



**Rotich v Cheruiyot & 4 others (Environment & Land Case
E006 of 2023) [2024] KEELC 1195 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E006 OF 2023**

MC OUNDO, J

MARCH 7, 2024

BETWEEN

SAMUEL ROTICH PLAINTIFF

AND

ZAKAYO CHERUIYOT 1ST DEFENDANT

RIVER BLUE INVESTMENT LIMITED 2ND DEFENDANT

ZAKAYO KIBET TOO 3RD DEFENDANT

DISTRICT LAND REGISTRAR, KERICHO 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. By a Notice of Motion dated 29th August, 2023 brought under the provisions of Order 40 (1), Order 51 (1) of the *Civil Procedure Rules, 2010*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, the Applicant herein sought for interim orders of injunction restraining the Respondents by themselves, servants, agents, proxies and/or persons exercising authority from destroying permanent structures, taking possession, Building, evicting, trespassing, selling, sub-dividing, charging, transferring and/or in any other manner interfering with the Applicant's quiet use, occupation and possession of Part B of Plot No. 38 also known as Plot No. 631/150B and measuring 0.346 Hectares now known as Kericho Municipality Block 2/143.
2. He also sought for temporary interim orders of injunction restraining the 4th Respondent whether by itself, its servants and/or agents or whomsoever from further subdividing, re-planning, re-parceling and issuing of any titles to other persons arising from the suit properties, Plot 38 also known as Plot No. 631/150B and Plot No. 39 also known as Plot No, 631/151 now known as Kericho/Municipality Block 2/143 and for costs of the Application and for any other orders that the court deemed fit to grant.



3. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Samuel Rotich, the Applicant herein to the effect that he was the lawful owner of Part B of the suit property with existing buildings which property was formerly known as Plot number 38 also known as 631/150B measuring 0.346 Hectares and which buildings extended to Plot 39 also known as 631/151 which formed the natural boundaries between the two parcels as per the proposed subdivisions plan dated 19th February, 1999 and approved on 27th June, 2000.
4. That the 1st Respondent was the lawful owner of the remaining part of and adjoining parcel Plot number 39 also known as 631/153 measuring approximately 0.967 Hectares (now Kericho Municipality Block 2/135) as per the aforementioned sub-division plan while the 3rd Respondent was the lawful owner of Part A of the suit property with no existing building and measuring 0.364 hectares.
5. That all parties except the 2nd Respondent had been allocated the above-mentioned properties by the Ministry of Local Authorities in the year 1999 through a proposed subdivision plan dated 19th February, 1999 and approved on 27th June, 2000 where each party immediately took actual and physical possession of the same from the year 1999 upon payment of the requisite fees.
6. That despite there having no land available between plots Numbers 38 and 39 and no existing road/plot/space in between the two parcels of land, or an approved subdivision plan re-planning the two plots or amending the boundaries or creating a space between the two plots for purposes of allocation to third parties, the Respondents had amended the survey map and adjusted the acreage of Plot No. 38, 631/151B and plot No. 39, 631/151 without following due process and procedure wherein it had altered the existing boundaries on the ground resulting into wrong mutation and subdivision of Plot No. 38, 631/151B and plot No. 39, 631/151 for the benefit of the 2nd Defendant thus dispossessing the Plaintiff and the 3rd Defendant of their rightfully owned land.
7. That the 1st and the 2nd Respondents had been pushing for the implementation of the boundaries from the illegal subdivision, illegally obtained titles which if implemented would split the Applicant's permanent structure into two cutting through the living room, thereby occasioning him a huge loss which could not be compensated by way of damages.
8. That the Applicant had also been issued with a certificate in respect of the 3rd Respondent's parcel without his knowledge or authority, actions which were criminal, perpetuated by fraud and intended to displace himself and the 3rd Respondent from their rightfully owned parcels of land.
9. That it was in the interest of justice that the court intervenes and put an end to fraudulent and sadistic acts of the Respondents so as to protect the fundamental rights and freedoms accorded to the Applicant by *the Constitution* by restraining them by way of temporary and permanent injunction.
10. In response and in opposition to the application, the 2nd Respondent through its Replying Affidavit sworn on 27th September, 2023 by John Kipkorir Ngetich, its duly appointed Attorney had deponed that the Applicant had never been a lawful owner of part B of the plot formerly known as plot number 38 and or 631/150B since a lawful owner was the one whom upon being given an allotment letter consents to it and pays the government or the county or municipal council its dues and obtains a title. The Applicant had conceded that he did not have a title.
11. That it was not true that the Applicant had been in occupation of the suit land since the year 1999 since one could only have possession if he had the title to the land and that was when time starts running. Further that no title would ever be issued unless a survey was done, to be shown the beacons and mutations and thereafter a title.



12. That the Applicant, a former county treasurer of Kericho/Kipsigis Municipal Council had used his position to allot himself the suit plot. That it was evident that he never paid for the subject plot but had used the 3rd Defendant's receipt to obtain a title in the 3rd Defendant's name.
13. That the Applicant did not neighbor the 2nd Respondent. That further the Applicant's suit against the 2nd Respondent was untenable for want of Locus Standi and should be struck out with costs. That the Applicant's claim had been based on unauthenticated map, which had since been discarded in favour of a proper delineation of beacons boundaries and issuance of title deeds. That the instant application was baseless, shapeless, lacked the requisite documentation, noncompliance to the allotment thus should be struck out with costs.
14. There was no response filed by the 1st, 3rd, 4th and 5th Respondents to the application.
15. Directions were given for the application be canvassed by way of written submissions to which only the 1st and 2nd Defendants/Respondents complied and filed their joint written submissions dated 16th November, 2023 wherein they had submitted that the Applicant had failed to conduct a search to confirm the authenticity and ownership of the subject property. Further, that the Applicant's pleadings were vague and not specific. Reliance was placed in the decided case of *Francis Omondi Odhiambo v Hippolitus Omondi Ochieng* [2022] eKLR.
16. Their further reliance was hinged on the provisions of Section 26 (1) of the *Land Registration Act* as well as the decision in the case of *Ali Wanje Ziro v Abdulbasit Abeid Said & another* [2022] eKLR to submit that the Applicant had not exhibited a title in evidence to ascertain ownership of the suit land and further that the subject property did not concern the 1st and 2nd Defendants and neither were the prayers in the application. That Plot No. 38 or 631/150B and Plot No.39 or 631/151 were old numbers that had been used to distribute plots that were now extinct and obsolete.
17. Reliance was also placed on the definition of a moot case from the *Black's Law Dictionary*, 10th Edition as well as the case of *Evan Kidero v Speaker of National City County Assembly & Another* [2018] eKLR, to submit that the instant application was a moot matter.
18. That Plot No. Kericho Municipality Block 2/143 belonged to the 3rd Defendant/Respondent who was well able to answer the allegations levelled.
19. The 1st and 2nd Respondents placed reliance on the land mark case of *Giella v Cassman Brown* to submit that the court should not grant the injunctive orders sought by the Applicant because he had failed to meet the threshold for the grant of temporary injunctions as enumerated in the said case. That the Applicant could not suffer irreparable loss/injury in the absence of proof of ownership of the suit land. That he had therefore not established a *prima facie case*.
20. While placing reliance in the case of *Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* [2019] eKLR, the 1st and 2nd Respondents placed their submitted that in the instant case, the balance of convenience tilted in no one's favour since all parties stood to lose the right to occupy the suit land. That subsequently, the Applicant could not claim that the balance of convenience tilted in his favour as what was at stake was equal for all parties. They thus sought for the instant application to be struck out with costs.

Determination.

21. I have considered the Applicant's application herein, the 2nd Respondent's replying affidavit, and the fact that the 1st, 3rd, 4th and 5th Respondents filed no pleadings in relation to the application. I have also considered the submissions allegedly filed by the 1st and 2nd Respondents.



22. In his application dated 29th August 2023, the Applicant herein sought for injunctive orders against the Respondents restraining them from interfering with the Applicant's quiet use, occupation and possession of Part B of Plot No. 38 also known as Plot No. 631/150B and measuring 0.346 Hectares now known as Kericho Municipality Block 2/143 and for injunctive orders against the 4th Respondent restraining it from further subdividing, re-planning, re-parceling and issuing of any titles to other persons arising from the suit properties, Plot 38 also known as Plot No. 631/150B and Plot No. 39 also known as Plot No, 631/151 now known as Kericho/Municipality Block 2/143.
23. In response to the said application, the 2nd Respondent in its Replying Affidavit dated 27th September, 2023 had deponed that the Applicant was not the lawful owner of part B of the plot formerly known as plot number 38 and or 631/150B since he had not been issued with a title deed. That his claim had been based on unauthenticated map, which had since been discarded in favour of a proper delineation of beacons boundaries and issuance of title deeds. That the instant application lacked merit and ought to be struck out with costs.
24. On the 9th October 2023, parties took directions to dispose of the instant application through the filing of written submissions and whereas the 1st and 2nd Respondents had complied, the Applicant herein did not comply.
25. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the court are deemed as parties who have failed to prosecute their application and therefore that application is liable for dismissal. The filing of submissions having been ordered as a mode for the hearing and determination of the application and there having been no compliance by the Applicant, his failure to exercise the leave granted to him to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on the Applicant's part in the prosecution of the matter. The Applicant had been afforded an opportunity to be heard by way of written submissions which he did not take up.
26. The Court of Appeal in *Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai vs. Attorney General & 3 Others* [2016] eKLR, observed as follows:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...”
27. The mode of hearing having been chosen by consent and the same having been adopted by the court, and there having been no compliance by the Applicant to prosecute the same, I am persuaded to dismiss the main motion dated 29th August, 2023.
28. In case I am wrong on this issue then I could consider the Applicant's application on merit as to whether he had established the Principles set in the case of *Giella –vs- Cassman Brown & Company Ltd* (1973) EA 358 which is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have *prima facie case* with a probability of success, secondly that they stand to suffer irreparable



damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

29. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.
30. In the present case there is no dispute that the suit land herein No. Kericho Municipality Block 2/143 is registered to the 2nd Respondent meaning that as it stands at the moment, the 2nd Respondent is the registered proprietor of the said suit land. The suit land having been registered on the 13th July 2009, was governed by the Land Registration Act No. 3 of 2012, which constitutes the 2nd Respondent as an absolute proprietor and confers on it all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act.
31. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

32. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

33. The Applicant has argued and asserted that the 1st Respondent’s title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provides for the indefeasibility of title and Article 40 (6) of the Constitution envisage that



where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

34. The 2nd Respondent having demonstrated that it was the registered owner of the suit property namely No. Kericho Municipality Block 2/143 and having been issued with a title, prima facie its title is indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.
35. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 2nd Respondent's title but the mere proof that it holds a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established a *prima facie case*.
36. I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella –vs- cassman Brown Ltd case (supra)* as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a *prima facie case* had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

37. Consequently, I dismiss the application dated 29th August, 2023 with costs to the 2nd Respondent. Parties to comply with the provisions of Order 11 of the *Civil Procedure Rules* within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 7TH DAY OF MARCH 2024

M. C. OUNDO

ENVIRONMENT & LAND – JUDGE

