



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 79 OF 2014

JOHN KIBOR SERONEI

JOSEPH KIBOR

CATHERINE CHELANGAT KIBOR

SAMUEL KIBET TOO (*suing as the Legal Representatives of*

MARY MARACHI CHEPKEMOI MARACHI (*deceased*).....PLAINTIFFS/RESPONDENTS

VERSUS

**STANLEY KIPTORUS CHEMOSY.....1ST
DEFENDANT**

**JACKSON KIPNG'ETICH KOMEN.....2ND
DEFENDANT**

**JOSEPH SAWENJA WANINGILO.....3RD DEFENDANT/
APPLICANT**

R U L I N G

1. The third defendant/applicant filed a Notice of Motion dated 19th February, 2016 seeking the following prayers:-

(a) This suit be dismissed for want of prosecution.

(b) The interim orders of injunction issued by this Honourable Court against the defendant on 5/6/2014 and which is currently being enjoyed by the plaintiffs be discharged, set aside and vacated.

(c) Costs of this application be provided for.

2. The applicant contends that it has been over one year since this case was last in court and that the respondents have not bothered to fix it for hearing or take any step towards furthering its prosecution. That the respondents have not complied with the court's orders with respect to service of summons upon the first and second defendants.

3. The applicant further contends that he was the one utilizing the suitland before orders of injunction

were issued against him and that those injunction orders are hurting him yet the respondents are not in hurry to fix the case for hearing.

4. The respondents have opposed the applicant's application based on a replying affidavit sworn on 26/4/2016. The respondents contend that this court gave them orders to serve summons upon the first and second defendants but due to financial logistics they have not been able to serve the summons. That the applicant was equally under a duty to fix the suit for hearing. That the court should allow the case to proceed upon compliance of the court's orders of 29/9/2015.

5. The parties agreed to dispose of this application by way of written submissions. Both the applicant and respondents filed their submissions on 12/5/2016. In his submission the applicant indicated that he had abandoned prayer (a) of his application as it became apparent to them upon observation by the court that the period of one year had not elapsed since the case was last in court.

6. The only issue which is for determination is whether the injunction given in favour of the respondents should be discharged or not. The grounds upon which the applicant wants the injunction orders discharged is that those orders have been in force for over two years and that the respondent's suit is frivolous and therefore the injunction orders should not be in force as they are hurting him. The other ground is that the respondents have not complied with the court's orders to serve the first and second defendants by substituted service.

7. The injunction being complained of was given on 5/6/2014. The application for injunction had come up for inter-partes hearing but the applicant who had been duly served was not present in court. The application was therefore allowed as prayed resulting in the injunction in issue now.

8. Order 40 Rule (7) of the Civil Procedure Rules gives a party who is affected by an injunction to apply to court for its discharge, variation or setting aside. In the instant case, the applicant says that he was the one utilizing the land before the injunction was issued. He states that the injunction orders are hurting him yet the respondents are not in hurry to proceed with their case. It is indeed true that the applicant is the one who was in possession of the suitland. When orders of injunction were issued, he had already planted. He came to court on 9/10/2014 and sought to be allowed to harvest maize. This request was granted because there was no opposition to the same by the advocate for the respondents.

9. Almost two years after the injunction orders were issued in the respondents favour, they have not bothered to fix the suit for hearing or take any step towards furthering its prosecution. The respondents were given leave to serve the first and second defendants by way of substituted service on 29/9/2015. No service was effected upon the two defendants until after the present application was filed that is when the respondents paid for the advertisement on 11/5/2016. The respondents have not disclosed the date the advertisement was carried out in the Daily Nation Newspapers.

10. It is clear that the respondents are not keen on proceeding with this case because they are enjoying the interlocutory orders of injunction which were issued ex-parte. **Order 40 Rule (7) of the Civil Procedure Rules** provides as follows:-

“Where a suit in respect of which an interlocutory injunction has been given is not determined within a period of twelve months from the date of grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise. Underling mine.

11. It has been over one year since the injunction orders were granted. The same have lapsed. There is no sufficient reason given to the court to order otherwise. I find that this is a proper case for discharge of the injunction orders. I therefore allow the applicant's application with the result that the injunction orders given herein on 5/6/2014 are hereby discharged. The applicant shall have costs of this application to be borne by the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 15th day of **September, 2016.**

E. OBAGA

JUDGE

COURT

At 2.45 pm. No appearance. Ruling signed in the absence of parties who had been notified of date of delivery of ruling.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

15/9/16