



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 208 OF 2016**

**KIPSEBA CHUMBA..... PLAINTIFF**

**VERSUS**

**THE CHAIRMAN BOARD OF MANAGEMENT,**

**KABIRISUS PRIMARY SCHOOL..... DEFENDANT**

**RULING**

*Kipseba Chumba* hereinafter referred to as the plaintiff/applicant has brought this application dated 21.7.2016 against the defendant/respondent seeking for orders that there be preservative and/or temporary order of injunction restraining the defendant/respondent by themselves, their agents, servants or any other person whatsoever purporting to act on their behalf from accessing, using, leasing out, selling, transferring or in any other way dealing with the plaintiff's piece of land known as **MOSOP/METKEI/1419** within Elgeyo Marakwet county pending the hearing and determination of this main suit. The plaintiff also seeks an order that there be an order of temporary injunction to restrain the defendant from carrying out any construction or development whatsoever on the plaintiff's parcel of land known as Mosop/Metkei/1419 pending the hearing and determination of the suit.

The application is based on grounds that the plaintiff/applicant is the legal owner of the land and yet the defendant intends to commence construction on the plaintiff's land. The defendant has pulled down the plaintiff's fence with the intention changing the boundaries which may render the suit nugatory. The plaintiff denies having been compensated for the land.

The application is supported by the affidavit of Kipseba Chumba who states that he is the registered owner of the suit land known as Mosop/Metkei/1419 measuring 6.2844 Ha. He donated a portion to the church. He alleges that the school has now trespassed on his land and interfered with the boundary and have created a road passing through the middle of the plaintiff's land.

The gist of the replying affidavit by the defendant is that the defendant started as a Nursery School in 1976 on a parcel of land known as L. r. 1029 measuring 0.09 Ha reserved by Keiyo Marakwet County Council but later the school progressed into its modern status as a public primary school. The plaintiff amongst others surrendered his parcel of land and was compensated at Kapkoi Settlement Scheme with parcels of land which they took. The defendant took possession and use in 1990s. However, the plaintiff refused to surrender his share to the school. The plaintiff interfered with the title by creating L.R. No. 1419 and 1420 from L.R. 1432. The defendant moved and hired out 2.6 acres from L.R. 1419. The school has been in quiet possession of the 2.6 acres. It is alleged that the disputed suit land is in the possession of the school.

In supplementary affidavit, the plaintiff states that he never surrendered his land to the defendant and

never received any compensation. His parcel of land was initially Mosop/Metkei/1032. He subdivided the same into the parcels 1419 and 1420 and donated 1420 to the church. He is the registered owner of the parcel of land.

The plaintiff filed submissions on 5.9.2016 wherein he appears to admit that the defendant is in possession of the parcel of land however, the plaintiff is the registered holder of the title to the land. The plaintiff further submits that there is no agreement between the plaintiff and the defendant. The plaintiff therefore, submits that he has established a prima facie case with the probability of success.

On balance of convenience, the plaintiff submits that he has been in possession since time immemorial and therefore, the balance of convenience tilts towards granting an injunction.

In applications for temporary injunction, the power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles:

- 1) *whether the applicant has demonstrated a prima facie case with a probability of success.*
- 2) *Whether the applicant is likely to suffer irreparable harm if injunction is not granted.*
- 3) *Where the balance of convenience tilts if the court is in doubt.*

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted to him. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed.

**Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

If in doubt, the court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

I have considered the submissions on record and do find that the plaintiff has established a prima facie case with the probability of success as he is the registered owner of the parcel of land and so far, there is no evidence of any agreement between the plaintiff and the defendant. However, on the issue of irreparable harm that cannot be compensated with damages, the plaintiff has not demonstrated that he is likely to suffer the same as he is not in possession and that it has been demonstrated that the defendant is in possession and that the plaintiff is the title holder. On a balance of convenience, this court finds that it tilts towards preserving the parcel of land pending hearing and determination of the suit. Since the plaintiff is not in possession, I do order that status quo be maintained until hearing and determination of the suit with a rider that there be no development or construction on the disputed parcel of land and that the County Land Registrar, where the parcel of land is situated is restrained from dealing in the parcel of land until suit is heard and determined.

**DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2017.**

**A. OMBWAYO**

**JUDGE**