



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 27 OF 2017

SAMWEL KIPLANGAT SANG.....PLAINTIFF

VERSUS

JOEL KIPROTICH KOECH.....DEFENDANT

RULING

This ruling is in respect the Plaintiff/Applicant's application dated 13th March 2017. The said application is brought by way of Notice of Motion pursuant to Order 40 rules 1, 2 (1), 3(1) and 9, Order 51 rule 1 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act. The Plaintiff seeks an order of injunction to restrain the Defendant/Respondent by himself, his agents, servants, employees or otherwise from occupying, constructing, erecting structures, sub-dividing, disposing of, interfering with or doing any other act that is prejudicial to the Plaintiff/Applicant's proprietary interest in land parcel number KERICHO/KIPKELION/CHEPSEON BLOCK 14 (KAPSEGER)/157 pending the hearing and determination of the suit herein.

The application is premised on the grounds stated in the Notice of Motion and plaintiff's supporting affidavit sworn on the 13th March 2017. In his affidavit the plaintiff depones that he purchased the suit property as a member of Kapseger Cooperative Society and he was allocated 25 acres after paying the full purchase price in 1992. He claims that the Defendant has illegally trespassed onto the plaintiff's land and fraudulently caused it to be registered in his name. The defendant is now in the process of sub-dividing it with the intention of disposing of it, thereby denying the plaintiff the use and occupation of the said land.

The application is opposed by the Defendant through his replying affidavit sworn on 22nd June 2017. The Respondent depones that sometime in 1993 the suit land was the subject of a dispute between the plaintiff and the defendant at the office of the District Officer Kipkelion Division where a verdict was reached by the elders to the effect that the land that the plaintiff bought through Kapseger Cooperative Society measuring 25 acres be divided between the plaintiff and the defendant in the ratio of 10 and 15 acres respectively. Subsequently the defendant had the land surveyed and two titles were issued. The Defendant was registered as the proprietor of land parcel number KERICHO/KIPKELION/CHEPSEON BLOCK 14 (KAPSEGER)/157 measuring 4.2 hectares and a title deed was issued to him on 5th December 1994.

The Defendant further avers that in 2009, the plaintiff filed a dispute before the Kipkelion Land Disputes Tribunal and the Tribunal upheld the decision of the elders and further held that they could not interfere with registered land. The decision of the Tribunal was subsequently adopted as a judgment of the court through Kericho PM Miscellaneous Civil Application No. 33 of 2011. Being dissatisfied with the judgment, the plaintiff applied for Judicial Review to quash the judgment of the court in HC Miscellaneous Application No. 44 of 2011. However, since obtaining leave to file the substantive application for Certiorari and Mandamus, the plaintiff has taken no action. The Defendant therefore avers that he is not a trespasser as he is merely occupying his rightful share of the land that was awarded to him.

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 Plaintiff has not demonstrated that he has a title to the suit land. Indeed, he admits that the land is registered in the name of the defendant although he alleges that the said registration was fraudulent and unlawful. This is neither here nor there. At this point therefore the plaintiff has not demonstrated that he has prima facie case with a probability of success. He has also not demonstrated that he stands to suffer irreparable loss if the orders of injunction are not granted.

From the material presented in court, it is clear that the Defendant has been in occupation of the suit land since 1993. In the circumstances, I am convinced that there would be a much larger risk of injustice if I found in favour of the Plaintiff than if I determined the application in favour of the Defendant. The balance of convenience therefore tilts in favour of the Defendant.

I have carefully considered the Plaintiff’s application, affidavits of both parties and annexures as well as the pleadings and the submissions filed on behalf of both parties and I have come to the conclusion that the Plaintiff has not met the threshold for the grant of a temporary injunction. I therefore find no merit in his application and I dismiss it with costs to the Defendant.

Dated, signed and delivered this 10th day of November 2017

J.M ONYANGO

JUDGE

In the presence of:

Miss Chelimo for the Applicant

The Respondent present in person

Court Assistant: Rotich