



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AND COURT

AT KERICHO

ELC CIVIL CASE NO. 25 OF 2018

RUTH CHELANGAT SIRMA.....PLAINTIFF

VERSUS

SAMWEL SANG.....1ST DEFENDANT

KIPROTICH ARAP CHIRCHIR.....2ND DEFENDANT

DANIEL NGETICH.....3RD DEFENDANT

PIUS CHEPKWONY.....4TH DEFENDANT

AND

JULIUS TOWETT

ERICK TOWETT (Sued as Legal Representatives of the estate of

Edward Kibilo Arap Chumo).....INTERESTED PARTIES

RULING

Introduction

1. Before me is the Plaintiff's application dated 22nd March, 2018, seeking the following orders:

(a) **THAT** this application be certified urgent and its service be dispensed with in the first instance

(b) **THAT** this Honourable Court do issue a restraining order prohibiting the Defendants, their servants, agents and/ or any other person acting under their authority from; sub-dividing, selling, encroaching on, cultivating, remaining and/or otherwise interfering with the Plaintiff's enjoyment, use and occupation of that parcel of land comprised in L.R NO. KERICHO/KIPCHIMCHIM/4165, registered in her name; pending the hearing and determination of this application.

(c) **THAT** this Honourable Court do issue a restraining order prohibiting the Defendants, their servants, agents and/ or any other person acting under their authority from; sub-dividing, selling, encroaching on, cultivating, remaining and/or otherwise interfering with the Plaintiff's enjoyment, use and occupation of that parcel of land known as L.R NO. KERICHO/KIPCHIMCHIM/4165, registered in her name; pending the hearing and determination of this suit.

(d) **THAT** this honourable court be pleased to issue any necessary directions.

(e) **THAT** the costs of this application be borne by the Respondent.

2. The application is supported by the affidavit of Ruth Chelangat Sirma, the plaintiff/ applicant herein sworn on the 22nd March 2018. In the said affidavit, the applicant deposes that she is the personal representative of the estate of KIBILAT A. BARKALIET –Deceased, who was the registered owner of land parcel number KERICHO/KIPCHIMCHIM/1172 which was subsequently sub-divided into land parcels number KERICHO/KIPCHIMCHIM/4165 and 4164. Parcel number KERICHO/KIPCHIMCHIM/4164 measuring 0.5 hectares was

transferred to the plaintiff while parcel number 4165 was registered in the name of the plaintiff after the plaintiff obtained a confirmation of grant in Kericho HC Succession Cause No.15 of 2016.

3. The applicant further depones that in 2014 the defendants trespassed upon the suit property and constructed a permanent house which they have rented out to third parties thus depriving her of the use and enjoyment of the suit property.

4. She depones that if the orders of injunction are not granted, she will suffer irreparable loss.

5. The application is opposed by the defendants/respondents. The 1st defendant Samwel Sang filed an affidavit dated 9th May 2018 in which he denies that he has trespassed upon the suit property. He depones that he is in occupation of land parcel number KERICHO/KIPCHIMCHIM/5674 which was curved out of land parcel number KERICHO/KIPCHIMCHIM/1176. The suit property and his parcel of land are therefore separate and distinct parcels of land. He has attached a copy of sale agreement in respect of land parcel number KERICHO/KIPCHIMCHIM/1176 dated 15th April 2011 between himself and one KIMORET MUNGETTI. The 1st Respondent therefore maintains that the calims of trespass made against him are unfounded and misplaced as, first and foremost the two parcels of land in question are different and are not related in any way. Secondly, the 1st Defendant has continued to enjoy quiet possession of the parcel of land in his ownership and has never at any point encroached, trespassed, leased out or erected structures on the suit property

6. The 4th Respondent Pius Chepkwony has sworn an affidavit dated 23rd April 2018 in which he claims that on 14th November 2014 he leased the suit premises from one EDWARD KIBILO ARAP CHUMO, now deceased who had bought a portion of the suit land from the plaintiff's late husband more than 20 years ago. The said lease which is attached to his affidavit was to run for a period of 5 years upto 2019.

Issue for determination

7. The main issue for determination is whether the plaintiff is entitled to an order of injunction against the respondents.

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 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 she is the registered owner of land parcel number KERICHO/KIPCHIMCHIM/4165. She has also attached a copy of the certificate of Confirmation of Grant in respect of the estate of Joseph Kibilat Bargaliet- deceased. Additionally, she has attached photographs of a permanent house and tin structures allegedly constructed on the suit property.

11. To the extent that the above-mentioned documents relate to the suit property, the plaintiff her established ownership of the same. However, from the Replying affidavits filed by the 1st and 4th Respondents, it is doubtful if the alleged acts of trespass have been committed by the respondents. 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 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.

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 parties shall continue to use or occupy the respective properties that they have been occupying but none of the parties shall sell, transfer 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 12th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kirui for the 3rd Defendant
2. Mr. Maina for Mr. Koech for the Plaintiff
3. Mr. Miruka for the 2nd Defendant
4. Mr. Chelule Adams for the 1st Defendant
5. 4th Defendant present in person
6. The Interested Party is present in person
7. Court assistant - Rotich