



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC NO. 33 OF 2018

CHARLES CHERUIYOT MOSONIK.....PLAINTIFF/APPLICANT

-VERSUS-

GEOFFREY NG'ENO.....DEFENDANT/RESPONDENT

RULING

Introduction

1. What is before me is the Plaintiff/Applicant's Notice of Motion dated 30th day of April 2018 in which he seeks the following orders:

a) Spent

b) THAT this honourable court be pleased to grant an order of temporary injunction restraining the defendant herein either by himself, his agents, employees and/ or servants from further trespassing, entering, subdividing, excising, fencing, ploughing, planting any crop, occupying, allocating, selling, leasing, charging, transferring, erecting any structures or dealing in any way with the plaintiff's parcel of land known as KERICHO/KAPTEBENGWET/463 pending the hearing and determination of this application.

c) THAT this honourable court be pleased to grant an order of temporary injunction restraining the defendant herein either by himself, his agents, employees and/ or servants from further trespassing, entering, subdividing, excising, fencing, ploughing, planting any crop, occupying, allocating, selling, leasing, charging, transferring, erecting any structures or dealing in any way with the plaintiff's parcel of land known as KERICHO/KAPTEBENGWET/463 pending the hearing and determination of the main suit.

d) THAT a copy of the order extracted hereof be served upon the OCS Mogosiek police station for effective compliance.

e) THAT cost of this application be provided for.

3. The application is supported by the applicant's affidavit sworn on the 30th April 2018. It is opposed by the Respondent through his Replying Affidavit sworn on 4th day of June 2018.

4. The application was canvassed by way of written submissions and counsels for the applicant and the respondent filed submissions on behalf of their respective clients.

Applicant's case

5. The applicant's case is that sometimes in or about the month of May in the year 2005, the plaintiff's deceased father Peter Tengecha Serem, who was the original owner of all the parcels of land known as KERICHO/KAPTEBENGWET 462, 463 and 464, sold and absolutely transferred all that piece of land known as KERICHO/KAPTEBENGWET 462 to one Alfred Maina Goymur, who during his life time continuously complained that what was sold to him was small, albeit without any justification and/or reasonable cause.

6. Sometimes in the year 2006, the defendant's father the late Alfred Maina Goymur, obtained a decree from court authorizing him to bring in a Government surveyor on the suit property to confirm the boundaries and acreage on the ground but he died before the property could be resurveyed.

7. The said Alfred Maina Goymur's wife and children including the defendant herein took over the matter and informed the plaintiff of the intended resurvey. They however resurveyed the property in the absence of the plaintiff and without consent and/or authority encroached on

the plaintiff's parcel of land known as KERICHO/KAPTEBENGWET 463 and became hostile when asked to vacate the said property.

8. The plaintiff reported the matter to the Provincial Administration in January 2012 and involved the Lands Office who resurveyed the property on 10th of January 2014 thereby tampering with the boundaries.

9. When the Bomet District Surveyor visited the said property to re-establish the boundaries, the late Alfred Maina Goymur's family including the defendant herein became extremely hostile and the surveyor advised the plaintiff to seek security orders from court.

10. The District Land Registrar wrote to the defendant herein through his deceased father summoning him to appear before him at the locus in quo and asking him to bring along his witnesses and/or any relevant evidence to enable the Registrar determine the boundary alignment but the defendant and his entire family became very hostile.

11. It is the plaintiff's position that he is the registered owner of all that piece of Land Known as KERICHO/KAPTEBENGWET/463, on which the defendant has since erected a fence, put up tea plantations thereon, planted trees and continues to cut down the trees that the plaintiff planted on the said parcel of land.

12. It is further the plaintiff's position that the defendant herein has illegally and without any color of right trespassed onto the plaintiff's parcel of land thereby placing him on the verge of losing his lawful proprietorship over the property, and that unless the defendant is restrained from perpetuating the aforementioned illegal acts on the plaintiff's land, the plaintiff will not be able to enjoy peaceful and quiet possession of the land.

Respondent's case

13. It is the Respondent's contention that their late father Alfred Maina Goymur purchased land parcel number KERICHO/KAPTEBENGWET/462 from the applicant's late father. He was subsequently registered as the proprietor thereof and issued with a title deed on 20/12/2005.

14. The late Alfred Goymur then took possession of the suit property and lived thereon with his family until he died. His family is still living on the suit property and they have carried out various developments including permanent and temporary houses, tea bushes, trees among others.

15. It is the Respondent's contention that after the demise of their father, they have not taken out letters of administration and they wonder how the property of a deceased person can be re-surveyed in the absence of an appointed legal representative. He denies that him or any of his family members have been hostile as alleged by the applicant.

Issues for determination

16. The issue for determination is summarized as follows:-

1. Whether the Plaintiff/Applicant has met the conditions requisite for the grant of the orders of interim injunction.
2. Whether the Plaintiff/Applicant is entitled to be granted the prayers sought herein

Analysis and Determination

17. Order 40 of the Civil Procedure Rules, 2010 states as follows:-

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

18. 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”

19. 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,”

20. In the instant case the applicant claims that the respondent has trespassed upon the applicant's land parcel number KERICHO/KAPTEBENGWET/463 On the other hand the respondent refutes the allegations of trespass and claims that his late father is the registered owner of land parcel number KERICHO/KAPTEBENGWET/463 which he bought from the applicant's late father. What is clear is that there appears to be a boundary dispute between the parties. Previous attempts to have this boundary dispute resolved through the Land Registrar have proved futile. This is therefore an issue that will have to be determined at the trial after taking the evidence of all relevant witnesses.

21. At this interlocutory stage I am not required to conclusively determine whether or not there is trespass on the applicant's land. What I am called upon to determine is whether an injunction ought to be granted to the plaintiff.

22. 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 applicant alleges that there has been a boundary dispute between the applicant's and the respondent's family since 2011.

23. According to the definition in the **Mrao case** (supra) the plaintiff appears to have a right which has apparently been infringed by the respondents. I therefore find and hold that she has demonstrated that he has a prima facie case with a probability of success.

24. The plaintiff has also demonstrated that he stands to suffer loss and damage if the injunction is not granted. As stated in his supporting affidavit, if the orders sought are not granted, the applicant will not be able to enjoy peaceful and quiet possession of his land. I must however point out that the acts complained of have been going on for the last 7 years or thereabouts and there is no imminent danger of either sale or alienation of the suit land as contemplated by section 40 of the Civil Procedure Rules.

25. Having said that, I am of the view that in order for the issue of trespass to be determined, there is need to preserve the subject matter of the suit in accordance with the doctrine of *lis pendens*.

26. 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...”

27. 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.

28. 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.

29. 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 applicant and the defendant shall continue to use and occupy their respective parcels of land but shall not sell, transfer, mortgage or otherwise part with possession of the suit property until this matter is heard and determined.

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 17th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Chelule for Mr. Kipkoech for the Plaintiff
2. Mr. Andama for Mr. Orora for the Defendant
3. Court Assistant – Rotich