



**REPUBLIC OF KENYA**

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

**ELC CASE NO.111 OF 2017**

**ERIC KIPNGENO KOECH.....PLAINTIFF**

**VERSUS**

**JOSEPH CHERUIYOT MESIS.....1<sup>ST</sup> DEFENDANT**

**NICHOLAS KIPNGENO.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. This Ruling is in respect of the Defendants' application dated 18<sup>th</sup> October 2017. The said application is brought pursuant to Order 40 Rule 7 and Order 51 of the Civil Procedure Rules, section 3 and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya. The application seeks three main prayers, namely:

i. That the injunctive order issued by the Honourable court on the 16<sup>th</sup> October 2017 restraining the Defendants/Respondents whether by themselves, their servants, agents or anybody acting on their behalf from re-entering, trespassing, cultivating, or in any other way interfering with Plaintiff/Applicant's property known as land parcel number KERICHO/EAST SOTIK S.S/1114 measuring 0.57 Hectares pending the hearing and determination of the suit be set aside, varied and or vacated pending the inter partes hearing of the main suit.

ii. That the application dated 27<sup>th</sup> September 2017 be listed afresh for hearing to allow the defendants to respond to it and participate in the interparties hearing.

iii. That the Honourable court be pleased to stay the Bomet SPM Criminal Case No. 1636 of 2016; Republic V Joseph Cheruiyot Mesis pending the hearing and determination of this suit.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the supporting affidavit sworn on the 18<sup>th</sup> October 2017 as well as the Supplementary Affidavit sworn on the 9<sup>th</sup> November 2017.

3. The application is opposed by the Plaintiff/Respondent through his Replying Affidavit sworn on the 30<sup>th</sup> October 2017. The parties opted to canvass the application by way of oral submissions.

**Applicant's Submissions**

4. In his submissions, Mr. Koko learned counsel for the Applicants relied on the Grounds stated in the Notice of Motion and the defendants' supporting affidavit together with the annexures. He challenged the mode of service of the application upon the Defendants and submitted that the mode of service did not comply with order 5 rules 7 and 12 of the Civil Procedure Rules.

5. He submitted that the Defendants were not given adequate notice of the application as required by law and they were therefore unable to respond to the application in good time.

6. Turning to the 1st Defendant's Affidavit, he submitted that the same raises issues of fraud in the acquisition of the suit land by the Plaintiff which is a serious issue that ought to be determined on the merits.

7. He pointed out that in the said affidavit the 1<sup>st</sup> Defendant disputes the number of people to whom the registered owner sold portions of her land which smacks of collusion with the Land Registrar.

8. He cast doubts on the participation of the registered owner of the suit land in the sale transactions, stating that whoever sold the parcels had no authority to do so.

9. He submitted further that the suit property is highly emotive as it has given rise to criminal proceedings where someone has lost their life. He urged the court to stay the proceedings in Bomet SPM Criminal Case No1636 of 2016 in order for the issue of ownership of the suit property to be determined, notwithstanding the provisions of section 193A of the Criminal Procedure Act.

### **Respondent's Submissions**

10. In opposing the application, Mr. Langat learned counsel of the Plaintiff relied on the Plaintiff's Replying Affidavit sworn on the 30<sup>th</sup> October 2017. On the issues raised by the Defendants regarding service of the application, he submitted that there was an Affidavit on record indicating that the defendants were served. He maintained that it was not necessary to serve the Defendants with a hearing notice as the date for the hearing of the application was indicated on the Application.

11. Regarding the orders of injunction which the Defendants seek to set aside, counsel submitted the issue of the sale of the suit property is explained in detail by the Plaintiff in his Replying Affidavit and the long and short of it is that the Plaintiff obtained the orders of injunction after demonstrating that he stood to suffer irreparable loss if an injunction was not granted.

12. On the question as to whether the criminal proceedings against the 1<sup>st</sup> Defendant should be stayed, he submitted that section 193A of the Criminal Procedure Code does not preclude criminal and civil cases relating to the same subject matter proceeding concurrently. He submitted that in any event the case commenced in 2016 and has been going on for about a year so there was no justification to stay the proceedings.

13. Counsel submitted that there was no evidence that the DPP had abused his power by instituting criminal proceedings against the 1<sup>st</sup> Defendant. In support of his submission on this point, he cited the case of **Midland Limited and 2 others V Director of Public Prosecutions and 7 Others (2015) eKLR**.

### **Analysis and Determination**

14. The following issues arise for determination;

- i. Whether there are sufficient reasons to set aside the orders of injunction issued on 16.10.2017
- ii. Whether Bomet SPM Criminal Case No 1636 of 2016 should be set aside.
- iii. Who should bear the costs of this application?

15. In determining the first issue I must consider that the law demands of justice that in allowing ex-parte proceedings, courts should balance the right of the individual to receive fair notice against the need for the court to step in to prevent imminent harm. In the case of **Abraham Lenauia V Charles Ketekya Nkaru (2016) eKLR** the court cited the case of **Ex Parte Princess Edmond De Polignac 1917 I KB 48 at Page 509** where Washington L.J observed as follows:

*“It is perfectly well established that a person who makes an application in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him “*

16. The principles which can be deduced from the above authority are fairness, justice and caution in conducting proceedings to adjudicate disputes between two disputants agitating for their respective rights within an adversarial system such as ours.

17. I have considered the affidavit evidence of the defendants and the submissions by both counsels. I have also perused the Affidavit of Service sworn by Wesley Kiprotich Nge'no on the 13<sup>th</sup> October 2017 and it is clear to me that the said affidavit falls short of the provisions of Order 5 Rules 7, 12 and 15 of the Civil Procedure Rules in that only one Defendant was served and there is no mention of any efforts made to serve the second Defendant.

18. In view of the foregoing reasons, the dictates of the law and in the wider interest of justice, I am satisfied that the Defendants are entitled to have the order of injunction set aside.

19. Moving on to the issue of stay of the criminal case at Bomet, section 193A of the Criminal Procedure Code provides as follows:

*“The fact that any matter in issue in criminal proceedings is also in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”*

20. In the case of **Midlands Limited & 2 Others V Director of Public Prosecutions & 7 Others cited above**, the court declined to issue an order prohibiting the court from proceeding with a criminal case against the applicants while their civil case was on-going on the grounds that it had not been demonstrated that the criminal proceedings had been commenced with ulterior motives.

21. In the instant case the criminal proceedings have been going on for a year and even though I appreciate the emotive nature of the matter, I am of the view that the Defendants have not placed sufficient material before this court to enable me issue an order of stay of the criminal proceedings. The best I can do under the circumstances is to expedite the hearing of this matter so that it can inform the outcome of the criminal case.

**Conclusion**

22. The upshot is that the Defendants' application succeeds in part and I make the following orders:

- a) The order of injunction issued on 16<sup>th</sup> October 2017 is hereby lifted and set aside.
- b) The application dated 27<sup>th</sup> September be fixed for hearing inter partes within 45 days from the date hereof.
- c) The costs of this application shall be borne by the Plaintiff/Respondent.

**Dated, signed and delivered at Kericho this 15<sup>th</sup> day of December 2017.**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

Ms. Ngetich for Mr. Koko for the Defendant

No appearance for the Plaintiff

Court Assistant; Rotich