



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 76 OF 2018

**ESTATE OF THE LATE MICHAEL KIPCHIRCHIR BOR (Represented by
JOSEPHAT KIPRUGUT KOSKE).....PLAINTIFF**

VERSUS

SARAH CHEPCHIRCHIR KIPLEITICH.....DEFENDANT

RULING

1. The application dated **7/8/2018** and filed in court on **8/8/2018** has been brought by the plaintiff. It seeks the following orders:-

a.spent

b. That while pending the inter-partes hearing and determination of this application, an ex parte temporary injunction be issued to restrain the defendant his agents and or servants from entering, cultivating, grazing, planting, cutting trees or in any other manner, interfering with the applicant's said land.

c. That upon inter-partes hearing, the ex parte temporary injunction be confirmed, while pending the hearing and determination of the suit herein.

d. That the OCS, Kitale Police Station be directed to ensure that the orders made by this court are obeyed.

e. Costs be provided for.

2. The applicant has brought the application under **Section 63(c)** of the **Civil Procedure Act and Order 40 Rules 1, 3 4; and 51 Rules 1 and 3 of the Civil Procedure Rules (2010)**.

3. The grounds upon which the application is made are contained at the foot of the application. They are that:- the land ownership dispute between the parties was finally determined by the decision of Kapomboi Land Disputes Tribunal (sic) which decision was adopted as judgment of this honourable court; that the respondent has forcefully ploughed the land and built some structures on it; that the land comprised in **Title Nos. Kapomboi/Kapomboi Block 3/Kobos/633** belongs to the plaintiff and that the respondent is clearly a trespasser thereon.

4. The application is supported by the affidavit of the applicant dated **7/8/2018** which substantially reiterates the grounds on the face of the application.

5. In reply to the application the defendant filed a replying affidavit sworn on **16/10/2018** and avers that she was married to the late **Elijah Leitich** with whom they had children and with whom she lived with until his demise; that the late Elijah Leitich had a land dispute over ownership of all that piece of land now described as **Kapomboi/Kapomboi/Block 3/Kobos/633**; that the dispute went before the tribunal but the findings of the tribunal were disputed by her husband on that the tribunal did not have the jurisdiction to hear the dispute; that the panel of elders were not gazetted to hear and settle the dispute and therefore could not ascertain and/or adjudicate the dispute and that the honourable court could not in the circumstance execute an illegality.

6. The defendant further deposes that the suit land is registered in her name being the successor of the estate of her late husband and her late husband did not consent to the findings of the Land Disputes Tribunal as they were inconsequential because of the Tribunal lacked jurisdiction.

7. The applicant filed her submissions on **15/10/2018**. I have perused through the record and I have not seen any submissions filed on behalf of the defendant.

8. In her defence the defendant has averred that she has been in occupation of the land “since inception”. I find this to be implicitly supported by the applicant’s supporting affidavit which begins with the narrative that the dispute between the parties has already been determined by the Land Disputes Tribunal and that the respondent has no reason or excuse whatsoever “*to remain on the plaintiff’s land*” after the tribunal decision.

9. A section of the prayers sought seek to prohibit the defendant from entering the land yet she has admittedly been on the land for a long time. In my view where the consequence of an order of injunction in the circumstances would amount to eviction or a mandatory injunction. An application for injunction that bears that effect can not be granted at the interlocutory stage unless very special circumstances which would warrant the grant of that order prevailed. Mandatory injunctions are addressed in the case of ***Beatrice Ngina Mwai & Another -vs- Gichine Mwai & Another 2010 eKLR*** which quotes the case of ***SHARIFF ABDI HASSAN -vs- NADHIF JAMA ADAN C.A. No. 121 of 2005 (unreported)*** where the **Court of Appeal** restates the position that:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

10. Besides even if the court were to consider the application as seeking an ordinary temporary injunction, the applicant has failed to demonstrate by way of evidence in his affidavit that the applicant stands to suffer irreparable loss that can not be compensated by way of damages if the orders sought do not issue. His affidavit is a brief one which focuses on the refusal of the defendant to vacate the suit land. Lastly the orders sought in the application are the same as those sought in the plaint.

11. This court finds that on a balance of convenience it is appropriate to maintain the status quo between the parties pending the hearing and determination of the suit. The application dated **7/8/2018** therefore has no merits and it is dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this 25th day of October, 2018.

MWANGI NJOROGE

JUDGE

25/10/2018

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for Applicants

N/A for Respondents

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

25/10/2018