



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 34 OF 2008

JONATHAN KIPYEGON MAINA.....PLAINTIFF/APPLICANT

VERSUS

JOHN KIPTONUI MATINGWONY.....1ST DEFENDANT/RESPONDENT

MURSI JOSEPH.....2ND DEFENDANT/RESPONDENT

DAUDI A KITUR.....3RD DEFENDANT/RESPONDENT

DAVID CHERUIYOT.....4TH DEFENDANT/RESPONDENT

JOEL SURUM.....5TH DEFENDANT/RESPONDENT

RULING

Introduction

1. This Ruling determines the application dated 6th July 2017 seeking an order of injunction to restrain the defendants by themselves, their agents, servants, employees or anyone acting on their behalf from using, possessing, selling, cultivating, disposing entering, trespassing, being on or remaining on or howsoever interfering with the Plaintiff's use or interests in all that parcel of land known as L.R No. KERICHO/KAPSOIT/335 pending the hearing and determination of the suit herein.
2. The application is premised on the grounds stated on the face of the Notice of Motion and the supporting affidavit sworn on the 6th July 2017.
3. The application is opposed by the 2nd and 3rd Defendants/Respondent through their Grounds of Opposition dated 12th July 2017. The 1st 4th and 5th Defendants did not file any response to the application. The parties opted to canvass the application by way of written submissions.

Applicant's Submissions

4. In his submissions learned counsel for the Applicant submitted that the applicant had met the conditions for the grant of an interlocutory injunction as set out in the case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** which are 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.”

5. He submitted that the Applicant had established that he was the registered proprietor of land parcel number KERICHO/KAPSOIT/335 as per the certificate of official search annexed to his supporting affidavit.
6. He further submitted that the applicant was likely to suffer irreparable loss which cannot be compensated by damages if the application was not granted. He relied of the case of **Panari Enterprises Limited V Lijoodi & 2 Others (2014) eKLR** where the court stated as follows:

“Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it

would not be right to say that the plaintiff can be compensated in damages”.

7. In the circumstances, he submitted that the balance of convenience titled in favour of the Applicant.

8. Counsel submitted that an injunction being an equitable remedy, the court had a discretion to grant the same if it considered it just and equitable to do so. Even though he conceded that the applicant had not prayed for an injunction in the Complaint, the court could nevertheless grant the injunction in order to do justice without undue regard to technicalities as contemplated in Article 159 (2) (d) of the Constitution.

Respondent's Submissions

9. In opposing the application, the 2nd and 3rd Respondents raised the following grounds of opposition:

- i. That the Complaint does not contain a prayer for permanent injunction and an interlocutory injunction cannot be granted in *vacuo*.
- ii. The application does not meet the standards for granting an injunctive relief
- iii. The applicant has admitted that the 2nd and 3rd Respondents have been in occupation of the suit land long before the suit was filed
- iv. The application is frivolous and vexatious and it amounts to an abuse of the process of the court.

10. Learned counsel for the 2nd and 3rd Respondents submitted that the applicant had failed to establish a prima facie case with a probability of success as he had admitted that the Respondents have been in occupation of the suit property since 2003 and he could therefore not seek to evict them before the case is heard on its merits.

11. He further submitted that the applicant had not demonstrated that he stood to suffer irreparable damage if the injunction was not granted. He added that since the Applicant had not included a prayer for injunction in his Complaint at the time of filing suit, he could not now make an application for injunction in *vacuo*. He submitted that the prayers sought amounted to eviction order before the suit is heard and determined.

Analysis and Determination

12. The following issues emerge for determination:

- i. Whether an injunction can be granted in *vacuo*.
- ii. Whether the applicant has met the threshold for grant of injunctive relief
- iii. Whether the court can issue an injunction to restrain parties who are in occupation before the suit is heard and determined.

13. In determining the first 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 clear indication or prayer in the suit seeking such an injunction. Where an applicant for injunction fails to demonstrate that the sought an order of temporary 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.”

14. On the second issue, it has been submitted by counsel for the Applicant that the applicant has met the threshold for the grant of an interlocutory injunction. On the other hand, counsel for the Respondents maintains that the remedy does not lie in the circumstances. It is common ground that the Respondents have been in possession of the suit land since 2003 and granting an injunction at this interlocutory stage would amount to evicting them before the suit is heard on its merits. In effect the injunction sought is mandatory in nature.

15. In the case of **Washington Okeyo V Kenya Breweries Limited Civil Appeal No. 332 of 2000** the Court of Appeal had occasion to consider the principles that govern the grant of a mandatory injunction and stated as follows: *“A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and the court thinks it is one which ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant tries to steal a match on the plaintiff, a mandatory injunction will be granted at an interlocutory stage.”*

16. In the case of **Locabail International Finance Limited V agro Export and Another (1986) 1 ALLER 901** which our Court of Appeal has followed in its decisions

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at

a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than that required for a prohibitory injunction”

17. In the instant case the court has not been told what special circumstances exist to warrant the grant of a mandatory injunction against the defendants who have been in occupation of the suit property for more than 14 years. I believe the right forum for the applicant to make out a case for their eviction would be at a full hearing.

Conclusion

18. In have carefully considered the application, the affidavit evidence, annexures, pleadings and the rival submissions of counsel as well as the applicable law and I am of the view that the application lacks merit and the same is hereby dismissed with costs to the 2nd and 3rd Respondents.

Dated at Kericho this 15th day of December 2017.

J.M ONYANGO

JUDGE

In the presence of:

Ms. Ngetich for the Applicant

Mr. Siele Sigira for the 2nd and 3rd Respondents

Court Assistant: Rotich