



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 102 OF 2016

WILLIAM KIPTOO KIMAIYO.....1ST PLAINTIFF

DANIEL KIPROP KIPTANUI.....2ND PLAINTIFF

SIMION KIPKOSGEI RUTO.....3RD PLAINTIFF

SANIEKO CHEBOI.....4TH PLAINTIFF

VERSUS

HON. NICHOLAS BIWOTT.....1ST DEFENDANT

THOMAS CHEBII CHANGACH.....2ND DEFENDANT

MICHAEL KIPKOSGEI KWAMBAI KINIGA.....3RD DEFENDANT

ANDREW KIBIEGO BIWOTT.....4TH DEFENDANT

THE LANDS REGISTRAR, UASIN GISHU.....5TH DEFENDANT

RULING

William Kiptoo Kimaiyo, Daniel Kiprop Kiptanui, Simion Kipkosgei Ruto and Sanieko Cheboi hereinafter referred to as plaintiffs have come to court against ***Hon. Nicholas Biwott, Thomas Chebii Changach, Michael Kipkosgei Kwambai Kiniga, Andrew Kibiego Biwott and The Lands Registrar, Uasin Gishu*** for orders that an interlocutory injunction do issue against the defendants, their servants and/or agents from entering, threatening the plaintiffs, ploughing, trespassing, alienating, charging, selling and/or depriving the plaintiffs of their interest or dealing in any way parcel L.R. No. SERGOIT/KOIWOPTAOI BLOCK 10(KARO) 47 pending hearing and determination of this suit. That costs of this application be borne by the defendants.

The application is based on grounds that the defendants have obtained Title Deed and are using the same to threaten the plaintiffs and yet the plaintiffs have been living in the said parcel of land since 2001. Moreover, that on several occasions, the defendants have been colluding with the OCS, Kapsoya Location to arrest the 2nd plaintiff whenever he is seen ploughing the land and that this suit has overwhelming chances of success.

The application is supported by the affidavit of Daniel Kiprop Kiptanui who states that he is one of the members of Kapkiyakut and the allottee of Title No Sergoit/ Koiwoptaoi Block 10 (Kairo) 47 and was

allocated the same with the three other plaintiffs after they surrendered their land at Cheptebo location Elgeyo Marakwet County to Hon Nicholas Biwott and that on the 19th October 2015 the defendants respondents by false representation and false presentation of a list of Karo farm members obtained title deed in respect of the said parcel of land fraudulently and have been using the police to harass the plaintiffs despite knowing that the plaintiffs are the rightful owners having been in the parcel of land since 2002.

The 2nd and 3rd defendants filed replying affidavits whose gist is that the applicants have no interest in the suit property whatsoever and that the applicants are not entitled to the suit land. The deponents state that the plaintiffs have forcefully entered the land and to allow them an order of injunction amount to acknowledge their illegalities to the disadvantage to the registered owners. The import of the affidavits of the 2nd and 3rd defendants is that the applicants have no interest in the properties as they are neither allottees nor registered owners and have been using force to utilize the parcel of land. Andrew Kibiego Biwott is in support of the defendants. In their further affidavit, the plaintiffs state that the replies by the defendants do not explain why the applicants were allowed to settle on Plot No. 47 and are now being told to vacate.

I have considered all facts on record and submissions by counsel for plaintiff and counsel for defendant and do find that both parties admit that the plaintiffs are in possession of the suit land though they are not the registered owners and that they entered forcefully. The plaintiffs claim to have settled on the land since 2001 and allege that the land was fraudulently registered in the names of the defendants.

The conditions for the grant of an interlocutory injunction are set out in the case of *Giella v Cassman Brown & Co Ltd [1973] EA 358*.

“The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.”

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.

On *prima facie* case with the probability of success, I do find that the plaintiffs claim that they surrendered their ancestral land to the 1st defendant in exchange with the suit land has not been disputed by the 1st defendant and therefore, makes it viable that the said exchange was done which issue can go for full trial. Moreover, the particulars of the persons who surrendered their lands to hon Nicholas Biwott can only be ascertained after full hearing of the case.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages as 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. On this issue, I do find it is not in dispute that the applicants have settled on the parcel of land and therefore disallowing the application might lead to an eviction causing them to lose what they call their homes or farms.

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. On this issue, I do find that it tilts towards granting an injunction as the plaintiff would be more inconvenienced if injunction is not granted being in possession. The upshot of the above is that the application is allowed.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE