

9. 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”.

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

11. 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

12. The Plaintiff has annexed a title deed and certificate of official search to show that that he is the registered proprietor of the suit property. This is *prima facie* evidence of ownership in accordance with section 22 of the Land Registration Act.

13. The said section provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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”.

14. The defendants however dispute the existence of the said title as they allege that the suit land has been sub-divided giving rise to new land parcel numbers and what remains is for the actual boundaries on the ground to be determined. The manner in which the suit property was sub-divided is in contention and the truth will only be determined at a full hearing. What has not been controverted by the defendants is that the plaintiff is in occupation of the suit property.

15. 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,”

16. I have considered the pleadings, notice of motion, affidavits, annexures and the rival submissions and from the material placed before me, I am persuaded that the balance of convenience tilts in the plaintiff’s favour. Accordingly, I grant a temporary injunction in the following terms:

a) A temporary order of injunction is hereby granted restraining the Defendants/Respondents their agents, servants assignees, representatives or nominees from entering into, trespassing onto, transferring, hiring surveying, continuing with the process of registration of the alleged resultant parcels from the sub-division carried out on 17th January 2016 an in any other manner interfering with the Plaintiff/ Applicant’s quiet use, occupation and enjoyment or dealing with all that parcel of land known as KERICHO/KIMULOT/413 pending the hearing and determination of this suit.

b) The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 4th day of May, 2018.

.....

J.M ONYANGO

JUDGE

In the presence of

1. Mr. Kemboi for the Applicant

2. Mr. Bii for the Respondent

3. Court Assistant - Wambany