



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 94 OF 2017

HELLEN CHELANGAT RUTO.....PLAINTIFF

VERSUS

PHILIP NGENO.....1ST DEFENDANT

AMOS LANGAT.....2ND DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated 12th March 2018 brought under Order 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules and sections 3A and 63 (c) of the Civil procedure Act, the plaintiff seeks an order of temporary injunction to restrain the defendant by himself, his the agents, servants or anyone claiming under him from interfering with, harassing, evicting, intimidating the plaintiff or her family members, or alienating them from land parcel number KERICHO/KIPKELION/BARSIELE/220 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 12th March 2018.
3. In the said affidavit the plaintiff depones that she is the legal occupier of the suit property which is registered in the name of her brother ROROGU CHERUIYOT NGENO having been authorized to occupy the same by the registered owner thereof since 1986.
4. The plaintiff avers that on 8th February 2018 the defendants/ Respondents who are her bother and nephew respectively, unlawfully trespassed onto the suit land and started tilling it and grazing their livestock thereon without her permission thus depriving her of the use and occupation thereof. She further depones that the defendants have threatened to evict her from the suit property and will proceed to do so unless restrained by this honorable court.
5. The application is opposed by the defendants through the 2nd defendant's affidavit sworn on the 10th April 2018 in which the 2nd defendant depones that the application is fundamentally defective, incurable in law and made in bad faith.
6. He further depones that the plaintiff is not the registered proprietor of the suit property and that the 2nd defendant has been managing the farm for the last 5 years at the request of his uncle who is the owner thereof for the benefit of his grandmother who is also the mother of Rorogu, the plaintiff and 1st defendant. He states even though he is aware that the plaintiff had been allowed to occupy he suit property by Rorogu Ngeno for sometime, the said Rorogu had given the plaintiff a six months' notice to vacate the suit land. He has attached a long letter by Rorogu to that effect.

Issue for Determination

7. The main issue for determination is whether 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. It is not in dispute that the applicant has been in occupation of the suit property for more than 30 years with the leave and permission Rorogu Ngeno who is the registered owner thereof. The applicant's case is that her right to use and occupy the suit property has been threatened by the defendants as the 2nd defendant has also moved into the suit property and is threatening to evict her. From these facts therefore, the plaintiff has established that she has a *prima facie* case with a probability of success.

11. The second issue that the court has to consider is if the applicant has established that she would suffer irreparable loss if the orders sought are not granted. Having stayed on the suit property for more than 30 years in her own words, this being the only home that she knows, there is no doubt that if she was to be evicted from it, she would suffer irreparable loss.

12. Be that as it may, it has not escaped my mind that the parties herein are closely related and all of them derive their right to use and occupy portions of the suit property from the registered owner thereof. This makes it difficult for any of the parties to claim exclusive rights to the suit property. Annexure “AL3” attached to the 2nd defendant's affidavit gives a detailed background of the facts giving rise to this suit. I am however aware that at this interlocutory stage I am not required to make any final findings regarding the said letter or any other facts as these will only become clear at the full hearing as they must be tested in cross-examination. I agree with counsel for the Respondents that granting an injunction at this interlocutory stage would amount to determining the suit as the only prayer sought in the plaint is an order of permanent injunction against the defendants. I am guided by the case of **Panari Enterprises Limited V Lijoodi & 2 Others (2014) eKLR** where the court declined to grant an interlocutory injunction on that grounds that it would amount to evicting the respondent at the interlocutory stage.

13. In the circumstances I am inclined to determine this application based on the principle laid down in the case of **Films Rover International** which holds that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”.

14. Accordingly, I decline to grant the orders sought and instead order that the status quo be maintained pending the hearing and determination of the suit herein. For the avoidance of doubt, the status as at now is that the plaintiff shall continue to occupy and use the portion she has been occupying which is one acre, while the 2nd defendant shall cultivate and manage the farm (1.75 acres) that he has been managing on behalf of his grandmother who is the mother of the plaintiff, 1st defendant and the registered owner of the suit property until this suit is heard and determined.

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

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

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J.M ONYANGO

JUDGE

In the presence of

1. Mr. Ngeno for the Applicant

2. Miss Kitur for the Respondents

3. Court Assistant - Rotich