



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT ELDORET**

**E&L 141 OF 2013**

**PHYLIS JEPKORIR KISABEL.....PLAINTIFF**

**VS**

**JOSEPH KIMAIYO SIRMA .....1ST DEFENDANT**

**SILA KIPRUTO KIMAIYO.....2ND DEFENDANT**

***(Application for injunction; principles upon which the court will determine an application for injunction; plaintiff having been married to the 1st defendant; divorce having been concluded; plaintiff now seeks to have 1st defendant and her son trespassers in suit land purchased before the marriage; suit land registered in the name of the plaintiff; no response filed by defendants; prima facie case; application allowed)***

**RULING**

1. I have before me a Motion dated 12 March 2013 filed by the plaintiff. It is an application brought inter alia under the provisions of Order 40 Rules 1,2 and 3 of the Civil Procedure Rules. It is an application for injunction in which the plaintiff seeks to have the defendants restrained from entering, developing and/or interfering with the plaintiff's peaceful possession of the land parcel Sergoit/ Koiwoptaoi Block 3 (Shamtrek)/173. The grounds upon which the application is based are that :-

- 1. The plaintiff and the 1st defendant were married but the said marriage has since irretrievably broken down and divorce Petition No.[....] High Court Nairobi has been concluded.*
- 2. That the plaintiff, after being manhandled, deserted, cheated on and treated with indignity by the 1st defendant, decided to invest in real estate for the sake of her biological children.*
- 3. To that end the plaintiff, using her own resources purchased the suit property.*
- 4. That the defendant has denied the plaintiff peaceful possession of the suit premises and has instructed his son from another woman the 2nd defendant, to construct on the suit premises.*
- 5. He has also gone a step further and put a relative of this another woman in the Plaintiff's 3 bedroom house, constructed solely by the Plaintiff, in the suit premises.*
- 6. The Defendants/Respondents intend, unless restrained by this Honourable Court, to continue wrongfully denying the Plaintiff peaceful possession of the suit premises by taking over the said property by force.*

2. The application is supported by the affidavit of the Plaintiff. The defendants have entered appearance to this suit but they have not filed Defence and neither have they filed any response to the subject application.

3. Although the application is unopposed by the defendant, it does not mean that it must automatically be allowed; I still need to be satisfied that the applicant has met the test set out in

- Giella v Cassman Brown (1973) EA 358.*** In the said case, the principles for the grant of an injunction were elaborated. Before the applicant may be granted the injunction sought, she must demonstrate a prima facie case. I ought also be alive to the principle that an injunction will not normally be granted where damages can be an adequate remedy, and finally, if I will be in doubt, decide the application on a balance of convenience.
4. The applicant's case is discernable from the plaint and the affidavit in support of this application. The plaintiff was previously married to the 1st defendant but they got divorced vide the suit Nairobi High court Divorce Cause No. [...]. The 2nd defendant is son to the 1st defendant through a previous union with another woman.
  5. It is pleaded that the 1st defendant has instructed the 2nd defendant to construct on the suit land without the plaintiff's consent. It is also pleaded that the 1st defendant has put a stranger in the plaintiff's house constructed on the suit land without the plaintiff's consent. The plaintiff has averred that despite asking the defendants to stop trespassing on the land, the defendants have persisted in doing so. It is contended that unless restrained the defendants will continue denying the plaintiff use of her property.
  6. The application was canvassed before me on 2 May 2013. Only Mr. J.M. Kimani, counsel holding brief for M/s S.K. Amani & Co for the plaintiff appeared in court. There was no appearance on the part of M/s Chelanga & Co Advocates who are on record for the defendants. The date had been taken by consent and I allowed Mr. Kimani to proceed and argue the application.
  7. Mr. Kimani urged me to allow the application and relied upon the grounds on the face of the application and the supporting affidavit. He pointed out that the plaintiff became registered as proprietor of the suit land in the year 1998 before getting married to the 1st defendant in the year 2001. He contended that the suit land is not therefore matrimonial property. He also referred me to the judgment in the Divorce case which was annexed to the supporting affidavit to demonstrate that the plaintiff and the 1st defendant are no longer married. He argued that the plaintiff has demonstrated a prima facie case with a probability of success and that she is therefore entitled to the injunction sought. He pointed out that the defendants have neither filed defence nor a reply to the present application and have thus not demonstrated any competing claim that would dis-entitle the plaintiff from being granted the injunction. On this latter point, he relied upon the decision in the case of ***Solomon Odira & Another vs Esther Laboso Eldoret ELC Case No. 662 of 2012.***
  8. I have considered the application and the submissions of counsel. I have seen from the certificate of title deed annexed to the supporting affidavit, that the plaintiff became registered as proprietor of the suit land on 4 December 1998. The plaintiff also annexed a certificate of marriage which indicates that the plaintiff and 1st defendant were married under the Marriage Act (CAP 150) on 6 July 2001. It is therefore apparent that the plaintiff acquired the property before being married to the 1st defendant.
  9. I have seen the judgment in Nairobi Divorce Case No. [...] which reveals that the marriage between the plaintiff and the 1st defendant was dissolved on 1 November 2012. At the moment, there is no relationship that exists between the plaintiff and the 1st defendant. Neither is there any relationship currently existing between the plaintiff and the 2nd defendant who is son to the 1st defendant through a previous union.
  10. The plaintiff has demonstrated that she is the sole proprietor of the suit land and that the defendants have no interest in the same. The defendants have not filed any Defence to the plaintiff's suit and have not declared any competing claim over the suit land. Neither have they opposed this application.
  11. As owner of the suit land, the plaintiff is entitled to enjoy all proprietary interest that vest in her by virtue of that ownership. This includes the right to exclusive possession of the suit land. The defendants do not have the permission of the plaintiff to be on the suit land. They have indeed not demonstrated that they have any right to be on the suit land nor any right to utilize the suit land. The plaintiff has thus demonstrated a prima facie case with a probability of success.
  12. As to irreparable loss, there is no doubt that the plaintiff stands to suffer irreparable loss. In my view, there is no measure in damages, of the pain and anguish that an owner of property suffers, when other people descend on that property without any colour of right and deprive the property owner of the use and enjoyment of that property. I am in the premises satisfied that the plaintiff has met the test that would entitle her to an injunction.
  13. I therefore allow this application and order the defendants not to enter, not to remain, not to

construct, not to utilize, not to waste, and not to deal in any other way with the land parcel Sergoit/  
Koiwoptaoi Block 3 (Shamtrek)/173 until the final disposal of this suit. The costs of this  
application shall be costs in the cause.  
14.It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF MAY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

**Delivered in the presence of**

**N/A for M/s S.K. Amani & Co for the plaintiff/ applicant.**

**N/A for M/s Chelanga & Co for the defendants/ respondents.**