



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO. 40. OF 2018**

**GREGORY HAYES DOW**

**Suing through DAVID APUULI KANDOLE.....PLAINTIFF**

**VERSUS**

**GEOFFREY KIBET NGETICH.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR BOMET....2<sup>ND</sup> RESPONDENT**

**ONGUMWE AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a Notice of Motion dated 10<sup>th</sup> July 2018 brought under the provisions of Order 40 Rule 1 and Order 51 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act the Plaintiff/Applicant seeks the following prayers:

- a. *Spent*
- b. *Spent*
- c. *That a permanent injunction be issued restraining the defendants, their servants, agents, employees, representatives and others, from continuing to take possession of, entering into, trespassing upon, selling, transferring, charging, developing and/ or in any way interfering with the use and enjoyment of the plaintiff's ownership of the parcel of land known as Title No. KERICHO/BOITO/1022 pending the hearing and determination of the main suit.*
- d. *That the costs of this application be borne by the Respondent*

2. The application is based on the grounds stated in the Notice of Motion and the Plaintiff's affidavit sworn on the 21<sup>st</sup> May 2018 and the Further Supporting Affidavit of Edward Chache Advocate sworn on the 10<sup>th</sup> July 2018.

3. In the supporting affidavit the Plaintiff depones that he is the registered proprietor of land parcel number KERICHO/BOITO/1022 measuring 0.56 Hectares having purchased it from the 1<sup>st</sup> defendant, and attaches a copy of the title deed thereof as annexure "DAK 3".

4. He further depones that after purchasing the suit property he took possession thereof and has been in occupation until 23<sup>rd</sup> March 2018 when the 3<sup>rd</sup> Defendant went to the suit property and purported to levy distress on the instructions of the 1<sup>st</sup> defendant who claimed that the plaintiff was in arrears of rent. The plaintiff depones that if the defendants are not restrained by way of injunction, the plaintiff will suffer irreparable loss.

5. In the affidavit of Edward Olaly Chache Advocate, he annexes a Land Sale agreement dated 8<sup>th</sup> April 2008 in respect of the suit property between the 1<sup>st</sup> defendant on the one hand and Gregory Dow and Mary Rose Dow on the other hand.

6. The application is opposed by the 1<sup>st</sup> defendant through his Replying Affidavit sworn on the 25<sup>th</sup> July 2018. The gist of the said affidavit is that the 1<sup>st</sup> defendant is the registered proprietor of the suit property. He has attached a copy of the title deed issued on 22<sup>nd</sup> April 1998 and

a search certificate issued on 28<sup>th</sup> February 2018.

7. The 1<sup>st</sup> defendant depones that he leased the suit property to the Gregory and Mary Rose Dow on 8<sup>th</sup> April 2008 for a period of 9 years upto 9<sup>th</sup> April 2017. He depones that after the expiry of the lease, the Dows continued occupying the suit premises without paying any rent prompting him to file a reference at the Rent Tribunal for recovery of possession and he was granted orders for recovery of the premises on 29<sup>th</sup> March 2018. He states that he has since taken possession of the suit premises pursuant to the said order of the Tribunal.

8. He denies that the Dows have any proprietary interest in the suit premises as alleged as there is no evidence that they obtained consent of the Land Control Board to sanction the transfer of the suit land to the Dows.

9. The application was canvassed by way of written submissions and counsel for both parties filed their submissions.

#### **Issues for determination**

10. I have carefully considered the pleadings, application, rival affidavits and counsel's submissions and the following issues arise for determination:

- i. Whether the plaintiff has met the threshold for the grant of a temporary injunction
- ii. Who should bear the costs of this application.

#### **Analysis and determination**

11. 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”.*

12. The first issue that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success.

13. 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”*

14. The Plaintiff has annexed a title deed issued on 11<sup>th</sup> August 2016 whereas the 1<sup>st</sup> defendant has annexed a title deed issued on 22<sup>nd</sup> April 1998 together with a certificate of official search dated 23<sup>rd</sup> March 2018. Which shows that the title is still registered in the 1<sup>st</sup> Defendant's name. It is therefore quite clear that the title to the suit property is hotly contested with both the plaintiff and the 1<sup>st</sup> defendant laying claim thereto.

15. Counsel for the 1<sup>st</sup> defendant has submitted that his clients title being the 1<sup>st</sup> in time ought to be considered as the genuine one.

16. The question to be answered is whether under these circumstances, the plaintiff has established as *prima facie* case with a probability of success. It is my finding that in view of the contested title over the suit property, the plaintiff has not established a *prima facie* case with a probability of success. The issue of ownership will only become clear after a full hearing.

17. As the Plaintiff has failed the first test for the grant of an injunction, I need not examine the other tests. I will however comment on the issue as to whether the balance of convenience tilts in the plaintiff's favour. The 1<sup>st</sup> defendant has stated that he has repossessed the suit premises pursuant to the orders of the Rent Tribunal and granting a temporary injunction against him would amount to evicting him from his premises which would be tantamount to granting a mandatory injunction.

18. In the case of **Kenya Breweries Ltd V Washington Okeyo (2002) eKLR** the Court of Appeal held that:

*“a mandatory injunction ought not to be granted in 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 be easily remedied or where the defendant tried to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”*

19. This position was adopted in the case of **Jane Wambui Macharia V Wais Capital Limited & Another ( 2015) eKLR** where the Court held as follows:

*When a permanent injunction is sought at interlocutory stage, the court has to carefully consider the facts of the case before it grants the relief because grant of such orders may determine the matter completely. Doubtless an order of permanent injunction usually preempts the defendant’s right to a trial, and the court would therefore grant such reliefs at interlocutory stage only in exceptional circumstances. See **Lansing Linde Limited V Kerr (1991) 1 WLR 251**, that to obtain such relief, the claimant must show “a more than an arguable case” or “more than a merely serious issue to be tried” but the actual applicable test here should be the same as the one applicable in the grant of mandatory injunctions at interlocutory stage as stated in Halsbury’s Laws of England ( 4<sup>th</sup> Edition) at para 948 that:*

*“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory will be granted on an interlocutory application”*

20. The plaintiff has not demonstrated any exceptional circumstances to warrant the grant of a mandatory injunction at this interlocutory stage.

21. The upshot is that the plaintiff’s application lacks merit and is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

**Dated, signed and delivered at Kericho this 19<sup>th</sup> day of October, 2018.**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss Natome for Mr. Kigen for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents
2. N/A for the Applicant
3. Court assistant - Rotich