



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 85 OF 2017**

**JOSEPHINE CHEBET RUTO.....PLAINTIFF**

**VERSUS**

**STANLEY K. CHEPKWONY.....1<sup>ST</sup> DEFENDANT**

**RICHARD ROTICH.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. What is coming up for determination is the Plaintiff's application dated 18<sup>th</sup> July 2017 seeking an order of injunction to restrain the defendants by themselves, their agents, servants, employees or anyone acting on their behalf from entering or interfering with the plaintiff's quiet possession, occupation and use of the premises on L.R No KERICHO/SILIBWET/1376 and/or carrying out any dealings which are detrimental to the plaintiff's occupancy of the suit premises.
2. The application is premised on the grounds stated on the face of the Notice of Motion and the applicant's supporting affidavit sworn on the 18<sup>th</sup> July 2017.
3. The application is opposed by the Defendants through the 1<sup>st</sup> Defendant's Replying Affidavit sworn on the 22<sup>nd</sup> September 2017 and the Grounds of Opposition dated 21<sup>st</sup> September 2017.
4. Additionally, learned counsel for the defendants raised a Preliminary Objection that the Plaintiff does not contain a prayer for permanent injunction and an interlocutory injunction cannot be issued in vacuo.
5. A brief background of the case is that pursuant to a lease agreement dated 24<sup>th</sup> April 2016 between the plaintiff and the 1<sup>st</sup> defendant the plaintiff took possession of the buildings on L.R No KERICHO/SILIBWET/1376 and started construction of some structures but before she could complete the said construction, the defendants chased her away and took possession of the premises in violation of the terms of the lease.
6. In his Replying Affidavit the 1<sup>st</sup> Respondent denies that he is the registered proprietor of the suit property or that he entered into a lease agreement with the plaintiff in respect of the same.
7. The parties agreed to canvass the application by way of written submissions and both parties filed their respective submissions.

**Applicant's submissions**

8. In his submissions, learned counsel for the applicant concedes that the 1<sup>st</sup> defendant is not the registered proprietor of the suit property and for this reason she could not pray for a permanent injunction to restrain the 1<sup>st</sup> Defendant from interfering with her occupation of the said premises. The plaintiff however states that the 1<sup>st</sup> Defendant breached the terms of the lease by chasing the plaintiff away from the suit premises after she had incurred great expense in constructing some structures for purposes of running a business. Counsel therefore submits that the plaintiff has suffered irreparable damage which cannot be compensated by damages and for that reason she is entitled to an injunction.
9. The Applicant's counsel submits that the 1<sup>st</sup> Defendant cannot raise the defence that he is not the registered owner of the suit property as he has benefited through his representation to the plaintiff that he was in a position to lease the premises to her.

## Respondent's submissions

10. In opposing the application learned counsel for the Respondents has relied on the Grounds of Opposition dated 21<sup>st</sup> September 2017 in which he raised the following points:

- i) The application does not meet the standards for the grant of injunctive relief set out in the case of *Giella V Cassman Brown & Co Ltd* (1973) E.A 358
- ii) That the Land parcel number KERICHO/SILIBWET/1376 is not registered in the names of the Respondents
- iii) That the subject lease had not been registered and the applicant has therefore not complied with section 19 of the Stamp Duty Act Chapter 480 of the Laws of Kenya
- iv) The applicant is asking the court to re-write the contract between the parties

## The Respondent's counsel

11. He has submitted that the applicant's case does not disclose a prima facie case with a probability of success as the applicant is not the registered owner of the suit property. He has submitted that the applicant has failed to demonstrate that he shall suffer irreparable loss which cannot be compensated by damages as he has quantified the amount he used to construct the house and carry out renovations to the suit property. He has therefore concluded that the balance of convenience does not tilt in the applicant's favour.

12. He has faulted the lease annexed to the applicant's supporting affidavit for being null and void as it is not accompanied by the consent of the Land Control Board as the subject land is agricultural land. He has also stated that the said lease is invalid as it has not been registered in accordance with the section 19 of the Stamp Duty Act Cap 480 of the Laws of Kenya. He has finally submitted that the injunctive relief sought by the applicant cannot be granted in vacuo as the applicant has not prayed for a permanent injunction in her Pleint.

## Analysis and Determination

13. There are two main issues for determination.

- i) The first one is whether the plaintiff has met the threshold for an interlocutory injunction.
- ii) Secondly, if the first one is in the affirmative, can an injunction can be granted in *vacuo*?

14. The principles that guide the court in granting an interlocutory injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** 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 the application on a balance of convenience."*

15. The first test 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) defined a prima facie case 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"*

16. The plaintiff is relying on a lease agreement entered into between herself and the 1<sup>st</sup> Defendant. In his Replying affidavit, the 1<sup>st</sup> Defendant denies that he is the registered proprietor of the suit land and further denies that he entered into any lease agreement with the Plaintiff. The plaintiff therefore has an uphill task to prove her claim against the Defendants.

17. The lease agreement attached to her supporting affidavit has been challenged as being invalid for two reasons. First it has been submitted on behalf of the defendants that since the suit land is Agricultural land consent of the Land Control Board ought to have been obtained before entering into the lease agreement. Secondly, it has been submitted that the lease was not registered in accordance with the provisions of section 19 of the Stamp Duty Act.

18. It is clear that the plaintiff has no suitable rejoinder to these assertions and she has therefore failed to prove that she has a prima facie case with a probability of success. Having failed the first test for the grant of an injunction, I need not look at the remaining two tests, but even if I was to do so, the Plaintiff has quantified her claim meaning that her loss can be compensated by damages and an injunction may not be the most suitable remedy.

19. I now turn to the second issue which is whether an injunction can be issued in vacuo. In determining this issue, I rely on the case of **James Archimedes Gichana V Pyrethrum Board of Kenya Nakuru HCCC No. 237 of 2007** where the court held as follows:

*“Both rules 1(a) and 1(b) of Order 40 have been judicially considered to require a clear indication or prayer in the suit seeking such an injunction. Where an applicant for injunction fails to demonstrate that he sought an order of permanent injunction in his suit, his application is said not to sound with rule 1a or 1b of order 40 and will be deemed to be incompetent. The reason for this is clear. It is found in order 2 rule 6 of the Civil Procedure Rules that no party may in his pleadings make an allegation of fact or raise any new ground of claim inconsistent with his pleadings. No party can depart from his pleadings whether in evidence or in an interlocutory application. To do so, a party must first amend his pleadings. “*

**Conclusion**

20. In view of the foregoing reasons, the Plaintiff’s application lacks merit and is hereby dismissed with costs.

**Dated, signed and delivered at Kericho this 19<sup>th</sup> day of December 2017**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

Mr Siele Sigira for the Defendants/Respondents

No appearance for the Plaintiff/Applicant

Court Assistant: Rotich