



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 144 OF 2017

HENRY KIPNGETICH TERER.....PLAINTIFF

VERSUS

CECILIA SOI.....1ST DEFENDANT

STANLEY NENO.....2ND DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the Plaintiff's application dated 18th April 2018. The said application is brought pursuant to Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 Sections 1A,1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. The plaintiff seeks the following prayers:

1. *Spent*
2. *Spent*
3. *That pending the hearing and determination of the entire suit, temporary orders of injunction do issue restraining the Plaintiff/Respondent, his agents, servants and/or any other person(s) whether acting on his behalf and/or his instructions from trespassing into, constructing structures, plucking tea and/or in any other way interfering with the 2nd defendant/Applicant's quiet possession of all that parcel of land known as KERICHO.NDARAWETA/2153 measuring 0.927 acres registered in the name of Kipsoi Arap Maina (deceased)*
4. *That the cost of this application be provided for.*

2.The application is based on the grounds stated in the Notice of Motion and the 2nd defendant's supporting affidavit sworn on the 3rd April 2018, the gist of which is that the plaintiff and his late brother's wife have invaded the suit property which is registered in the name of the plaintiff's late father and began plucking the applicant's tea and they intend to construct structures thereon. The 2nd defendant avers that he exchanged his land with the plaintiff's late brother and has no claim over the suit property.

3.The application is opposed by the Plaintiff/ Respondent through his Replying Affidavit sworn on the 18th April 2018. In the said affidavit the Plaintiff denies that he has trespassed on to the suit property.

4. The application was argued orally.

5. Mr. Koech learned counsel for the 2nd defendant/applicant relied on the grounds stated in the Notice of motion and the applicant's supporting affidavit. He submitted that in 2007 the applicant entered into an agreement for exchange of land with the plaintiff's late brother, one Zephania Mariandany whereby the deceased gave the applicant the suit property, L.R No. Kericho/Ndaraweta/2153 measuring 0.927 acres in exchange for his land parcel no. Nakuru /Likia/474 measuring 0.7 acres and Nakuru/Likia 359 measuring 0.5 acres. He submitted that the plaintiff has no claim over his late father's land in Kericho as he sold his land and moved to Mau forest where he has been residing. He submitted that there was no dispute between the applicant and the late Zephania Mariandany and that the suit instituted by the plaintiff is aimed at dispossessing him as the plaintiff has realized that the suit property is still registered in his late father's name. He submitted that the plaintiff has not come to equity with clean hands and if the orders sought are not granted the applicant shall suffer irreparable loss.

6. In opposing the application, Mr. Bii, learned counsel for the respondent submitted that the application was defective as none of the applicant's annexures bear his name and he has therefore not established a *prima facie* case. He submitted that there was no evidence to support the applicant's claim. He argued that the plaintiff had sued the applicant because he has trespassed on the plaintiff's land. He argued that the plaintiff has been living on the suit property since birth and that the same has never been sold to the applicant.

7. I have considered the pleadings, the Notice of Motion, affidavits and rival submissions and the main issue for determination is whether the applicant has made out a case for the grant of injunctive orders.

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."

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".

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

10. 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"

11. 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,"

12. The applicant has annexed some agreements whose evidentiary value can only be determined at a full hearing. However, from the material placed before me so far, I am satisfied that the applicant has met the threshold for a prima facie case as defined in the Mrao case (supra). Coupled with this is the acknowledgement by the plaintiff that the applicant is in possession of the suit property. In the circumstances I am of the view that the balance of convenience tilts in the applicant's favour.

13. Accordingly, I grant a temporary injunction in the following terms:

a. A temporary order of injunction is hereby granted restraining the Plaintiff/Respondent his agents, servants or anyone acting on his behalf from trespassing into, plucking tea, constructing structures, cutting trees or in any other way interfering with the 2nd defendant/ applicant's quiet possession and enjoyment of all that parcel of land known as KERICHO/NDARAWETA/2153 measuring 0.927 acres registered in the name of Kipsoi Arap Maina (deceased) pending the hearing and determination of the main suit herein.

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

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

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J.M ONYANGO

JUDGE

In the presence of :

1. Mr. Bii for the Plaintiff

2. No appearance for the Defendant

3. Court Assistant – Wambany