



REPUBLIC OF KENYA

INE THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO 52 OF 2016

JOYCE CHELANGAT KORIR.....PLAINTIFF

VERSUS

BERNARD KIMUTAI TONUI.....1ST DEFENDANT

ALEXANDER TONUI.....2ND DEFENDANT

ESTHER CHERONO KORIR.....3RD DEFENDANT

R U L I N G .

What is before me is a Notice of Motion dated 19th September, 2016 brought under Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiff/Applicant seeks orders for an injunction to restrain the defendants from interfering with the Plaintiff's quiet enjoyment and occupation of L.R number **KERICHO/TEBESONIK/354** measuring 1.6 Hectares.

The application is supported by the Plaintiff's affidavit sworn on the 19th September, 2016 to which she has attached a number of documents relating to the suit land including a copy of the title deed in her name, the Green Card, Transfer forms and the Consent of the Land Control Board, among others.

In the Supporting Affidavit, the Applicant avers that sometime in the month of September 2014, the Respondents jointly made a forceful entry into the Applicant's parcel of land L.R number **KERICHO TEBESONIK/354**, sealed off the gate and started tilling the land thereby preventing the Plaintiff from accessing her land or enjoying its use and occupation. The defendants claimed that they are the rightful owners of the said land. The applicant therefore filed this application to assert her right over the land and stop the defendants from interfering with it.

At the hearing of the application counsels chose to make oral submissions buttressed by written submissions. Counsel for the Applicant Mr Kirui relied on the Plaintiff's Supporting Affidavit together with the annexures. He submitted that the Defendants had not filed any Defence since they were served with Summons to enter Appearance, in accordance with Order 7 Rule 1 of the Civil Procedure Rules and therefore, their Replying Affidavit stands on quicksand and ought to be struck out. He further submitted that the defendants had not produced any documents to show that they were entitled to the suit land and their acts therefore constituted trespass.

The application is opposed by the defendants through the Replying Affidavit sworn by Esther Cheron Korir, the 3rd Defendant/Respondent on 20th February 2017.

Mr. Bii Counsel for the Respondents submitted that the title deed in the plaintiff's name was a forgery as the documents accompanying it do not match. He pointed out that the mutation forms and transfer forms bear different names. Another puzzle is that the mutation forms were made in 1984 while the consent of the Land Control Board was obtained in 2014. He further submitted that according to the copy of the green card and mutation forms, the suit land was originally registered in the name of **Elizabeth Chepkemoi Cherobon- Deceased**, who held it in trust for her sons, namely **Richard Cheruiyot Korir, Reuben Korir, John K. Korir** and **Mariandany Kiptanui arap Korir** yet this is not disclosed by the applicant. Furthermore, there is no indication that Letters of Administration were taken out in respect of the estate of **Mariandany Kiptanui arap Korir –Deceased**, the plaintiff's husband who was beneficially entitled to the suit land before the transfer was made.

Counsel for the Defendants/ Respondents cited the case of **National Bank of Kenya Vs. Lawrence Otweyo Gumbe Civil Appeal No 93 of 2002** which restates the principles for granting an injunction laid down in the celebrated case of **Giella Vs Cassman Brown** as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant will suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

In view of the averments by the 3rd Respondent in the Replying Affidavit, it is their counsel's submission that the Plaintiff/Applicant has not satisfied the threshold for grant of an injunction as laid down in the **Giella** case.

By attaching the title in respect of **L.R No KERICHO/TEBESONIK/354**, the Plaintiff/applicant has shown that she is *prima facie* the owner of the suit land. The averments contained in the Replying Affidavit though weighty, can only be canvassed and subjected to cross-examination at a full hearing. For reasons best known to themselves, the defendants have so far neither filed a defence nor sought leave to do so out of time.

At this point in time, all that I am required to do is satisfy myself that the applicant has met at least one of the principles laid down in the **Giella** case. I find that the applicant has demonstrated that she is the owner of the suit land and is therefore entitled to its occupation and use without interference from the respondents or any other person.

Consequently, I allow the application in terms of prayers 3, 4 and 5 and direct as follows:

- a) That pending the hearing and determination of the suit herein, an injunction is hereby issued restraining the Defendants/Respondents by themselves, their agents, servants, employees or anyone acting on their behalf from preventing the applicant from entering, remaining on, or cultivating L.R no KERICHO/TEBESONIK/354 or interfering with the applicant's occupation and use of the said land.
- b) That the parties take such steps as are necessary to expedite the hearing of this case.
- c) The costs of the application be in cause.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MAY, 2017.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Bii for the Defendants/Respondents.
2. Mr. Mwita for J.K.Kirui for the Applicants.
3. Court Assistant- Wambany