



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 74 OF 2017

JULIUS KIPYEGON KOECH.....PLAINTIFF

VERSUS

PAUL KIPNGETICH KOECH.....DEFENDANT

RULING

This ruling is in respect of the Plaintiff/ Applicant's application dated 30th June 2017. The said application was brought by way of Notice of Motion pursuant to the provisions of Order 40 Rules 3(1) and (2) and Order 51 of the Civil Procedure Rules as well as sections 1, 1A, 3 and 3A of the Civil Procedure Act. The application seeks orders of injunction to restrain the Defendant/Respondent by himself, his servants, agents, employees, representatives, assigns and heirs from encroaching into, grazing animals, cutting down trees and/ or doing any acts that are detrimental to the Plaintiff's right of peaceful occupation, possession and use of land parcel number KERICHO KOIYET/S.S/359 measuring 6.9 Hectares pending the hearing and determination of the main suit.

The application is anchored on the grounds stated in the Notice of Motion and the applicant's supporting affidavit sworn on the 30th June 2017. In essence the applicant depones that being a son of Makerer Arap Birir- deceased and beneficiary of his estate, he was registered as the proprietor of land parcel number KERICHO/KOIYET S.S/359 through transmission pursuant to Kericho HC Succession Cause no. 91 of 2008. The applicant has annexed a copy of the judgment of Mumbi Ngugi J in the Succession Cause which clearly sets out how the deceased's property should be distributed among his beneficiaries. The said parcel was derived from a sub-division of land parcel number KERICHO/KOIYET S.S/168 which was divided into equal portions two between the applicant and the respondent who is his brother. He depones that despite the respondent having been given his share of land he has encroached on the applicant's portion thereby interfering with the applicant's quiet and peaceful occupation thereof.

The application is opposed by the respondent through his Replying Affidavit sworn on 11th July 2017 in which he disputes the manner in which his late father's property was distributed and claims that he was not involved in the sub-division of the suit land. He has however not produced any evidence to show that he has appealed against the judgment in the Succession cause.

When the application came up for hearing on the 24th October 2017 the respondent did not attend court despite the fact that he was present in court when the hearing date was fixed. The application therefore proceeded ex-parte. Learned counsel for the applicant relied on the applicant's affidavit and gave an account of how the applicant's title was acquired. He submitted that in accordance with the provisions of the Land Registration Act, a registered owner of land has exclusive rights and is entitled to quiet and peaceful possession thereof. He further submitted that the respondent has unlawfully interfered with the applicant's rights to the suit land. In the circumstances, the applicant has demonstrated that he has a prima facie case with a probability of success and the respondent's continued acts of trespass are causing him irreparable loss.

The main issue for determination is whether the applicant has met the threshold for the grant of a temporary injunction. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the celebrated 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 applicant has attached a certificate of title to show that he is the registered proprietor of the suit land. He has explained that he inherited this property from his late father and even though the respondent was given his share, he has encroached on the applicant's land without any justification whatsoever. In the absence of any evidence to the contrary, the court must take the applicant's certificate of title as prima facie evidence that he is the absolute proprietor of the suit land. I therefore find and hold that the plaintiff has established a prima facie case with a probability of success.

The second condition that the applicant is expected to meet is to demonstrate that if the injunction is not granted, he will suffer irreparable loss. Both in the plaint and the Notice of Motion, the applicant has indicated that the acts of trespass the respondent is engaging in include cutting down trees, grazing his animals, cultivating and denying the applicant peaceful occupation of his land. These are acts that cannot easily be quantified in monetary terms. The applicant has therefore demonstrated that unless the respondent is restrained from encroaching on his land he is likely to suffer irreparable loss.

Thirdly, I am convinced that there would be a much larger risk of injustice if I found in favour of the respondent than if I determined the application in favour of the applicant. The balance of convenience therefore tilts in favour of the applicant. Consequently, the applicant has met the threshold for the grant of a temporary injunction.

Accordingly, I find it just and equitable to make the following orders:

That pending the hearing and determination of the suit herein a temporary injunction do and is hereby issued restraining the defendant by himself his servants, agents, employees, representatives, assigns and heirs from encroaching into, grazing animals, cutting down trees and/ or doing any acts that are detrimental to the Plaintiff's peaceful right of occupation, possession and use of land parcel number KERICHO KOIYET/S.S/359 measuring 6.9 Hectares.

The defendant shall bear the costs of this application.

Dated signed and delivered this 7th day of November 2017

J.M ONYANGO

JUDGE

In the presence of:

Koko for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Court Assistant Rotich.