

REPUBLIC OF KENYA

High Court at Kitale

Environmental & Land Case 11 of 2012

SIMIYU KITUI MUTOKO aka JOHN SIMIYU..... PLAINTIFF

VERSUS

WANYONYI MABUKADEFENDANT

R U L I N G

This is a ruling in respect of an application dated 13th December, 2012. The application was brought under the provisions of order 40 Rule 1 and 2 of the Civil Procedure Rules. The application was brought under certificate of urgency on 17/12/2012 when Interim Orders of injunction were given in favour of the Applicant. The application was heard inter parties on 23/01/2013. In the Supporting Affidavit, the Applicant Simiyu Kitui Mutoko alias John Simiyu deponed that he is the sole proprietor of land measuring 20 acres comprised in **Tulwet Farm LR No. 5766** which he purchased from Kimalel Arap Chumo who was the original shareholder of Tulwet Farm.

He annexed a Sale Agreement dated 24th December, 1973 marked "SKM1". He also annexed a list of members of Tulwet Farm in which his name appears as number 60 on the list. He further deponed that on 26/11/2012, the Defendant entered the aforesaid land and started erecting a temporary structure on part of his land measuring 0.2 acres. He annexed a photograph of a temporary structure being erected. He asked the Defendant to move out of his land but that the Defendant refused to do so arguing that he had bought the portion from Esther Namorone and Geoffrey Wanyonyi who are his wife and son respectively. This is how he decided to come to Court where he is contending that his wife and son have no authority over his land.

The application was opposed by the Defendant/Respondent based on Replying Affidavit sworn on 18th January, 2013. In the Affidavit, the Defendant/Respondent avers that he bought the suit land from the son of the Applicant one Geoffrey Wanyonyi Simiyu. He annexed a copy of Sale Agreement marked "WM1". He further deponed that the Plaintiff/Applicant had divided his land amongst four of his wives and that he has information that sons of the other wives have been selling their portions without any interference by the Plaintiff/Applicant. The Defendant/Respondent filed a Supplementary Affidavit sworn by Geoffrey Wanyonyi Simiyu the son of the Applicant who sold the suit land to him. In the Supplementary Affidavit, the deponent depones that the Applicant divided his land amongst his four wives between the year 1999 and 2009 and that since then, each house had been residing on their respective portions and have dealt with their portions including selling part of it without interference from the Applicant. He annexed copies of agreements indicating that on two occasions, the Applicant has subdivided this land and gave each of his wives their portions. He also annexed a Sale Agreement showing that one of his step brothers had sold part of the portion given to his mother. He contends that his father, the Applicant herein is discriminating against him.

I have gone through the application by the Applicant as well as the Affidavit in support of the same as well as the annexures. I have also gone through both the Replying Affidavit and Supplementary Affidavit. I have carefully considered the submissions of counsel for both parties. This is an application which seeks confirmation of interim injunction granted on 17th December, 2012. An injunction is an equitable remedy. Any party seeking the same must come before the court with clean hands. All material information regarding the case ought be laid out to court in a candid manner. Having said these statements which are well known in law, the question which then emerges for determination is whether the Applicant is entitled to have the Interim Orders confirmed. The principles which courts ought to

consider when deciding whether to grant an injunction or not were well settled in the case of **Giella Vs Cassman Brown & Co Ltd 1973 EA** Page 358;

“First the Applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. Thirdly when the court is in doubt, it will decide the application on the balance of convenience.”

In the present case, I must say at the outset that I am not in any doubt which will require me to decide this application on a balance of convenience. The facts which have emerged in the course of the hearing of this application are that the Applicant had divided his parcel of land into four portions and had given each of his wives 4 acres. It has also emerged that one of his sons from one of his four wives has sold a portion of the land given to his mother. This fact was not contested by the Applicant.

The document annexed to the Replying Affidavit and Supplementary Affidavit shows that the intention of giving each of his four wives their portions was to enable each wife to use it to support their children. It has been demonstrated that one of his sons from another wife has sold land given to his mother without the Applicant raising any objection. On this score, I do not think that the Applicant has succeeded in showing that he has a prima facie case with probability of success. Even if he finally manages to succeed in the main suit, he has not shown that he will suffer irreparable loss which cannot be compensable in monetary or any other terms. It is on the above grounds that I find that the motion dated 13th December, 2012 and filed in court on 14th December, 2012 cannot succeed. The same is hereby dismissed with costs to the Respondent. The Interim Orders granted on 17/12/2012 are hereby discharged.

It is so ordered.

Dated, signed and delivered at Kitale on this 20th day of February, 2013.

In the presence of Mr. Bundi for Plaintiff/Applicant and Mr. Kiarie for Mr. Kaosa for Defendant/Respondent, Court Clerk Joan.

**E. OBAGA
JUDGE**