



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

ENVIRONMENT AND LAND CASE NO. 51 OF 2016

PHILIP KIBET KEMEI.....1ST PLAINTIFF

JOEL KIPTOO TUEI.....2ND PLAINTIFF

VERSUS

JOSIAH KIPKOSKEI KIRUI.....DEFENDANT

RULING

What is coming up for determination is the Notice of Motion dated 2nd May 2017. The said application which was filed by the plaintiffs seeks orders of temporary injunction to restrain the defendant by himself, his servants, workers, employees and/or agents from entering, working on, cultivating, grazing, building, developing and/or in any way or manner whatsoever or howsoever interfering with a portion of two acres comprised in land title number KERICHO/SORGET/KALYET BLOCK 1/160 pending the hearing and determination of the suit herein.

The application is premised on the supporting affidavit of Philip Kibet Kemei and Joel Kiptoo Tuei, the applicants herein sworn on the 2nd May 2017. The applicants aver that they have been in occupation of the suit land since they purchased it from the Defendant more than 10 years ago. However, since March 2017, the defendant has maliciously dumped some building materials on their portions of land and has started constructing a building thereon. They further depone that they have been deprived of their source of livelihood as they are unable to cultivate the suit land.

The application is opposed by the defendant/respondent through his replying affidavit sworn on the 7th day of June 2017. He depones that the suit land is registered in his name and even though he admits having sold portions of it to the applicants, he states that the sale is null and void as it was never approved by the Land Control Board as required by the Land Control Act Cap 302 of the Laws of Kenya.

He further avers that he is willing to refund the applicants the purchase price and he went as far as drawing bankers cheques for the amounts paid by the applicants but they refused to accept the refunds. He states that he started the construction complained of before the suit was filed and he has no intention of stopping as he is using his land.

The application was canvassed by way of written submissions and both parties filed their submissions in which they stated their positions. In his submissions, learned counsel for applicants restated what is contained in the applicant's affidavits. On the other hand, learned counsel for the respondents put up a spirited fight and cited a plethora of authorities to support his submission that the sale of land to the

applicants was null and void for lack of Land Control Board consent. He also submitted that the applicants had not made out a case for the grant of injunctive orders.

The main issue for determination is whether the applicants meet the criteria for the grant of an injunction set out in the case of *Giella V Cassman Brown* 1973 EA 358 which held 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”.

The applicants have no title to the suit land and even though the respondent does not deny that he sold it to them, it is common ground that consent of the Land Control Board was never obtained within the requisite period of six months after the sale. This renders the sale null and void. I rely on the case of **Kiplagat Kotut V Rose Chebor Kipngok Civil Appeal No 31 of 2015** where the Court of Appeal held that where no consent of the Land Control Board had been obtained within six months of the sale, its hands were tied by the mandatory provisions of the Land Control Act.

In view of the above, the applicants have failed to establish that they have a prima facie case against the respondent and are therefore not entitled to the orders sought. The upshot is that the application lacks merit and is hereby dismissed with costs.

Dated, signed and delivered this 24th day of October 2017

J.M ONYANGO

JUDGE

In the presence of :

Mr. Koko for Anassi Momanyi for the Defendant/Respondent

Mr. Bii for Mr. Koske for the Plaintiffs/Applicants

Court Assistant: Rotich