



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

CIVIL SUIT NO. 8 OF 2013 (O.S)

PAUL KIBET KOECH.....PLAINTIFF

VERSUS

DAVID KIPRONO KOSKE.....DEFENDANT

RULING

What is before me for determination is the application dated 5th April 2017. The said application is brought by way of Notice of Motion pursuant to Order 40 rule 1 and 2 of the Civil Procedure Rules together with sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks an order of injunction to restrain the Defendant/Respondent from entering, leasing, cultivating, grazing animals or in any manner whatsoever, interfering with the Plaintiff's parcel number KERICHO/CHEMAGEL/2113 pending the hearing and determination of the suit herein.

The application is premised on the grounds stated in the Notice of Motion and the Applicant's supporting affidavit sworn on the 5th April 2017. The Applicant depones that he is the registered proprietor of land parcel number KERICHO/CHEMAGEL/2113 and he has attached a copy of the Certificate of title. He further depones that he sold to the Respondent a portion of his land known as KERICHO/CHEMAGEL 2114 measuring ½ an acre which he subsequently transferred to him. He then requested the Respondent to look after his remaining parcel of land known as KERICHO/CHEMAGEL 2113 but the Respondent encroached onto the said parcel and started planting crops thereon prompting the Applicant to file suit against him through SOTIK PMCC NO. 52 of 2009. The said suit was struck out for want of jurisdiction. The Applicant depones that unless the Respondent is restrained by an order of injunction the Applicant shall suffer great prejudice as he will be denied the use of his land.

The application is opposed by the Respondent through his replying affidavit sworn on the 24th July 2017. In the said affidavit he depones that he bought the suit parcel from the Applicant in 1990 in addition to land parcel number KERICHO/CHEMAGEL/2114 and he has been residing on it with his family since then. He further depones that he has carried out some developments on the land and if he is restrained from using it he will be rendered homeless.

The main issue for determination is whether the Plaintiff has met the threshold for the grant of a temporary injunction as set out in the case of **Giella V Cassman Brown 1973 EA 358** which were restated in the case of **David I. Githuku V George Munyua Mbira & 2 Others (2013) eKLR** as follows:

“First, the applicant must show that he has 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 adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR** when in recognizing that “*the law has always kept growing to greater levels of refinement to cover new situations not foreseen before*” he relied on the English case of **Films Rover International 1986 3 All ER 772** where the court stated as follows:

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”.

The first issue that the court must determine is whether the plaintiff has established a prima facie case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

In the instant case the Defendant/Applicant has demonstrated that he has a title to the suit land. Even though the Respondent alleges to have bought the said parcel of land in addition to the parcel the Applicant had earlier sold to him, he has not attached any evidence to support this claim. As counsel for the Applicant has rightly submitted the Applicant’s title is prima facie evidence of ownership. Section 26 (1) of the Land Registration Act provides as follows:

1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate and the title of the proprietor shall not be subject to challenge except

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

Section 24 of the Land Registration Act provides that;

a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges appurtenant thereto.

At this point therefore, the Applicant has demonstrated that he has prima facie case with a probability of success. What is not clear is why he took no action to assert his claim since 2009 when his first case was struck out. Equity assists the vigilant and not the indolent. On the other hand, the Respondent alleges to have bought and occupied the suit land since 1990 although his claim has not been substantiated. However taking into account that this is a suit for adverse possession, it would be in the interest of justice if the status quo was maintained as granting an injunction at this stage would amount to determining the suit without hearing the parties. I am persuaded that there would be a much larger risk of injustice if I found in favour of the Applicant than if I determined the application in favour of the Respondent.

In the circumstances I find it just and equitable to order that the status quo be maintained pending the hearing and determination of the suit herein.

In order to expedite this matter, I direct that the suit be listed for directions within the next 30 days.

The costs of this application shall be in the cause.

Dated, signed and delivered this 16th day of November 2017

J.M. ONYANGO

JUDGE

In the presence of:-

Kiprono for the Applicant;

No appearance for the Respondent.

Court Assistant: Wambany