



REPUBLIC OF KENYA



KENYA LAW
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**Kimutai v Keter & 4 others (Environment & Land Case E011 of 2023)
[2023] KEELC 20878 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E011 OF 2023
JM ONYANGO, J
OCTOBER 18, 2023**

BETWEEN

SARAH JEPKOSGEI KIMUTAI PLAINTIFF

AND

CORNELIUS KIPLIMO KETER 1ST DEFENDANT

HENRY KIPROTICH METTO 2ND DEFENDANT

JANET CHEPKOSGEI BARNGETUNY 3RD DEFENDANT

JULIUS KERING KIMEKI 4TH DEFENDANT

YUSUF TOO 5TH DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 22nd February, 2023 seeking an order of temporary injunction to restrain the defendants from constructing, putting up structures, occupying, cultivating, utilizing, selling charging sub-dividing or otherwise interfering with all that parcel of land known as Eldoret Municipality/ Block 15/2428 pending the hearing and determination of the suit herein.
2. The grounds upon which the application is based are contained in the Notice of Motion and the Applicant's supporting affidavit sworn on 22nd February, 2023. In the said affidavit the Applicant avers that she is the registered proprietor of land parcel number Eldoret Municipality/ Block 15/2428 (hereinafter referred to as the suit property) having been allocated the same by the Government of Kenya. She states that she has been in peaceful occupation of the suit property from 2012 after the previous trespassers were evicted from her land pursuant to the judgment in Eldoret ELC Case No. 916 of 2012. She has annexed a copy of the judgment and decree in the said case to her affidavit. He avers that on 3rd February 2023, the defendants removed her fence, trespassed on her land after she



had ploughed it in readiness for planting and started digging holes thereon. She deposes that the 6th defendant who had previously trespassed on her land, returned in disobedience of the judgment of the court and he is now accompanied by new trespassers. She further avers that as a result of the defendants' illegal activities, her proprietary rights have been prejudiced as she is not able to utilize her land. She has annexed a copy of the certificate of official search and a photograph depicting the land.

3. The application is resisted by the defendants through the Replying Affidavit of Cornelius Kiplimo Keter, the 1st Defendant herein sworn on 24th April, 2023 on his own behalf and on behalf of the 2nd, 3rd, 4th 5th and 6th defendants. He deposes that he and the 2nd-5th defendants have been in occupation of the suit property since 2016 pursuant to a sale agreement between themselves and the plaintiff. He contends that the Plaintiff having sold the suit property to them cannot be heard to complain about their occupation. He denies that they moved into the suit property in February 2023.
4. He states that the application is untenable as the applicant has not met the threshold for the grant of an injunction as he has not demonstrated that he has a prima facie case with a probability of success nor has he demonstrated that if the orders sought are not granted, he shall suffer irreparable loss. He adds that the balance of convenience tilts in their favour as they are in possession of the land.
5. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.
6. The only issue for determination is whether the Applicant has met the conditions for the grant of a temporary injunction.
7. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of *Giella v Cassman Brown & Company Ltd* 1973 EA 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 the application on a balance of convenience.”

8. In the case of *Mrao v First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated 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.

9. The first question I must determine is whether the plaintiff has a prima facie case with a probability of success. The plaintiff has annexed a certificate of official search indicating that the suit property is registered in her name. In his Replying affidavit, the 1st Defendant acknowledges that the Plaintiff is the registered owner of the suit property although the defendants allege to have purchased the land from the plaintiff. What is contested is whether the defendants have been in occupation of the suit property.
10. As was stated in the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* 2014 eKLR

The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of



probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

11. On the material placed before the court, I am persuaded that the Applicant established a *prima facie* case with a probability of success.
12. With regard to irreparable loss, it has been submitted for the plaintiff that her land was invaded by the defendants just before she planted crops and the defendants ended up planting maize on her land so she missed out on the planting season for this year. It was contended that this will affect her food security as she will be forced to buy food. This will cause her irreparable loss. The plaintiff annexed a photograph of suit property depicting the ploughed area.
13. The test for irreparable loss is defined in Halsbury's Laws of England, Third Edition Volume 21, P.352 as follows:

“Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable and second that it is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter.”
14. If indeed the defendants ploughed the plaintiff's land and caused her to miss out on the planting season with the attendant consequence of subjecting her to food insecurity, then that amounts to irreparable loss.
15. Turning to question of the balance of convenience, the plaintiff has demonstrated that she has been inconvenienced by the defendants' unlawful activities on her land and therefore the balance of convenience tilts in her favour.
16. In the final analysis, I am satisfied that the Applicant has satisfied the conditions for the grant of a temporary injunction. Consequently, I find merit in her application and I grant it and make the following orders:
 - a. A temporary injunction is hereby granted restraining the Defendants/ Respondents either by themselves, their agents, servants and/or anyone claiming under them from constructing structures, cultivating, utilizing, selling, charging leasing, sub-dividing, wasting or otherwise interfering with all that parcel of land known as Eldoret Municipality/ Block 15/2428 pending the hearing and determination of the suit herein.
 - b. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 18TH DAY OF OCTOBER 2023.

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J.M ONYANGO

JUDGE

In the presence of:



1. Miss Adongo for the Plaintiff/Applicant
 2. Mr. Momanyi for the Defendants/Respondents
- Court Assistant: Oniala

