



**Bor v Courts & 4 others (Environment & Land Case
3 of 2017) [2018] KEELC 4900 (KLR) (13 July 2018) (Ruling)**

Mathew Kipketer Bor v Resident Magistrate, Kericho Law Courts & 4 others [2018] eKLR

Neutral citation: [2018] KEELC 4900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 3 OF 2017**

JM ONYANGO, J

JULY 13, 2018

BETWEEN

MATHEW KIPKETER BOR PETITIONER

AND

RESIDENT MAGISTRATE, KERICHO LAW COURTS 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

DISTRICT LAND SURVEYOR, BURETI 3RD RESPONDENT

SOPHIA CHEPKEMOI KISHARA 4TH RESPONDENT

KENNEDY CHERIRO 5TH RESPONDENT

RULING

1. The Petitioner commenced suit by way of a Constitutional Petition dated 4th April 2017 seeking the following prayers:
 1. That this honourable court be pleased to issue a declaration that the Judgment of Kericho Resident Magistrate's Court Land Tribunal Case No. 62 of 2011 infringed on the petitioner's constitutional rights in land title number KERICHO/CHEMOIBEN/297 and is therefore ultra vires *the constitution*, null and void.
 2. That a declaration do issue that section 7 (2) of the now repealed land Disputes Tribunal *Act No. 18 of 1990* was invalid and ultra vires *the Constitution*.
 3. That this honourable court be pleased to quash the judgment of the Kericho Resident Magistrate Court's Land Disputes Tribunal Case No. 62 of 2011 between Mathew Kipketer Bor and Sophia Chepkemoi Kishara



4. That a permanent injunction do issue restraining the 4th and 5th Respondents by themselves, their servants, workers, employees, agents and or those claiming through or under them from entering, working on, building and/or in any way whatsoever and howsoever from carrying out any activities and/or interfering with the petitioner's occupation and use of the Petitioner's land comprised in title number KERICHO/CHEMOIBEN/297.
 5. Costs of this suit
 6. Any other or further relief that this court may deem fit.
2. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion dated 5th April, 2017 under Certificate of urgency seeking the following prayers:
 - a) Spent
 - b) Spent
 - c) That pending the hearing and determination of the Petition herein this honourable court be pleased to stay the proceedings and particularly the execution of the decree in Kericho RMC Land Dispute's Tribunal Case No. 62 of 2011.
 - d) Spent
 - e) That the costs of this application be provided for.
 3. The said application was supported by the affidavit of Mathew Kipketer Bor sworn on the 5th day of April 2017. In the said affidavit the Petitioner states the judgment of the court in RMC Tribunal Case No. 62 of 2011 infringes on his constitutional rights and ought not to be executed as the Tribunal exceeded its jurisdiction by entertaining a claim relating to ownership of land.
 4. The 4th and 5th Respondents filed a Reply to the Petition dated 11th April 2017 in which the criticize the Petitioner's application and Petition as being incompetent and fatally defective and an abuse of the process of the court. They claim that the Petition is being used for extraneous, malafide and illegitimate purposes. The 5th Respondent also filed a Replying affidavit sworn on 11th April 2017 on his behalf and on behalf of the 4th Respondent.
 5. In the said affidavit the 5th Respondent contends that the Petitioner never appealed against the decision of the Tribunal either to the Provincial Appeals Committee nor to the High Court. Consequent upon the said judgment, the district surveyor Bureti visited the suit land on 13th January 2012 and 8th March 2012 to re-survey the same and confirmed that the Petitioner had encroached on the 4th Respondent's land known as KERICHO/CHEMOIBEN/1476.
 6. He further depones that following the said confirmation, the 4th Respondent disposed of 0.5 acres of his parcel of land no. 1476 and the same was sub-divided into land parcel no. KERICHO/CHEMOIBEN/2219 and 2221 which are now registered in the names of the 4th Respondent and 5th Respondents respectively. The respondents therefore claim that they have no interest in the Petitioner's land and that the suit against them is baseless and discloses no cause of action as the judgment of the court was executed in March 2012 and there is therefore nothing to stay.
 7. The application was canvassed by way of written submission and only the Petitioner's counsel filed his submissions.



Issue for Determination

8. The main issue for determination is whether the applicant is entitled to injunctive relief.

Analysis and Determination

9. 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.”

The first issue that the court must determine is whether the petitioner 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”

10. The Petitioner has not demonstrated that he has a prima facie case with a probability of success. He has not established any infringement of his constitutional rights as alleged. What is evident from the record is that he has filed this petition to challenge a decision of the RM's court which rightly ought to have been challenged by way of Judicial Review within 6 months from the date when the decision was made in 2011.
11. As to whether the applicant has established that he stands to suffer irreparable loss, I am not convinced that he has demonstrated any loss. I say so because the order sought to be stayed was executed way back in 2012 and the suit land has since changed hands and been given new title numbers. An injunction is an equitable remedy and equity aids the vigilant, not the indolent. This is a clear case where the Petitioner slept on his rights and he has only himself to blame.
12. In view of the foregoing, I find absolutely no merit in the Petitioner's application and I dismiss it with costs to the 4th and 5th Respondents.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 13TH DAY OF JULY 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Bii for the Petitioner
2. Miss Kitur for Mr. Koske for the Respondent
3. Court Assistant – Rotich

