



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 28 OF 2018

DAVID KIBET TUEI (suing as the administrator of the estate of

Kenduiywa KIPRONO CHUMO.....PLAINTIFF

VERSUS

JOHANNA KIPKURUI MARSOI.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

Introduction

1. What is before me is the Plaintiff's Notice of Motion dated 26th March 2018 seeking the following prayers:

a. Spent

b. Spent

c. That pending inter partes hearing and determination of the main suit, the Defendants/Respondents by themselves, their agents, servants, employees or anyone acting on their behalf be restrained from entering, selling, transferring, mortgaging, charging, disposing of and/or interfering with 4 acres comprised in L.R No. KERICHO/CHESOEN/2887 which the plaintiff is occupying or doing anything which is prejudicial to the Plaintiff/Applicant's interest therein.

d. That the costs of this application be provided for.

2. The application is supported by the Plaintiff's affidavit sworn on the 26th March 2018.

3. The application is opposed by the 1st Defendant through his Replying affidavit sworn on the 3rd May 2018.

4. The Plaintiff's contention is that the Respondent has fraudulently had the suit land registered in his name thus excluding the Plaintiff and his siblings from the their rightful share thereof.

5. The Plaintiff also contends that he is apprehensive that the Respondent may dispose of , sell, mortgage or interfere with the suit property thereby making it difficult for the Plaintiff to regain his portion thereby rendering him and his siblings landless.

6. In opposing the application, the Respondent refutes the claims leveled against him. He asserts that he is the registered owner of the suit land. He states that the Plaintiff is the administrator of the estate of Kenduiywo Kiprono Chumo- deceased and not Mursoi Chumo who is the Plaintiff's late father who was the registered owner of the suit land. He therefore maintains the that Plaintiff has no claim against him as the suit land was given to the Respondent by his late father during his lifetime. He denies that his late father held the land in trust for the Plaintiff's father.

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 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. The Applicant has annexed a certificate of official search which clearly shows that the respondent is the registered owner of land parcel number KERICHO/CHESOEN/2887. He has also attached a copy of the green card showing that the land was originally registered in the name of Mursoi Chumo.

11. To the extent that the above-mentioned documents relate to the suit property, the Plaintiff has not established ownership of the same. However, from his affidavit, he seems to be staking a claim through his late father, who apparently was entitled to the land registered in the name of the Respondent's late father. These are issues which can only become clear when the matter is heard and all the parties present their evidence.

12. I am however persuaded that in order for the issue of trust to be determined, there is need to preserve the subject matter of the suit in accordance with the doctrine of *lis pendens*.

13. 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...”

14. 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 the Land Registration Act.

15. 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 which more or less accords with the balance of convenience.

16. 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 the Respondent shall continue to use and occupy L.R No KERICHO/CHESOEN/2887 but he shall not sell, transfer, charge or part with possession of the suit land pending the hearing and determination of the main suit..

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 20th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Miruka for Mr. Migiro for the Applicant
2. N/A for the Respondent
3. Court assistant – Rotich