



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 43 OF 2016

**DAVID KIPLAGAT KITUR (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
ELIJAH KIMILGO CHUMO ALIAS KIMILGO CHUMO-DECEASED....PLAINTIFF**

VERSUS

ELIZABETH CHEPTONUI CHUMO.....1ST DEFENDANT

REGISTERED TRUSTEES CATHOLIC DIOCESE OF KERICHO.....2ND DEFENDANT

BOMET COUNTY LAND REGISTRAR.....3RD DEFENDANT

R U L I N G.

By a Notice of Motion dated 30th June, 2016 brought pursuant to Order 40 Rule 1 and 2, Order 50 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act, the Plaintiff/Applicant seeks the following prayers:

a. An interim injunction restraining the 2nd defendants, its servants, agents or employees from occupying, ploughing, leasing, transferring, disposing, charging, putting up structures, plucking tea or alienating land parcel number KERICHO/KIMULOT/502 pending the hearing and determination of the suit herein.

b. That the cost of this application be provided for.

The application is based on the grounds that the 1st defendant/applicant fraudulently sub-divided and sold a portion of the suit land to the 2nd defendant in collusion with the 3rd defendant without the consent of the beneficiaries of the estate of the late **ELIJAH KIMILGO CHUMO** hence dispossessing the applicant and other beneficiaries.

The application is supported by the Plaintiff/Applicant's affidavit sworn on the 30th June, 2016 and a further affidavit sworn on the 12th August, 2016.

In his affidavit the applicant depones that he is the administrator of the estate of **ELIJAH KIMILGO CHUMO-Deceased**. The deceased was the registered owner of land parcel number **KERICHO/KIMULOT/502**. The deceased had two wives and eight children. He further depones that the 1st defendant /respondent who is one of the deceased's widows fraudulently sub-divided and sold a portion of the deceased's land to the 2nd respondent without the consent of the beneficiaries of the estate of the late **ELIJAH KIMILGO CHUMO**. As a result of the said fraudulent sub-division and transfer,

the 2nd Respondent is now registered as the owner of land parcel number **KERICHO/KIMULOT/1151** while the 1st Respondent is the registered owner of land parcel number **KERICHO/KIMULOT/1149**.

The Applicant maintains that unless the Respondents are restrained by way of an injunction, they will render the applicant and other beneficiaries of the deceased landless.

This being an application for injunction, the applicant is expected to prove that he has met the principles established in the case of **Giela Vs Cassman Brown 1973 EA 358** which are as follows;

- a. An applicant must show a prima facie case with a probability of success.
- b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
- c. When the court is in doubt, it will decide the application on the balance of convenience.

I have carefully considered all the issues raised in the Pleadings, Notice of Motion, Supporting affidavits, Replying affidavit and annexed documents. I have also considered the submissions by both counsels for the plaintiff/ applicant and the respondents.

The Plaintiff/Applicant herein has not demonstrated that he has a *prima facie* case with a probability of success. Even though he alleges that 1st defendant has fraudulently sub-divided and sold a portion of the deceased's land parcel number **KERICHO/KIMULOT/502**, the 1st Respondent has attached documents to show that consent to sub-divide was obtained by the deceased during his lifetime on 20th May, 1997. There is also documentary evidence to show that it is the applicant who transferred one of the titles derived from the suit parcel, i.e land parcel number **KERICHO/KIMULOT/1447** to the Catholic Diocese of Kericho.

From the foregoing it is not at all clear who is telling the truth as it would appear that both the applicant and the 1st respondent have benefited from the deceased's estate so far. The whole truth will only come to light once the case is heard and the testimony of all witnesses is subjected to cross-examination. As matters stand now, it would not make sense to grant injunctive orders in favour of the applicant as he has not demonstrated that he would suffer irreparable loss nor does the balance of convenience tilt in his favour.

The upshot is that the application fails and it is dismissed with costs.

In order to expedite the determination of the real issues in controversy, I direct that the parties comply with **Order 11** of the **Civil Procedure Rules** within 30 days so that the case can be set done for hearing.

It is so ordered.

SIGNED, DATED AND DELIVERED this 31st day of May, 2017.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. T.M.O Nyaingiri for the 1st and 2nd Defendants.

2. Court assistant- Rotich