



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 28 of 2012**

**KOLIL KIMAIYO KIOS ..... PLAINTIFF**

**VERSUS**

**PETER NJOGU ..... DEFENDANT**

**R U L I N G**

The Applicant brought a Notice of Motion seeking an order of temporary injunction to issue restraining the Defendant, his agents, servants, employees and or any other person claiming through him from in any manner intermeddling with the Plaintiff's peaceful occupation of land known as Plot 296 at Twiga Settlement Fund Trustee pending hearing and determination of the suit herein. The Applicant contends that he is the allottee of the suit property, the same having been allocated to him on 08/08/1995. The Applicant further contends that he has all along been in occupation of the suit land and that in 2012 when he ploughed the land ready for planting, the Defendant/Respondent came and claimed that he was the owner of the land. He therefore prays that the Defendant/Respondent be restrained from interfering with his enjoyment of the land.

The Defendant/Respondent opposed the application based on his sworn Affidavit filed in Court on 26/11/2011. The Respondent concedes that the Applicant was indeed the allottee of the suit land but contends that he sold the same land to one Peter Kibet Cheruiyot way back in 1989. The said Peter Kibet Cheruiyot took possession of the same. He annexed a copy of the Sale Agreement between the Applicant and the said Peter Kibet Cheruiyot. The Sale Agreement is dated 8th March, 1989. The Sale Agreement was executed before Kapten & Co. Advocates. The said Peter Kibet Cheruiyot sold the entire parcel of land to the Respondent on 12/03/1998. The Respondent annexed a Sale Agreement dated 12/03/1998. The Defendant Respondent contends that he took immediate possession of the property upon purchase and that the Applicant only came up with allegations that he had only leased the land to Peter Kibet Cheruiyot. This was in 2012 after the said Peter Kibet Cheruiyot had died.

I have carefully considered the application by the Applicant as well as the Replying Affidavit of the Respondent. It is not contested that the Applicant was the allottee of the plot in issue. The Respondent contends that the application had sold the land to one Peter Kibet Cheruiyot who in turn sold him the land. The Respondent has gone ahead to provide copies of Sale Agreement between the Applicant and Peter Kibet Cheruiyot and the other Sale Agreement between the Respondent and the late Peter Kibet Cheruiyot. The Applicant has not denied the existence of the agreements. In fact, the Applicant filed a further Affidavit in which he states that he has been staying away from the suit land and that he only learnt that some trees which he had planted had been cut down by the Respondent. He did not say anything about the agreement. The closest he comes to disputing the sale is in the letters written by the Chief of the area who tried to resolve the dispute between him and the Respondent in which it is said that the Applicant claims that he never sold the land to Peter Kibet Cheruiyot but only leased it to him.

The principles of grant of temporary injunction are now well settled in the case of **Gielle Vs Cassman Brown & Co. Ltd 1973 EA 358.**

***“An 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”.***

What has emerged from the submissions herein is that the Respondent is the one in possession of the suit land. The Applicant has not denied the existence of the agreement of sale between him and the late Peter Kibet Cheruiyot. The Plaintiff/Applicant has clearly not shown that he has a prima facie case with probability of success. The fact that it is the Respondent who is in possession of the land and the fact that the Applicant has not contested the Sale Agreements and given the fact that he has admitted in his Further Affidavit that he has been away from the suit land for sometime tilts the balance of convenience tilts against grant of the injunction sought. The Applicant's application is therefore dismissed with costs to the Defendant/Respondent.

It is so ordered.

**Dated, signed and delivered in Open Court on this 18th day of April, 2013.**

**E. OBAGA**

**JUDGE**

In the presence of M/S Nyakibia for the Applicant and Mr. Nyamu for Bungei for the Respondent. CC: Joan.

**E. OBAGA**

**JUDGE**

**18/04/2013**