



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC NO. 10 OF 2017**

**KOROS BERNARD.....PLAINTIFF**

**VERSUS**

**GEOFFREY BII.....DEFENDANT**

**R U L I N G.**

What is before me is a Notice of Motion date 1<sup>st</sup> February, 2017 brought pursuant to **Order 40 Rule 1** and **Order 51 Rule 1** of the **Civil Procedure Rules** as well as **Section 3A**, of the **Civil Procedure Act**. The Plaintiff/Applicant seeks the following orders:

- 1. That this application be certified as urgent and the service of this application be dispensed with in the first instance.*
- 2. That pending the hearing and determination of this application interparties, this honourable court be pleased to issue injunction orders restraining the Defendant/Respondent by himself, agents, servants, employees or otherwise from entering remaining, cultivating, selling, leasing, interfering with and or doing any other act which is prejudicial to the Plaintiff/Applicant's quiet enjoyment and occupation of L.R.NO.KERICHO/KABIANGA/38 measuring Fifty by One Hundred (50x100) Feet.*
- 3. That pending the hearing and determination of this suit this honourable court be pleased to issue injunction orders restraining the Defendant/Respondent by himself, agents, servants, employees or otherwise from entering, remaining, cultivating, selling, leasing, interfering with and or doing any other act which is prejudicial to the Plaintiff/Applicant's quiet enjoyment and occupation of L.R.NO.KERICHO/KABIANGA/38 measuring Fifty by One Hundred (50 x100) Feet.*
- 4. That further and necessary directions be given.*
- 5. That the cost of this application be in the cause.*

The Application is supported by the Plaintiff's affidavit sworn on the 1<sup>st</sup> February, 2017 in which he depones that he is the registered proprietor of land parcel no. KERICHO/KABIANGA/38 situated at Kabianga Market and measuring 50 by 100 feet. The Plaintiff depones that he purchased the said plot from one LAWRENCE KIPKOECH KETER in 2014. He attached a copy of an affidavit sworn by the said LAWRENCE KIPKOECH KETER confirming the same.

He depones that the Respondent's Father one MALIT- deceased sold the said plot to the County Council of Kipsigis which now falls under the County Government of Kericho which in turn allocated the plot to

LAWRENCE K. KETER.

He further depones that sometime in 2015, while in the process of demarcating the plot, he discovered that the defendant/respondent had trespassed thereon constructed permanent structures and sold a portion of the suit parcel to one SUSAN MOROGO and EDWARD KEMEI who are currently in occupation of the same.

In support of his averments the Plaintiff has attached a copy of the allotment letter in the name of LAWRENCE K. KETER, consent to transfer from the County Government of Kericho and receipts for payment of land rent.

In his response the Defendant/ Respondent avers that the suit parcel was curved out land parcel number KERICHO/KABIANGA/124 which was registered in the name of TABELGA W/O MARITIM – Deceased who was his grandmother. He further depones that neither his grandmother nor his father (MALIT) sold the suit land to the Kipsigis County Council and therefore the same could not have passed to the County Government of Kericho.

He therefore maintains that the County Government of Kericho had no capacity to allocate the suit parcel to Lawrence Keter.

He denies that he has trespassed onto the suit parcel as he is in occupation of the plot by virtue of being the beneficial owner thereof.

In his submissions, Mr. Kirui, Counsel for the Applicant submits that the Applicant has demonstrated that he is the legal proprietor of the suit parcel. He further submits that the applicant has met the principles for the grant of an injunction laid down in the case of **Giella V Cassman Brown 1973 EA 358**. The said case held as follows:

*“The conditions for the grant of an interlocutory injunction are now well settled. 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 might otherwise 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 elaborating the meaning of *prima facie* case he relied on **Machareus Obaga Amunda V Kenya Electricity Transmission Co. Ltd (2015) eKLR** where in citing the case of **Mrao V First American Bank of Kenya Ltd & 2 Others 2003 KLR 125** a *prima facie* case was described as follows:

*“A prima facie case in a Civil Application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been apparently infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

He submitted that based on the above definition, the Plaintiff had established a *prima facie* case and was therefore entitled to the orders sought.

On the other hand, Miss Koech, Counsel for the Defendant/Respondent's has submitted that the Applicant has not made out a case for the grant of an injunction. She has cited a number of authorities which support the position that injunctions ought to be granted sparingly. Of particular interest is the case of **Njenga V. Njenga 1991 KLR 401** where Bosire J (as he then was) observed that:

*“The jurisdiction of the Court to grant orders under Order XXXIX (currently 40) is specific. It can only be exercised where it is shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree.”*

She also relied on the case of **Kenleb Cons Ltd V New Gatitu Service Station Ltd & Another 1990 KLR 557** where it was held that:

*“To succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

In the instant case, the Applicant has not produced evidence of ownership of the suit land. What he has annexed to his supporting affidavit is a letter of allotment in the name of the person he alleges to have bought it from.

The Respondent has made a strong assertion that the suit land originally belonged to his late grandmother TABEGA W/O MARITIM and at no point did she sell it to the County Council of Kipsigis. The Applicant alludes to the fact that MALIT who was the uncle of the Defendant sold the land to the County Council of Kipsigis.

From the evidence so far adduced by the parties it is not possible for the court to determine who the rightful owner of the suit land is. This is an issue that will only become clear when the case goes to full hearing.

In the circumstances, I am of the view that the Applicant has not established a *prima facie* case with a probability of success. I therefore disallow the application.

Costs in cause.

**DATED, SIGNED AND DELIVERED THIS 28TH DAY OF JUNE, 2017.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss. Kitur for the Applicant.
2. Respondent present in person.