



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 916A of 2012**

**SARAH JEPKOSGEI KIMUTAI .....PLAINTIFF**

**VS**

**TITO TARUS & 5 OTHERS.....DEFENDANTS**

*( Application for injunction – principles to be applied in application for injunction – applicant registered owner of suit land – defendants having occupied suit land in excess of twelve years – competing claim by defendants - whether plaintiff's claim barred by limitation – prima facie case in view of a competing claim – balance of convenience - whether application for injunction should be allowed – order of status quo made pending hearing and determination of suit )*

**RULING**

The application before me is a Notice of Motion dated 10th October 2012 filed by the Plaintiff. The application is said to be brought under the provisions of Section 1A,1B, & 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules. It is the usual application seeking an injunction pending the hearing and determination of the suit. Specifically the plaintiff prays for the order :-

THAT pending the hearing and determination of this suit, the “defendants by themselves agents and/or servants be restrained through temporary injunction from invading , encroaching, constructing and/or putting up structures and/or dealing in any other way with the Plaintiff's parcel No. Eldoret Municipality Block 15/2428 and interfering with plaintiff's quiet enjoyment of her rights over the suit land.”

The grounds upon which the application is founded are THAT-

- a) The plaintiff applicant is the sole registered and absolute owner of ELDORET MUNICIPALITY BLOCK 15/2428.
- b) The defendants have defied the local administration and the local authority (Municipal Council of Eldoret) and invaded on (sic) the applicant's property.
- c) The applicant stands to suffer irreparably as the defendants' action is likely to encourage lawlessness and further invasion from land speculators and idle youths in the estate.
- (d) The respondents have no right whatsoever on the plaintiff's parcel and are just out to intimidate, harass and frustrate the plaintiff from carrying out developments.

The application is supported by the Affidavit of the plaintiff sworn on the 10th October 2012. The

applicant has deposed that she is the sole proprietor of the leasehold title comprised in the land parcel Eldoret Municipality Block 15/2428 and has annexed a Certificate of Lease (SKK-1) issued on the 2nd April 2012. The Certificate of Lease indicates that the Plaintiff is the leasehold owner of the suit land for a term of 99 years from 1.6.1991. Also annexed to the supporting affidavit is a Certificate of Official Search dated 27th September 2012 which indicates that the proprietor of the property is one Sara Jepkosgei Kimutai, the plaintiff herein. The plaintiff has also annexed as SKK-3(a) and 3(b) some receipts for payment of rates to the Municipal Council of Eldoret. In her affidavit, the plaintiff has deposed in paragraph 4 thereof “that sometimes in June (year not stated) after obtaining permission from the municipality to start developing, a group of people including the respondents started interfering by removing the fencing posts put up the boundaries (sic).”. She has further deposed that she wrote to the town clerk Eldoret Municipality raising her complaint and concerns. The letter is annexed as SKK-4. She has also annexed to her supporting affidavit, a letter dated SKK-5 from the municipal council which is titled “DEMOLITION NOTICE” addressed TO WHOM IT MAY CONCERN. The letter is signed by one Jones Lutta for the Town Clerk and it states as follows :-

*TO WHOM IT MAY CONCERN.*

*RE: DEMOLITION NOTICE.*

*It has come to the notice of the Council that you have engaged in illegal development on plot No.Eldoret Municipality Block 15/2428/2429 Kipkaren (sic)*

*Contrary to the provisions of the Physical Planning Act Cap 286 and relevant statistics (sic)*

*Arising from the foregoing, you are hereby given Notice of (7) days from the date hereof to remove your structures, encroaching on the above registered Plot No.15/2428/2429/Kipkaren.*

*Failure to comply would force the Council to forcefully remove the structures at your cost and without further reference to you.*

*Signed Jones Lutta*

*For TOWN CLERK*

The plaintiff has continued to depose in her supporting affidavit, that despite the above notice, the respondents have been interfering with her plans to develop prompting her to go to the District Commissioner who advised her to seek redress and an order from court. She has further deposed that the defendants are encroaching onto her said land without any right and she is apprehensive that masses of people are likely to descend on to the said plot given that “Kipkaren Estate is populous with unemployed youth and idle people.” She states that unless an order is issued to restrain the defendants she is likely to suffer irreparably due to the fact that she is unable to develop the said plot and get income from it.

The application is opposed. To make clear the nature of objection, I must state at this juncture that the 1st-5th defendants are represented by the firm of M/S Anassi Momanyi & Co Advocates whereas the 6th defendant is represented by the firm of E.C Rotich & Co Advocates. The plaintiff is represented by the firm of Limo R.K & Company Advocates.

The replies of the 1st-5th respondents are contained in three Replying Affidavits. One is sworn on 14th November 2012 by Tito Tarus, the 1st defendant/respondent. The other two are sworn on 15th November 2012 by Samson Kitur and Geoffrey Lelei Kipkemboi who are the 2nd and 5th defendants/respondents respectively. The three Affidavits represent the responses of the 1st-5th defendants/respondents. The 6th defendant filed a Replying Affidavit sworn on 25th October 2012. The gist of the replying affidavits of the 1st-5th respondents is that they are on the suit land by virtue of letters of allotment issued by the Municipal Council of Eldoret. The letters of allotment for all the 1st-5th respondents are dated 11th December 1990. There are five such letters annexed and addressed separately to Tito K. Tarus (plot no.B26), Rodah Too (plot no.B20), Yusuf Too (plot no.B43), Simon Kiproop arap Kitur (plot No.B35),

and Geoffrey Lelei (plot no.B29). The said allotments allude to the same Part Development Plan (PDP) No. ELD.17/95/329B, which Plan is annexed to the letters of allotment and which purports to indicate the site of the plots on the plan. The said PDP is said to be "Recommended" By Eldoret Municipal Town Clerk and is so signed by the Town Clerk (or his representative). There is a part at the said PDP which is required to be signed by the Director of Physical Planning and the Commissioner of Lands approving the PDP. These parts are not signed.

The 1st-5th defendants further argue that they have been on the suit land since 1990. That have deposed that they are in occupation of the land and they have built houses where they stay with their families. That, in brief, is the case of the 1st-5th defendants/respondents.

On the part of the 6th defendant, his Replying Affidavit is to the effect that he has never demonstrated any interest in the suit land and that he is neither in occupation nor does he claim ownership of the same. He has denied ever invading or encroaching or erecting any structures on the suit land. It is his deposition that the plaintiff is "influenced by Personal Political Motives" to tarnish his reputation as he is an aspiring ward representative in the area and he has been a Councillor in the Municipality. He says that he is a total stranger to the suit.

The application was canvassed before me on the 14 November 2012. Mr. Limo urged that I should issue the interim orders as prayed. He argued that the plaintiff is the sole registered owner of the land and that the defendants have no right to reside on the suit land. He referred me to the annexures SKK-1 and SKK-2 which show that the plaintiff is the registered proprietor. He further referred me to annexure SKK-5 the letter from the Municipal Council of Eldoret and it was his argument that if indeed the respondents were granted land by the Municipal Council then the Council would not write to them asking them to vacate the suit land. He was of the view that the allotment letters of the 1st-5th respondents may be referring to a different parcel of land, probably, in Mr. Limo's view, to Block 17 of the Municipality, which Mr. Limo said that he picked from the PDP annexed by the 1st - 5th respondents. In any event Mr. Limo argued that if the allotments are genuine, the 1st - 5th respondents have not demonstrated that they abided by the conditions for the issuance of title to entitle them to a lease. Mr. Limo pressed that indeed they have no lease. He further argued that as the registered proprietor the plaintiff is entitled to protection. He signed off by saying that the plaintiff has demonstrated a prima facie case and prayed for the orders sought.

On his part, Mr.Momanyi for the 1st-5th respondents, opposed the application. He argued that it was not denied by the plaintiff that the defendants were on the suit land. He referred me to annexures SKK-4 and SKK-5 which demonstrate that the respondents were actually on the suit land and that is why the Plaintiff sought to have them evicted. He stated that the respondents have been on the suit land since 1990 and live there with their families. He argued that to grant the injunction as sought will be akin to evicting the respondents without having heard the suit on merits and that it will be as good as making a final determination on the suit. He further urged that the defendants are on the suit land on the authority of the Municipal Council of Eldoret who allotted to them the land. He also submitted that the plaintiff has not made any deposition that she has ever been in occupation of the suit land. He faulted Mr. Limo's submissions that the PDP referred to land in Block 17 . He attacked the Plaintiff's lease on the ground that by the time the plaintiff was paying for the lease the offer had lapsed. This was in reference to the letter of allotment SKK-7 annexed to the Supporting Affidavit of the applicant. Mr. Momanyi pointed out that according to the said letter of allotment, payment for the plot was to be made within 30 days of the letter of allotment which is dated 14.6.1991 and in default the offer to take up the lease would lapse, but that payment was made on 11/11/1994 in line with the receipt annexed as SKK-6 to the supporting affidavit. He was of the view that at the time payment was being made, the offer to take up the lease had lapsed and thus no lease could issue to the plaintiff.

Mr. Momanyi urged that the best order that the court could give is to have the status quo prevail till determination of the suit as it is doubtful who is entitled to the suit land. He stated that the balance of convenience tilts in favour of the defendants. He relied on three authorities, *Kenya Breweries vs Okeyo (2002) 1EA 109*, *Mundiar T/A Kabarak Development Services vs Tradewheel Kenya Ltd (1988) KLR 145*, *Diamond Trust Bank (K) Ltd vs Jaswinder Singh Enterprises (1999) 2EA 72* and *Kenya Commercial Bank Ltd vs Kaven (2005) 1EA 124*.

On her part, Miss Rotich for the 6th defendant reiterated the contents of the Replying Affidavit. She argued that the 6th respondent was improperly enjoined as he has laid no claim on the suit land and neither does he occupy the same. She asked that the application as against her client be dismissed.

In reply, Mr. Limo argued that this is not a case fit for the status quo to be maintained. That such order will precipitate lawlessness. He further argued that allowing the subject application will not be the same as determining the suit but that the Plaintiff requires protection pending the determination of the suit. He reiterated that I should allow the application.

That is the nature of the application that is before me. This being an application for injunction I will turn to the time tested case of **Giella vs Cassman Brown**[1]. In the said case it was stated that :-

*“The conditions for the grant of an interlocutory application are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”* [2] This test is still applied to date although I cannot rule out in future a variation of this test so that the court may issue an injunction where it deems it just to do so.

Following **Giella vs Cassman Brown**, I first need to be satisfied that the applicant has laid out a prima facie case with a probability of success. A prima facie case goes beyond an arguable case.[3] In the case of **Mrao vs First American Bank**[4] the court of appeal stated as follows on what a prima facie case is .

*“I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”* [5]

The court of appeal further elaborated that *“... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case.”* [6]

The plaintiff's case is that she is the owner of the suit land and has annexed a Certificate of Lease to that effect. That taken alone would entitle her to the leasehold interest to the exclusion of all others in line with Section 24 of the Land Registration Act, 2012. She appears to hold a valid leasehold title. There is no doubt that occupation by third parties has caused or will continue to cause her irreparable loss, for a title holder has every right to enjoy the bundle of rights which comes along with the ownership of such title. However, I cannot look at the plaintiff's suit in isolation. In my view, if a defendant has filed a Replying Affidavit/Grounds of Opposition and/or a Defence, the Plaintiff cannot be considered in isolation and regard must be given to the Reply/Defence of the respondent. Such defences must then be gauged against the applicant's case. The 1st-5th defendants have in their joint defence said that they were allotted the said land and that they are thus entitled to it. They have referred me to the letters of allotment annexed to their affidavits and issued by the Municipal Council of Eldoret.

I am not persuaded at this stage that the Municipal Council of Eldoret had power to allot the said plots unless I am shown that they hold a leasehold or freehold title to the same. I am more inclined to give weight to the Plaintiff's letter of allotment and the subsequent title issued to her. But even assuming that the Letters of allotment issued by the Municipal Council of Eldoret are valid, the Plaintiff already holds a registered leasehold title and this cannot be overridden by a letter of allotment. I have been guided on this point by the decision of the Court of Appeal **Wreck Motor Enterprises Ltd vs Commissioner of Lands & 3 Others**. [7] Moreover, under Section 26 of the Land Registration Act, the Certificate of Title is held to be conclusive evidence of proprietorship only subject to very strict limitations. [8] I am therefore not inclined to give much weight to the assertion of the 1st-5th defendants that they have an equally valid title by virtue of the letter of allotment issued by the Municipal Council of Eldoret. I will also not give much weight to Mr. Momanyi's position that since the offer of lease to the plaintiff was accepted out of time,

then her lease is invalid.

Nevertheless, in the Joint Defence of the 1st-5th respondents, they have averred that they have been on the suit land for over 12 years. I am more inclined to give more serious consideration to this Defence. That allegation if proved may mean that the plaintiff's title to the suit land has been extinguished following the provisions of the Limitation of Actions Act, CAP 22 Laws of Kenya. Section 7 thereof provides that :-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

There is therefore a doubt as to the validity of the Plaintiff's case when faced with this defence. There has been no evidence presented to me so far that the plaintiff has been in occupation of the suit land or had leased out the suit land to signify possession of the suit land. So although at face value the plaintiff appears to have a prima facie case due to the fact that she is the registered owner, such case may be destroyed by virtue of Section 7 of the Limitation of Actions Act as I have alluded to above. In other words, the defendants have at this preliminary stage also set out a valid defence and probably even a prima facie case of their own that would entitle them to the suit land. It will not however be wise at this stage for me to go to the merits or demerits of each other's case, suffice it to say that from the face of it the plaintiff and the 1st-5th defendants appear to have set out two competing cases that are capable of success depending on the evidence that will be provided at the hearing of the main suit. I am therefore unable to decide this application on the first principle of ***Giella vs Cassman Brown***.

On the second principle in the case of ***Giella vs Cassman Brown***, I feel that given the position that there are competing rights that are capable of going either way, both parties can argue at this stage that they stand to suffer irreparable injury. I will therefore have to decide this application on a balance of probabilities or at least according to what I feel will be the most just order given the circumstances of this matter.

It would appear from the Affidavits on record that it is the respondents who are occupying the suit land. They claim to occupy the suit lands alongside their families on the basis that the land was allotted to them. Mr. Momanyi has argued that it is improper to issue an injunction where the respondents are in occupation of the suit land. I do not agree to the generality of Mr. Momanyi's submissions. There may indeed be instances where an injunction will issue even where the respondents are on the suit land. It all depends on the totality of the surrounding circumstances of each case. Indeed whether to issue an injunction or not really depends on the peculiar facts of each matter which must be assessed on a case by case basis. The applicant has raised concern that if no interim orders are given, there will be an invasion by other people. I am not sure that this may happen. I am alive to the fact that if I issue an injunction, the defendants who may actually have a legitimate defence to the Plaintiff's case will be denied use of the suit land. If I was not satisfied that the defendants have set out a legitimate defence, I would probably have been inclined to issue an injunction as sought by the Plaintiff. But I feel that they have raised a triable issue, i.e whether the plaintiff's claim is not barred by limitation. I am therefore inclined to order that the status quo ante be maintained. The 6th defendant from the look of his pleadings will not be prejudiced at all by this order.

I therefore order that the status quo ante be maintained pending the hearing and determination of this suit. For clarity, the status quo does not give the defendants any rights to continue putting up new structures or occupy more land than they did at the time this suit was filed. The defendants will merely continue occupying the portions that they occupied at the time the suit was filed. Costs of this application will be in the cause.

It is so ordered.

Dated this 21st day of November 2012

**JUSTICE MUNYAO SILA  
ENVIRONMENT & LAND COURT ELDORET**

Delivered on 21/11/2012 in the presence of

Mr. R.K. Limo for the plaintiff.

Mr. A.T. Kiboi holding brief for Mr. Momanyi for the 1st – 5th defendants.

Mrs. A.L. Khayo holding brief for Miss Rotich for the 6th defendant.

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[1] *Giella vs Cassman Brown* (1973) EA 358.

[2] *Ibid*, at page 360.

[3] See the dictum of Hancox J in *The Francois Vieljeux Case* (1984) KLR 1 at page 14.

[4] *Mrao vs First American Bank* (2003) KLR 125.

[5] *Ibid*, at page 137.

[6] *Ibid*, at page 138.

[7] Civil Appeal No. 71 Of 1997 (1997) eKLR. Judgement of 24 October 1997.

[8] Section 26 of the Land Registration Act, 2012. The limitations include proof of fraud and misrepresentation or where the title was acquired illegally, unprocedurally or through a corrupt scheme.