



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KERICHO

E.L.C CASE NO. 23 OF 2018 (0.S)

IN THE MATTER OF LAND PARCEL NO. KERICHO/KAPSUSER/3325

IN THE MATTER OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP22 OF THE LAWS OF KENYA

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT 2011

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION

BETWEEN

GRACE CHEMUTAI KOECH.....PLAINTIFF

VERSUS

FRANICES KIPLANGAT CHEBIROR.....1ST DEFENDANT

KIPKURUI WILLIAM KIMETO.....2ND DEFENDANT

ROBERT KIPKURUI TANUI.....3RD DEFENDANT

RULING

Introduction

1. What is before me is the plaintiff's application dated 13th March 2018 brought pursuant to order 40 Rules 1, 2 (1), 3 (1) and 9, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act. The Applicant seeks an order of temporary injunction to restrain the defendants/respondents by themselves, their agents, servants, employees or otherwise from further encroaching onto, interfering with, cultivating, erecting structures thereon and/or doing any other act that is prejudicial to the plaintiff's proprietary interest in land parcel number KERICHO/KAPSUSER/3325 pending the hearing and determination of this suit.
2. The affidavit is premised on the Grounds stated on the face of the Notice of Motion and the plaintiff's affidavit sworn on the 13th March 2018.
3. In the said affidavit the plaintiff deposes that she purchased the suit property measuring 0.40 hectares from the 1st and 2nd defendants in 1999. She thereafter took possession of the suit property and made some developments thereon. She has attached a copy of the sale agreement and photographs of the said improvements.
4. She further alleges that on or about 7th February 2018 the 3rd respondent trespassed onto the suit property, destroyed crops and started cultivating the same thereby interfering with the plaintiff's use and occupation of the same thereby occasioning the plaintiff loss and damage.
5. The 3rd defendant attempted to evict the plaintiff and when she resisted, he had her locked up at Kapsoit Police station for over 5 hours after which she was released without any charges being preferred against her. She alleges that the situation on the ground is volatile as

violence is likely to erupt.

6. The plaintiff later learnt that the 1st and 2nd defendants had transferred the suit property to the 3rd defendant without her knowledge. The plaintiff claims that the said transfer is unlawful and she prays that she be declared the lawful owner of the suit land by adverse possession.

7. The application is opposed by the 3rd respondent through his Replying Affidavit sworn on the 28th March 2018. In the said affidavit the 3rd Respondent depones that he is the registered owner of the suit property having purchased it in September 2017 from the one Wilson Rotich who in turn bought it from the 1st and 2nd Respondents. He has attached a copy of the sale agreement.

8. The 3rd respondent further depones that after purchasing the suit property, he took possession thereof immediately and has been in occupation thereof without any interference from anyone including the applicant. He claims to have fenced the plot and made some developments including planting crops thereon.

9. The 3rd respondent refutes the plaintiff's claim that she bought the suit property from the 1st and 2nd defendants. She in turn claims that it is the plaintiff who trespassed onto his land and destroyed crops thereon prompting him to report the matter to Kapsoit Police Station. He has attached a copy of the O.B No.

10. The 3rd Respondent denies that the plaintiff has ever lived on the suit property and claims that she had made attempts to occupy the land sometime in May 2017 through one Richard Chepkwony but the matter was reported to the village elder and the chief who held a meeting and it was resolved that the land belonged to Wilson Rotich. He maintains that he plaintiff has no lawful claim to the suit property.

Issue for Determination

11. The main issue for determination is whether the plaintiff has met the threshold for the grant of a temporary injunction.

Analysis and Determination

12. 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”

13. 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,”

14. In the instant case both the plaintiff and the 3rd defendant claim to have bought the suit property from the alleged owners. Each of them have sale agreements and the 3rd defendant has a title deed issued on 31st January 2018. The plaintiff claims to have been in occupation of the suit property since 1999, while the 3rd defendant claims that he has been in occupation thereof since September 2017. Even though the 3rd Respondent has acquired a title to the suit property it's clear that the plaintiff is challenging the same although this is an issue that will be determined at the trial.

15. At this interlocutory stage I am not required to conclusively determine the ownership of the suit property. What I am called upon to determine is whether an injunction ought to be granted to the plaintiff. An injunction is an equitable remedy intended to safeguard the subject matter of the suit from being wasted, damaged or alienated by one party to the detriment of another. In this case the plaintiff alleges that despite having been in occupation of the suit property for over 18 years, she is now faced with imminent eviction by the 3rd respondent who

has acquired title to the suit property.

16. According to the definition in the Mrao case (supra) the plaintiff appears to have a right which has apparently been infringed by the respondents as the plaintiff will need to lead evidence on why she suspects that the 3rd respondent's title is unlawful. I therefore find and hold that she has demonstrated that she has a prima facie case with a probability of success.

17. The plaintiff has also demonstrated that she stands to suffer loss and damage if the injunction is not granted. As stated in her supporting affidavit, the situation on the ground is volatile and there have been threats of violence. When the matter came up in court on 21st March 2018 there were allegations that the plaintiff's house had been burn ostensibly over this dispute. Whereas this is a matter that ought to be investigated by the police, it is clear to me that indeed this is a very emotive and potentially explosive matter.

18. In order for the issue of the title to be determined, there is need to preserve the subject matter of the suit in accordance with the doctrine of *lis pendens*.

19. In the case of *Mawji vs US International University & another [1976] KLR 185*, Madan, J.A. stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

20. The principle of *lis pendens* is therefore applicable in this suit. See the case of *Naftali Ruthi Kinyua V Patrick Thuita Gachure and Another* where the Court held that the doctrine of *lis pendens* is applicable pursuant to the provisions of section 107 of eh Land Registration Act.

21. I am also guided by the principle laid down in the case of Films Rover international cited in the case of Amboseli Resort (supra), that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong.

22. Accordingly, I direct as follows:

a) That the status quo be maintained pending the hearing and determination of the suit herein. For the avoidance of doubt, the status quo means that neither the plaintiff nor the defendant should use or occupy the suit property before this matter is heard and determined. Should any of the parties require to remove their belongings or harvest crops on the suit property they shall do so under the supervision of the OCS Kapsoit Police Station.

b) That the parties comply with order 11 of the Civil Procedure Act within the next 30 days in order to expedite the hearing and disposal of this suit.

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

Dated, signed and delivered at Kericho this 13th day of June 2018

.....

J.M ONYANGO

JUDGE

In the presence of :

1. Mr. Orina for the Plaintiff
2. Miss Mitey for the Defendant
3. Court assistant – Rotich