

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 273 OF 2013

ROSEMARY SILANTOI MUTOA.....PLAINTIFF/APPLICANT

VERSUS

MEPUKORI OLE OLPAAKUA.....DEFENDANT/RESPONDENT

RULING

The application for determination is the Notice of Motion dated 20th February 2013 brought under **section 1A,1B and 3A of the Civil Procedure Act and Order 40 Rules 1 (a), 2 and 4 of the Civil Procedure Rules** seeking for the orders that pending the hearing of this suit, a temporary injunction be granted restraining the Defendant whether by himself ,servants, agents or otherwise from selling ,disposing of ,transferring ,charging, pledging, leasing, wasting, developing or in any manner whatsoever or howsoever from dealing or interfering with the suit property title No LTK/NGAMA1724.

The application is based on the grounds stated on the face of the application and the Supporting Affidavit of the Plaintiff herein Rosemary Silantoi Mutoa deposing that she is the legal owner of the suit property having bought it on 6th July 2010 from the Defendant and has been in possession since she was issued with the title deed. It is her averment that on 11th February 2013 the Defendant encroached on her land and without consent started cultivating it despite the knowledge that the Applicant was the owner of the land and feels that there is a deliberate move by the Defendant to evict her and claims that she is in eminent danger of being dispossessed of the suit property as well a real likelihood that unless, restrained by this court the defendant might dispose, charge, transfer the suit property to a third party or otherwise deal with the property to her detriment rendering the suit a nugatory.

This application is unopposed though I note that the Defendant was only served with a hearing notice, there is no evidence that the application was served upon the Defendant.

OPINION

I have considered the application. The principles upon which the court will grant an injunction are well settled and were well articulated in the case of **GIELLA –VS-CASSMAN BROWN &CO LTD (1973) EA 358**. A party needs to show that they have a *prima facie* case with a probability of success; that they stand to suffer irreparable damage that cannot be compensated by an award in damages and that in the event of any doubt in regard to the above two conditions that the balance of convenience having regard to the circumstances of the matter tilts in favour of the applicant. It should also always be remembered that the essence of an application for injunction is for the court to make an order on how the subject matter of the suit ought best to be preserved pending the substantive hearing of the matter.

I have seen the sale agreement which the Plaintiff claims to have entered with the Defendant on the purchase of the suit property. I have also seen the title deed that was issued to the Plaintiff on 23rd December 2010. There is also another title deed bearing the names of the Defendant annexed by the Applicant in her Application even though the transfer form for the land is incomplete. I therefore cannot tell at this stage whether such possession has been quiet and uninterrupted. I guess that is a matter that

will reveal itself at the hearing of the matter. However, I think from the material placed before me that the Plaintiff has laid out a prima facie case with a probability of success. The Plaintiff no doubt stand to suffer irreparable loss if she is evicted pending the hearing of this suit. The balance of convenience in the circumstances of this case also lies in favour of preserving the status quo, the *status quo* which, as demonstrated, is that the Plaintiff is in possession of the portions of land that she claims she purchased from the Defendant, in the circumstances of this case, her possession ought not to be disturbed pending the hearing of this matter.

I therefore allow the application for injunction as prayed in the application. I order the Defendant not to evict or disturb the possession of the Plaintiff on the suit land pending the hearing and determination of this suit. I also issue an order of injunction restraining the defendant from selling, leasing or in any other way deal with the suit land in a manner that is adverse to that of the Plaintiff pending the hearing and determination of this suit.

The costs of this application shall be costs in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE