



**Sang v Sang & 3 others (Environment & Land Case 72 of 2015)
[2017] KEELC 3874 (KLR) (3 February 2017) (Ruling)**

John Cheruiyot Sang v Hillary Sang & 3 Others [2017] eKLR

Neutral citation: [2017] KEELC 3874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 72 OF 2015**

M SILA, J

FEBRUARY 3, 2017

BETWEEN

JOHN CHERUIYOT SANG PLAINTIFF

AND

HILLARY SANG & 3 OTHERS & 3 OTHERS DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff asserting ownership of certain land and seeking the defendants to be restrained from it; defendants claiming to be sons of the plaintiff and asserting that they have a right to be on the land; evidence showing that defendants are sons to the plaintiff's divorced wife and have not been living with the plaintiff; status quo before their entry into the land to be maintained pending hearing of the case)

1. The application before me is one for injunction seeking to restrain the defendants from interfering with the land parcel Kericho/Getarwet/1029 pending the hearing and determination of this suit. The said application was filed contemporaneously with the plaint.
2. It is the case of the plaintiff that he is the owner of the land parcel Kericho/Getarwet/1029 (hereinafter described as "the suit land") and that the defendants/respondents have no right whatsoever over the said land. It is averred that sometimes on 7 September 2016, the defendants interfered with the plaintiff's possession and use of the said land by forcibly evicting one Richard Kipngetch Langat whom the plaintiff had given possession of a portion of 0.5 acres of the said land. In the suit, the plaintiff seeks orders to have the defendants permanently restrained from the said land and general damages.
3. In his supporting affidavit, the plaintiff has deposed that the 1st and 2nd defendants are his brothers whereas the 3rd and 4th defendants are strangers to him. He has stated that he did sell the portion of 0.5 acres to the said Richard Kipngetch Langat but the defendants interfered with his possession by



uprooting fencing posts and preventing him from taking possession. It is averred that the defendants have now illegally started erecting structures on the suit land. He has stated that the said Richard Kipngetich Langat is now threatening to sue him for a refund of the purchase price paid or have him prosecuted for obtaining money by false pretenses. It is his view that it is just and fair that the injunction be granted.

4. The defendants have filed a defence and counterclaim to the suit and a replying affidavit to the application. In their defence and counterclaim, they have pleaded that they have rights over the suit land but have denied forcibly evicting Richard Kipngetich Langat. The 3rd and 4th defendants have contended that they are children of the plaintiff and that they have a customary right to occupy the suit land since it is their ancestral home. They have pleaded that they are children of one Mary Chebet Sang who was married to the plaintiff in the year 1974. It is averred that in the year 1978, the plaintiff divorced his wife, but by that time, the 4th defendant had already been born and the 3rd defendant was born a few months after the divorce. In their counterclaim, they have sought a declaration that the 3rd and 4th defendants are children of the plaintiff and entitled to occupy part of the suit land; a permanent injunction to restrain the plaintiff from dispossessing them of the suit land and costs.
5. The replying affidavit has been sworn by Erick Sang, the 2nd defendant. He has deposed that he is a brother to the plaintiff and that the 3rd and 4th defendants are sons to the plaintiff out of his union with Mary Chebet Sang. He has annexed the judgment in Kapsabet Magistrate's Civil Case No. 163 of 1978 wherein the two were divorced on 20 September 1978. After the divorce, the two children went to live with their mother. He has deposed that in the year 1998, the plaintiff wrote a letter to his former wife and children inviting them back home. There are copies of the said letters annexed but the same are in Kalenjii language without any interpretation and I have been unable to comprehend them. He has continued to add that the plaintiff accepted back his wife and children and subsequently built them a house. He has annexed a photo of this. He has deposed that his former wife and children did not enjoy quiet possession of the area that they had been allocated because he was in constant quarrel with his former wife. A number of clan meetings were held and it was resolved that the children belong to the plaintiff and that they are Kaptuiyek clan members (probably the same clan as the plaintiff). Some copies of minutes of meetings held on 14 October 2005, 7 November 2015 and 23 November 2015 are annexed. He has averred that despite allowing them back, the plaintiff later chased away his former wife and children in the year 2006. He also damaged the house that he had earlier built.
6. I took in the submissions of both Mr. Koske for the plaintiff and Mr. Mbeche for the respondents but basically they only rehashed what was in the affidavits. None tendered any authorities or referred me to any law for me to take into account.
7. I have considered the matter. What I have before me is an application for injunction. The principles guiding such applications were laid down in the case of *Giella vs Cassman Brown* (1973) EA 358. It was held that for one to succeed, he must demonstrate a prima facie case with a probability of success and also show that he stands to suffer irreparable loss if the injunction is not granted. If the court will be in doubt, it will consider the application on a balance of convenience.
8. The case of the plaintiff is simple. He avers that he owns the suit land and that the defendants have no right over it. He states that he does not know the 3rd and 4th defendants. From the defence filed, I have not seen any claim over the suit land filed by the 1st and 2nd defendants who are the brothers of the plaintiff. It is the 3rd and 4th defendants who appear to assert some rights over the suit land. They aver that they are sons of the plaintiff and therefore have a customary right to occupy the land since it is their ancestral home.



9. I have two competing claims and it is in my view best that I decide this application straight away on the principle of balance of convenience.
10. I do note that the plaintiff divorced the mother of the 3rd and 4th defendants. I cannot at this stage state with finality that they are actually children of the plaintiff. But if I am to take it as true, it is said that the 3rd defendant was alive when the divorce was concluded and that the 4th defendant was born soon thereafter. It is not in dispute that after the divorce, they went to live with their mother. They never lived with the plaintiff in this disputed land. It was said that at some point the plaintiff invited them back and built them a house but he later chased them away and he pulled down the structure that he had built. This it is said took place in the year 2006. It has not been explained to me in the replying affidavit where exactly the 3rd and 4th defendants have been living since the year 2006 which is about 10 years to the time this suit was filed. Mr. Mbeche in his submissions stated that they have been living with their grandfather who died in the year 2008. I think this, being a question of fact, ought to have been in the replying affidavit. But it is not in dispute that they did come to the suit land in the month of September 2016 and they laid a claim to the disputed land.
11. Given the above, it is my view that the balance of convenience tilts in favour of the plaintiff. The defendants have not been on this land and only made entry very recently prior to this suit being filed. It does appear that the plaintiff has otherwise been in exclusive occupation of the same, at least since the year 2006. It is in my view best that the status quo prevailing before the 3rd and 4th defendants made entry in the month of September 2016 be maintained and the status is that it is the plaintiff who was in possession of the suit land.
12. From the above discourse, I do allow the application for injunction. I do order the defendants to stay away from the suit land pending hearing and determination of this case. The costs of the application shall be costs in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KERICHO THIS 3RD DAY OF FEBRUARY 2017

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

KERICHO

Present;

Mr. Nyadimo holding brief for Mr. Koske for the Plaintiff/Applicant

Mr. Moses Mbeche for the Defendants/Respondents

Court Assistant; Wambany

