



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 961 of 2012**

**JANE MUTHONI MATHENGE.....PLAINTIFF**

**VS**

**JAMES KURIA NJOROGE.....DEFENDANT**

***(Application for injunction; principles to be applied in an application for injunction; plaintiff claiming that her deceased husband purchased 3 acres of the suit land; plaintiff asserting that the defendant holds the land in trust for the plaintiff in respect of the 3 acres; suit land registered in favour of defendant; defendant admitting agreement but arguing that he has full purchase price was not paid; defendant arguing that agreement rendered void by lack of consent of the land control board; prima facie case ; whether plaintiff has established a prima facie case; doubt as to case of plaintiff; balance of convenience; inhibition order granted to inhibit further dispositions on the suit land).***

**RULING**

The application before me is the motion dated 25 July 2012. It is an application filed by the plaintiff under the provisions of Order 40 Rules 1,2,3,4 and 5 of the Civil Procedure Rules and Sections 68 and 69 of the Land Registration Act, 2012. It is an application seeking orders of injunction and as drafted seeks the following orders :-

1. *Service of this application upon the defendant/respondent be dispensed with in the first instance.*
2. *The Honourable Court be pleased to issue an interim inhibition order inhibiting the transfer and or disposal of all those parcels of land known as L.R. Uasin Gishu/Iilula/1086 and 1088 formerly known as Plot No. 77 Iilula Settlement Scheme, pending the hearing and determination of this application interpartes or until further orders.*
3. *The Honourable Court be pleased to issue an inhibition order inhibiting the transfer and or charge and or any other disposition over the parcels of land known as L.R. Uasin Gishu Iilula/1086 and 1088, pending the hearing and disposal of this suit.*
4. *That further to prayers 2 and 3 above the defendant/respondent, its servants and or agents be restrained by interim injunction from transferring, occupying, alienating, disposing, charging or engaging in any development whatsoever or in any way dealing with the portion of land comprising 3 acres found within parcels known as L.R. Uasin Gishu/Iilula/1086 and 1088 pending the hearing and determination of this application interpartes or until further orders.*
5. *That further to and in the alternative to prayers 3 above the defendant/respondent be restrained by means of an injunction from transferring, occupying, alienating, disposing, charging or*

*engaging in any development or in any other manner dealing with that parcel of land comprising of 3 acres which is found within and between parcels of land known as L.R. Uasin Gishu/Illula/1086 and 1088 pending the hearing and determination of this suit.*

6. *Costs of this application be provided for.*

The application is supported by a supporting affidavit and a supplementary affidavit of the plaintiff and is opposed by the defendant.

This being an application for injunction, I stand guided by the principles laid out in the case of ***Giella vs Cassman Brown (1973) EA 358***. In the said case, the principles for the grant of an injunction were elaborated. It was laid out in the said case that the applicant needs to establish a *prima facie* case with a probability of success; that the court should be alive to the principle that an injunction will not normally be granted unless damages will be an adequate remedy; and finally if the court is in doubt the application is decided on a balance of convenience.

To determine whether an applicant has laid out a *prima facie* case, it is inevitable that the court must make a preliminary assessment of the applicant's case based on the pleadings and the supporting evidence provided in the application. Where the respondent has filed his pleadings and has opposed the application, the applicant's case must be assessed with regard to the pleadings and reasons given by the applicant in opposing the application. It is from an assessment of the totality of these material that a court will determine whether the applicant has laid out a *prima facie* case.

This suit was originated by a Plaintiff filed on the same day that this application was filed. It is pleaded and deponed by the plaintiff that she is the personal representative of the estate of one Ephraim Mathenge Waruingi (hereinafter the deceased) and she has brought this suit on behalf of the estate of the said deceased. It is the plaintiff's case that on or about the 16<sup>th</sup> November 1982, the deceased purchased 3 acres of land out of the land then known as L.R No. 77 Illula Settlement Scheme from the defendant at a consideration of Kshs.21,500/=. The two entered into a written agreement dated 16 November 1982. The plaintiff has deponed that upon execution of the sale agreement and payment of the purchase price, they took possession of the said land. The deceased died in 1991 before the land was transferred to him. Nevertheless, it is deponed that the plaintiff continued being in possession until March 2011 when the defendant unlawfully and forcefully evicted her. The plaintiff has further deponed that in the same year, the defendant caused the land L.R No. 77 Illula Settlement Scheme to be sub-divided into several parcels and now the three acres claimed falls within two parcels of land registered as Uasin Gishu/Illula/1086 and 1088. She has argued that the defendant does not have a genuine claim over the 3 acres. Consequently in the plaint, the plaintiff has sought the following prayers :-

(a) *A declaration that the registration of the defendant as owner and proprietor of all that land formerly known as L.R. ILLULA SETTLEMENT SCHEME PLOT NO. 77 and now designated as L.R. UASIN GISHU/ILLULA/1086 and 1088, respecting 3 acres thereof, was done in trust for the plaintiff and should be restituted to her.*

(b) *Orders that titles procured by the defendant over L.R. UASIN GISHU/ILLULA/1086 and 1088, respecting the 3 acres owned by the plaintiff be cancelled and in their place fresh titles do issue giving effect to the sale concluded in 1982.*

(c) *Permanent injunction do issue restraining the defendant from interfering with the plaintiffs use, ownership and utility of 3 acres of land comprised within titles No. Uasin Gishu Illula/1086 and 1088.*

(d) *Costs of this suit.*

The defendant on the other hand has admitted that he did enter into the written agreement alluded to by the plaintiff with the deceased. He has however deponed that the deceased never paid him the full purchase price and therefore the agreement lapsed. It is further his case that the transaction between

himself and the deceased was a controlled transaction for which the consent of the Land Control Board was never issued in accordance with the Land Control Act. It is his case that when the deceased did not finalize the purchase price, he exercised his option to revoke the agreement and did revoke the same on the 6 September 2011. He has averred that the only remedy of the plaintiff is to seek a refund of the money that he paid. He has stated that he is perfectly entitled to deal with his land. He has averred that the inhibition order will cause him hardship as he intends to sub-divide and sell portions of the land for his own sustenance.

The application was argued before me on 24 January 2013. Mr. A.M. Ngigi, learned counsel for the plaintiff argued that if the inhibition order is not granted as prayed, the defendant may proceed to sub-divide the land and alter the nature of the suit. He took me through the application, the pleadings and the supporting affidavit. He argued that when the defendant obtained title in the year 2011, it was not taken into account that he had sold 3 acres to the deceased. He referred to the agreement of sale and stated that the full purchase price had been paid. He argued that the defendant therefore holds 3 acres of the suit land in trust for the estate of the deceased. He averred that the transaction between the deceased and the defendant was not a controlled transaction by virtue of the provisions of Section 6 (3) (b) of the Land Control Act since at the time of the agreement the land was under the Settlement Fund Trustees. He asserted that the plaintiff's case is one of trust and that trust is one of the recognized overriding interests under Section 28 of the Land Registration Act. He also argued that when the title herein was issued to the defendant in the year 2011, the same was issued under the Registered Land Act, CAP 300 (repealed) and the said statute under Section 30 also recognized a trust as an overriding interest. His conclusion was that the plaintiff has demonstrated a *prima facie* case and that the inhibition sought should issue.

On the other hand, Mr. Kitigin, learned counsel for the defendant referred me to the replying affidavit of the defendant and to his pleadings. He admitted that the agreement was made but that the defendant exercised his right to revoke the same when the deceased and the plaintiff failed to pay the balance of the purchase price. He also argued that the transaction was a controlled transaction and consent of the land control board was not granted thus rendering the agreement void. In his view, Section 6(3) of the Land Control Act was not applicable. He referred me to various authorities which emphasize that if consent is not granted in a controlled transaction, the agreement is void. He asserted that a vendor can only be regarded as trustee for purposes of transfer if the full purchase price has been paid and where it is demonstrated that the full purchase price has been paid.

I have considered the application and taken note of the rival submissions of the parties. It is not denied that through a written agreement, the defendant sold 3 acres to the deceased. It is also not denied that the 3 acres fall within the land parcels Uasin Gishu/Illula/1086 and 1088. What is not agreed and in my view, the bone of contention, is whether the deceased performed his part of the agreement. The plaintiff has argued that the deceased paid the purchase price in full and what was left was for the defendant to transfer the land to him. The defendant on the other hand has averred that the deceased never paid the full purchase price and that he was therefore entitled to rescind the contract which he duly did. It is difficult for me, at this stage of the proceedings, to make a determination on whether or not the full purchase price was paid. I think this is a matter that will have to be determined at the hearing of this suit.

There is also the argument whether or not the transaction herein was required to have been approved by a land control board established under the provisions of the Land Control Act. I note that the plaintiff's case is one of trust and if I properly grasped the case of the plaintiff, it is that the interest of the deceased ought to have been noted in the register when the defendant was being registered as the first proprietor of the suit land. A trust even if not noted in the register was recognized as an overriding interest by virtue of the provisions of Section 30 of the Registered Land Act, CAP 300 (repealed) and now in the provisions of Section 28 of the Land Registration Act. I am not sure that the plaintiff can prove the trust alleged without proving the contract and the full performance thereof. Strictly speaking, the contract if it is for agricultural land, and there appears to be consensus that the suit land is agricultural land, ought to have been approved by the Land Control Board by virtue of Section 6 of the Land Control Act. I have taken note of the numerous authorities submitted by Mr. Kitigin on this point. I however hesitate, at least at this stage of the proceedings, to make a final determination as to whether the alleged trust is affected by the lack of consent by the land control board. I think it would be prudent for me to hear the evidence first and

take a deeper look at the law before making such determination.

The subject application seeks an order of inhibition and an order of injunction. Under Section 68. (1) of the Land Registration Act, Act No.3 of 2012, the court may make an order of inhibition, inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

I have my own doubts as to the strength of the plaintiff's case but I also hesitate to consider it hopeless at this stage of the proceedings. I take heed that if I do not issue the prohibition as sought, the suit land will most likely be sub-divided and sold off to third parties. This act of sub-division may render this suit nugatory. I think given the circumstances, it is only fair that an inhibition order do issue in terms of prayer 2 of the application. I would have been inclined to permit the defendant to deal with the land apart from the disputed 3 acres. However, I am alive to the fact that any sub-division of the two parcels of land will bring forth new parcel numbers and therefore we will be litigating on a land parcel that will no longer be in existence and whose character will have completely changed. The balance of convenience in my view tilts in favour of having an order of inhibition placed on the two land parcels. In so far as the occupation of the land is concerned, the balance of convenience tilts in favour of the defendant who is the registered owner of the two suit lands and who is in occupation of the same. I will not therefore issue any orders of injunction in so far as the defendant's occupation is concerned.

I therefore make the following order.

- (a) That an order of inhibition do issue inhibiting the registration of any disposition on the two parcels of land Uasin Gishu/ Illula 1086 and 1088.
- (b) That the inhibition do remain in place until further orders of this court.
- (c) That costs of this application be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 5<sup>TH</sup> DAY OF FEBRUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

Delivered in the presence of

Miss Ngelechei holding brief for Ngigi Mbugua for the plaintiff

Mr. Arap Mitei holding brief for Mr. Angu Kitigin for the defendant