



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L 95 OF 2017

EMMANUAL CHERUIYOT KWAMBAL.....PLAINTIFF/APPLICANT

VERSUS

RICHARD KOTUT KWAMBAL.....1ST DEFENDANT/RESPONDENT

PHILIP CHIRCHIR.....2ND DEFENDANT/RESPONDENT

JOSEPH KWAMBAL.....3RD DEFENDANT/RESPONDENT

JUDAH KIPLAGAT TARUS.....4TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

This ruling is in respect of an application for a temporary injunction which was brought by way of a Notice of Motion dated 8th March, 2017 under Certificate of Urgency seeking for orders:

1. THAT service of this application be dispensed within the first instance.
2. THAT an injunction be issued against the Defendants/Respondents restraining them by themselves, their agents, servants and/or any other person acting on their authority from trespassing, selling, leasing, transferring, encumbering, alienating, cultivating and/or in any other manner dealing with the suit land parcel number TEMBELIO/ELGEYO BORDER BLOCK 5(EX-TOOLEY)/30 measuring approximately 10 ACRES or thereabout pending the hearing and determination of this application inter-parties.
3. THAT an injunction be issued against the Defendants/Respondents restraining them by themselves, their servants, agents and/or any other persons acting on their authority from trespassing, selling, leasing, transferring, encumbering, alienating, cultivating and/or in any other manner dealing with the suit land parcel number TEMBELIO/ELGEYO BORDER BLOCK 5 (EX-TOOLEY)/30 measuring approximately 10 acres or thereabout pending the hearing and determination of this suit and/or further orders.
4. THAT the defendants/Respondents be restrained and/or stopped from sub-dividing and/or obtaining title deed in respect to the aforesaid parcel of land without the knowledge and/or consent of the plaintiff/applicant herein.
5. THAT the OCS Kapsoya police station be directed to oversee compliance.
6. The defendants be condemned to pay costs.

This application was brought before the court under certificate of urgency on 8th March 2017 whereby the court certified the matter as urgent and directed that the application be served for inter parte hearing on 22nd March 2017. The same was served and Counsel's for the parties stated that the matter involves family members. The court noted this issue and urged the parties to try and resolve the matter and agree on a status quo which should be maintained until the suit is heard and determined. Court gave parties some time to discuss but after one hour Counsels came back and reported to the court that the parties were not able to agree on the status quo.

The court therefore ordered that the Counsels do proceed with the application.

Plaintiff's Counsel's Submissions

Mr Kenei Counsel for the plaintiff/Applicant argued the application and relied on the grounds and the supporting affidavit of Emmanuel Cheruiyot Kwambai the plaintiff/Applicant herein sworn on 8th March 2017. He submitted that the plaintiff/Applicant is seeking for prayers nos. 2,3,4,5 & 6 in the application prayer no. having been spent. Counsel stated that the substantive order that they are seeking for is that the defendant/Respondents be restrained from interfering in any way with Land parcel **LR No. TEMBELIO/ELGEYO BORDER BLOCK 5 (EX- TOOLEY)/30 until** this suit is heard and determined.

Mr. Kenei further submitted on the principles of granting temporary injunctions as per the case of **Cassman Brown** and stated that the plaintiff/Applicant had established a prima facie case by demonstrating that he is the legal registered owner of the suit land. He also stated that the plaintiff had annexed a copy of the title and a copy of certificate of official search.

Counsel further submitted that there was a need to demonstrate that there is a right that has been infringed or under threat to be infringed. He cited Article 40 of the Constitution that guarantees property rights and that the plaintiff's proprietary rights are at stake in this suit. Mr. Kenei, in response to the averments in the replying affidavit by the defendant, he stated that the replying affidavit had confirmed from the annexures that the plaintiff's rights had been infringed.

Counsel submitted on the issue of irreparable damage, that the plaintiff is likely to suffer irreparable damage as he uses the suit land for his economic livelihood. He also alluded to danger of bloodshed which he stated that had happened before. Counsel also submitted that the plaintiff has been in actual possession and occupation for a period of over 40 years. He stated that the defendants only came to the suit land a week before which necessitated the filing of this suit.

Counsel submitted that the defendants have alternative abode where they are staying currently and that they would have an effective remedy of mesne profits. Mr. Kenei referred the court to paragraphs 9 & 20 of the replying affidavit which he stated that were contradictory on the issue of possession. He also poked paragraph 7 of the replying affidavit which stated that the land was bought jointly with a Mr. Christopher Cheruiyot but no evidence was adduced to support the same. Counsel also stated that on the issue of locus standi, section 45 of the Law of Succession Act Cap 160 prohibits a person to deal or lay claims over the estate of a deceased person including filing suits for that matter. There was no evidence that a succession Cause had been filed. He urged the court to allow the application as prayed.

Defendants' Counsel's Submissions

Mr. Komen Counsel for the defendants opposed the application and relied on the replying affidavit sworn by Richard Kotut Kwambai on behalf of the other defendants. He relied entirely on the deposition of the defendant in the replying affidavit save for paragraph 7 which had a typo error which read 1996 instead of 1976. Counsel submitted that there is a house on the suit property. He further submitted the 1st defendant is in actual and physical possession of the suit land. Counsel stated that the application is therefore seeking for eviction and not an injunction. He further submitted that paragraph 19 of the replying affidavit states that the plaintiff has not enjoyed peaceful occupation of the suit land. He urged the court to take notice of the fact that parties to this suit are brothers and that there have been several meetings to try and resolve this dispute but it has not been successful. He urged the court to dismiss the application.

Mr Kenei Counsel for the plaintiff in reply to Counsel's submission, stated that the defendants have not demonstrated any right to the land. He dismissed Counsel for the defendants' contention that the balance of convenience should have been on the face of the application. He stated that when you trespass on someone's land it means you are not in possession and that is why preservative orders are necessary to protect the suit property. He reiterated his quest for granting of the orders sought in the application.

Analysis and determination

I have considered the plaintiff's application together with the supporting documentation. I have also considered the submissions by both Counsels in support and opposition of the application and I have come to the conclusion that the issue for determination is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction that he seeks. I will proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction as earlier submitted by both Counsels.

The principles in **Giella vs Cassman Brown & Co Ltd**, are well recognized and an applicant must establish a prima facie case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

I must first deal with the question as to whether the plaintiff has established a prima facie case with a probability of success. The plaintiff annexed a copy of title deed registered in his name and a copy of an official search certificate to prove ownership. This shows that he has proprietary interest in the suit land. The plaintiff also averred in his supporting affidavit that he is in actual possession of the suit land. The defendant stated that the plaintiff is holding the land in trust for the defendants which suggests that they are not in occupation. If it is the case that the plaintiff was holding the land in trust for the defendants then why was the land registered in the plaintiff's name and not in their deceased father's name. This land was purportedly bought in 1976, how come the defendants have not taken steps to get their rightful shares. On that basis, I find that the plaintiff has established a prima facie case.

Having found that the plaintiff has established a prima facie case I need not delve into the other limbs of granting temporary injunctions. Be as it may I would state that I also disagree with the Defendants' Counsel that the principles of granting temporary injunctions must be put on the face of the application for injunctions. If I were to decide this application on the two limbs that is, that the applicant would suffer irreparable damage that cannot be compensated by way of damages, and in whose favour the balance of convenience lies, I would still find that it tilts in favour of the plaintiff. The defendants have not produced any evidence before the court to demonstrate any proprietary rights. The information in the replying affidavit was contradictory and did not help the court in any way. The defendants tried to introduce an angle

that the suit land was bought jointly together with their deceased father but no evidence was tendered to support the same. This would have technically made the suit land under administration of the estate of the father. The defendants further introduced another angle that there was a Mr Cheruiyot who also bought the land jointly with them but no evidence was produced in that respect.

I therefore find that the application dated 8th March 2017 has merits and is hereby allowed.

Since the parties are brothers I order that each party to bear their own costs.

Parties to comply with Order 11 within 30 days and set down the suit for hearing.

Dated and delivered at Eldoret this 13th day of April, 2017

M.A ODENY

JUDGE