



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 290 of 2012**

**ETTA MIDEVA MADETE ..... PLAINTIFF**

**VERSUS**

**JANET I. MUGISA ..... DEFENDANT**

**RULING**

Before me is an application by way of Notice of Motion dated 15<sup>th</sup> October 2012 filed by the plaintiff under **Order 45 rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act (Cap. 21)**. It seeks two restraining orders pending the hearing and determination of the suit. The plaintiff claims to have a beneficial interest in the subject piece of land KAKAMEGA/BULUKHOBA/64 which, it is admitted, belonged to her late husband JOHN MADETE MUKHAYO.

The plaintiff claims to have bought the land jointly with her late husband and maintains that the husband held the land in trust for herself and her immediate family. She claims that the land was initially left under the care of JOSEPH MUKHAYO, her father-in-law. Later, when the said father-in-law became ill, the land was left under care of the defendant's husband. The plaintiff claims that the defendant took advantage of the situation and fraudulently registered the land in her name in 1981.

The application is opposed. The defendant filed a replying affidavit claiming that she actually bought the land from the husband of the defendant and became the registered owner in 1981. She annexed copies of documents from the Lands Office and Land Control Board to back her contention.

Counsel for the parties M/S Amasakha & Company for the plaintiff and J. J. Mukavale for the defendant filed written submissions.

This is an application for the grant of interlocutory injunctive orders. The parameters to be taken by a court in such an application are well settled. They were enunciated in the case of **GIELLA –vs- CASSMAN BROWN LTD. [1973] EA 358**. An applicant has to show a prima facie case with probability of success. Secondly, an injunction will not normally be issued unless the applicant will otherwise suffer irreparable loss that cannot be adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

Considering all the facts and documents placed before me, I am of the view that this is a borderline case with regard to establishment of a prima facie case and also with regard to the likelihood of the applicant or plaintiff suffering irreparable loss. In short, I am in doubt, and will therefore have to determine this application on the balance of convenience.

This being a land matter, and the plaintiff being a wife of the deceased who was the registered owner of the land, in my view the balance of convenience will dictate that I grant some injunctive orders. This is because the presumption of a rebuttable trust might exist. However, since the defendant is currently the registered owner of the land, the injunctive orders will not be as wide as sought by the plaintiff. I will only grant injunctive orders in respect of disposal. In my view, such orders will serve the interests of justice, as they will preserve the subject matter of this litigation of the case, pending the final determination of the case on its merits.

In the result, I allow the application and order as follows:-

1. Pending the hearing and determination of the suit herein, an order is issued inhibiting the disposal or sale of land parcel NO. KAKAMEGA/BULUKHOBA/64.
2. Costs in the cause.

*Dated and delivered at Kakamega this 16<sup>th</sup> day of May, 2013*

**George Dulu**

**JUDGE**