



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

CIVIL SUIT NO. 22 OF 2018

CHRISTINA CHEMUTAI SOWEK

(Suing as the legal representative of the

estate of the late CHESONGONY SOET).....PLAINTIFF

=VERSUS=

DAVID KIPCHIRCHIR LANGAT.....1ST DEFENDANT

STANLEY SALAT.....2ND DEFENDANT

ANNA KOSKEI.....3RD DEFENDANT

PAUL CHIRCHIR.....4TH DEFENDANT

THE LAND REGISTRAR –BOMET COUNTY.....5TH DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the Plaintiff's application dated 13th March, 2018 seeking the following prayers:

i) Spent

ii) Spent

iii) That the defendants by themselves, their servants or agents be restrained from entering, remaining on, trespassing, transferring, charging, or in any manner dealing with land titles numbers KERICHO/SILIBWET/4181, KERICHO/SILIBWET/4182, KERICHO/SILIBWET/4183 and KERICHO/SILIBWET/4184 pending the hearing and determination of this suit.

iv) The costs of this application be provided for.

v) Any other of further order be made as this honourable court shall deem just and expedient.

2. The application is supported by the affidavit of the Plaintiff sworn on the 13th March 2018. In the said affidavit the Plaintiff depones that she is the daughter and administrator and legal representative of the estate of Teresia Chepkoech Taptany also known as Chesongony Soet – deceased who died on 6.2.1996 and no Grant of letters of Administration had been issued in respect of her estate.

3. She further depones that the deceased was the registered owner of land parcel number KERICHO/SILIBWET/46 situated within Bomet county. She states that in 2016 the 1st and 2nd Respondents without any colour of right, illegally, fraudulently and in collusion with the 5th Respondent sub-divided the suit land into new parcels of land and caused the same to be registered as KERICHO/SILIBWET/4181, KERICHO/SILIBWET/4182, KERICHO/SILIBWET/4183 and KERICHO/SILIBWET/4184.

4. She depones that in an attempt to conceal the illegal acts, the 5th Respondent caused parcels numbers KERICHO/SILIBWET/4181 and KERICHO/SILIBWET/4183 to be registered in her name while the other two resultant parcels KERICHO/SILIBWET/4182 and KERICHO/SILIBWET/4184 were fraudulently registered in the name of the 2nd and 1st Respondents respectively. She contends that the 1st, 2nd, 3rd and 4th Respondents have trespassed upon the suit property and cut trees and continue to intermeddle with the suit property of the deceased.

5. The Plaintiff depones that she has learnt that the 1st and 2nd Respondents are in the process of fraudulently transferring the suit properties to bona fide 3rd parties which actions will prejudice the beneficiaries of the estate of the deceased and deprive them of their legitimate rights to the suit property thus causing them to suffer irreparable loss.

6. The 2nd Respondents have opposed the application through the Replying Affidavit of Stanley Salat, the 2nd Defendant/Respondent sworn on 30th April 2018. In the said affidavit the 2nd Respondent depones that in November 2013, he bought a portion of the suit property comprised in land parcel number KERICHO/SILIBWET/46 measuring 100x100 feet at kshs 500,000 from the applicant who purported to be the administrator of the estate of her late mother. He further depones that after paying the full purchase price, the applicant processed his title and put him in possession of the suit property and he has been in occupation thereof since 2013.

Issue for determination

7. The main issue for determination is whether the plaintiff has met the threshold for the grant of a 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. In the instant case, the 2nd Defendant claims to have bought the suit property from the Applicant. He has attached a sale agreement dated 15th September 2015. The 2nd Defendant claims to have been in occupation of the suit property since 2013. Even though the Applicant now claims that the Respondents are trespassers, this will only become clear when the case is heard and the evidence of all the parties taken and subjected to cross-examination.

11. At this interlocutory stage I am not required to conclusively determine the ownership of the suit property. What I am called upon to determine is whether an injunction ought to be granted to the Plaintiff.

12. 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 2nd Respondent alleges that despite having been in occupation of the suit property for over 5 years, he is now faced with imminent eviction by the Applicant who allegedly sold the land to him.

13. According to the definition in the Mrao case (supra) the Plaintiff appears to have a right which has apparently been infringed by the respondents as the Plaintiff will need to lead evidence on why she suspects that the 3rd Respondent's title is unlawful. I therefore find and hold that she has demonstrated that she has a prima facie case with a probability of success.

14. The 2nd Respondent has also demonstrated that he stands to suffer loss and damage if the injunction is not granted. In order for the issue of the title to be determined, there is need to preserve the subject matter of the suit in accordance with the doctrine of lis pendens.

15. 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...”

16. 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 .

17. 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.

18. 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 Respondents shall continue to use or occupy the suit property before this matter is heard and determined and none of the parties shall sell, transfer or part with possession of the suit land while the suit is pending.

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 6th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyaata for the Plaintiff/Applicant

2. N/A for the Defendants/Respondents

3. Court Assistant: Rotich