



THE REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

ENVIRONMENT AND LAND CASE NO 30 OF 2018

GEOFFREY KIPROTICH KOROS.....PLAINTIFF/APPLICANT

=VERSUS=

STANLEY CHIRCHIR.....DEFENDANT/RESPONDENT

KIPYEGON MUTAI.....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. What is before me is the Plaintiff/Applicant's application dated 14th April, 2018, seeking the following orders;

a) **THAT** this honourable court be pleased to issue an order of temporary injunction restraining the Defendant by himself, his agents, servants, employees or whosoever from encroaching, entering, trespassing, destroying or otherwise and/or doing any act prejudicial to the applicant's quiet possession of that land known as UNS. RESIDENTIAL PLOT NO. 54-KERICHO MUNICIPALITY until this application is heard and determined.

b) **THAT** this honourable court be pleased to issue a temporary injunction restraining the Defendant by himself, his agents, servants, employees or whosoever from encroaching, entering, trespassing, destroying or otherwise and/or doing any act prejudicial to the applicant's quiet possession of that land known as UNS. RESIDENTIAL PLOT NO. 54-KERICHO MUNICIPALITY till this suit is heard and determined.

c) **THAT** costs of this application be provided for.

2. The application is supported by the applicant's affidavit sworn on the 12th April 2018 and further affidavit sworn on the 21st June 2018.

3. It is opposed by the Respondent through his Replying Affidavit sworn on the 11th June 2018.

4. The Applicant's case is that he is the legal and beneficial owner of the suit properties, having been allotted the same by the Government vide a Letter of Allotment dated 18th June, 2012. It is the plaintiff's case that by the said Letter of Allotment, he became the beneficial owner of the suit property.

5. The Plaintiff subsequently took possession and has enjoyed exclusive possession to date.

The Plaintiff avers that he has paid up to date all the rates due to the Kericho Municipal Council.

6. The Plaintiff maintains that the Defendants do not have any interest or claim in the suit properties. He states that the Defendants have never before challenged the Plaintiff's title or letters of Allotment from the then Municipal Council of Kericho.

7. The Applicant maintains that being in lawful possession and indeed ownership, and having already fenced the suit property, there is a strong presumption that he is the owner in equity of the suit land and therefore the balance of convenience tilts in his favour. He further states that he stands to suffer irreparable loss and damage if the injunction is not granted.

Respondents' case

8. The application is opposed by the 1st Defendant through his Replying Affidavit dated 11th June, 2018 wherein he avers that he is a member of the Talai Resettlement Committee which was inter-alia formed to identify and vet members of the Talai Clan of the Kipsigis Community

who had been evicted from their ancestral home within Kericho County by the Colonial Government and forcefully resettled at Gwassii region of the former Nyanza Province.

9. The 1st Defendant avers that a number of his clan members, aforesaid, later relocated to Kericho before independence and settled at Talai/Laibon Area of Kericho Municipality, which was then classified as un-alienated government land. They resided on the said land as squatters until the year 2012 when the Government decided to allocate them their respective portions.

10. He further states that subsequently he, alongside three other individuals namely, Joel Tuei, Kipsugut Lelei and Mary Cherotich were elected to form a committee charged with vetting and proposing bonafide members of the Clan to be allocated portions of the said land situate within Kericho Municipality. He states that they did submit a list of the bonafide members of the community after which letters of allotment were issued to each of the individuals listed.

11. The 1st Defendant avers that the said list was verified in the presence of County Commissioner, Kericho, and the Land Officer, Kericho who signed and stamped it and kept the original thereof.

12. He further avers that efforts to procure a copy of the said list have been frustrated by the Land Officer Kericho but he knows for a fact that the Plaintiff herein is not amongst the beneficiaries cited in the said list. He has annexed a copy of the initial list of beneficiaries presented.

13. The 1st Defendant also states that the Plaintiff is not a member of the Talai Clan and does not even claim ancestral interest in the disputed parcel and therefore his purported allotment was a consequence of fraud.

14. It is the 1st defendant's case that the property claimed by the Plaintiff i.e UNS. RESIDENTIAL PLOT NO. 54 (KERICHO MUNICIPALITY) was meant to be allocated to his nephew namely, GIDEON KIPROTICH ROHO (RONO) of I.D NO. 26211976 whose name was apparently indicated as, "GEOFFREY KIPROTICH albeit with his correct national identity card number captured.

15. The 1st Defendant further avers that when this anomaly was brought to their attention as members of the allocation committee they advised him to swear an affidavit to have the discrepancy corrected. He has annexed a copy of the affidavit sworn by the said beneficiary annexed to the Replying Affidavit as appendix 2.

16. He states that they were however shocked to later learn that an allotment letter had been issued to the Plaintiff who was a stranger to them prompting them to report the matter at Kericho Police Station which complaint was noted as O.B NO. 22/6/3/18 the matter is pending investigation on allegations of forgery raised against the Plaintiff. He has annexed a copy of the extract from police records.

17. The 1st Defendant further states that he later learnt that the Plaintiff had made several attempts to dispose of the property when he was called by one Geoffrey Kiplangat Chepkwony who was a prospective buyer, to verify the Plaintiff's interest. The 1st Defendant avers that the transaction however fell through when he informed him that the Plaintiff was not the property's bonafide allottee.

18. The 1st Defendant avers that the Plaintiff later disposed the property to Willy Kipyegon Sigei and Alfrider Chemutai Walei on 28th February, 2018, using a different name and Identity Card Number from the one he had used while transacting with the previous buyer namely, Geoffrey Kiplangat Chepkwony. He has annexed a copy of the agreement dated 28th February, 2018, attached to the Replying Affidavit.

19. The 1st Defendant further avers that the Plaintiff later filed this suit in a bid to sanitize his claim to the disputed parcel using the court process. The 1st Defendant surmises that the instant application is only aimed at frustrating the determination of the question of ownership of the property before the committee relating to the allocation of property by trying to establish a superior interest in the property.

20. The 1st Defendant states that in view of the fact that the Plaintiff's claim is not premised on any ancestral interest in the disputed property, his claim lacks merit.

21. The 1st Defendant finally avers that Plaintiff's suit is fatally incompetent as he has not sued the person claiming interest in the property but instead chose to sue him whereas he is only a member of the allotment committee with no claim over the disputed plot.

Issues for Determination

22. The main issue for determination is whether the plaintiff has met the threshold for the grant of a temporary injunction.

Analysis and Determination

23. 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**.

24. I have carefully considered the submissions filed by both counsel. I agree with counsel for the respondent that the applicant has not established a prima facie case with a probability of success. It is clear that the purported allocation of the suit property to the Plaintiff is hotly contested. Allegations of fraud have been raised by the 1st Defendant against the Plaintiff who elected to wish them away by insisting that, "he is not a mad man who could just wake up one day and claim ownership of the suit property from nowhere"; instead of leading cogent evidence in support of his claim. Furthermore, the Plaintiff chose to deliberately omit a direct claimant to the suit property and instead sued the Defendants herein who have no interest in the suit property.

25. In the case of *Rukaya Ali Mohammed...Vs...David Gikonyo Nambacha & Another, Kisumu HCCA No.9 of 2004*, cited with approval in *Wanjiku Njuguna Gachui & 5 others v Frank Logistics & 2 others [2017] eKLR* the Court held that:-

*“...Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship **unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest.***

26. The Letter of Allotment claimed to have been fraudulently procured cannot be deemed to confer a legal right over the property in favour of the Plaintiff.

27. Since the applicant has failed the first test for the grant of interlocutory injunctions, I need not look at the other tests.

28. Accordingly, I find no merit in the Plaintiff’s application and I dismiss it with costs to the Defendants/Respondents.

Dated, signed and delivered at Kericho this 29th day of August, 2018.

.....

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Mwita for the 1st Defendant

2. N/A for the Plaintiff

3. Court assistant – Rotich