REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 915 of 2012

Formerly HCC 222 OF 2012

ISABEL CHELANGAT.....PLAINTIFF

VS

SAMUEL TIRO ROTICH & 5 OTHERS.....DEFENDANT

(Application for injunction; principles to be applied in an application for injunction; plaintiff joint owner of suit with estranged husband; defendants holding a power of attorney from husband; defendants entering into the suit land on the basis of the power of attorney; rights of joint holders to land; whether right of possession and occupation can be transferred to a donee of a power of attorney without consent of other joint owner; extent of a power of attorney; whether holder of power of attorney of one joint owner can be regarded as trespasser in respect to the other joint owner; movable property on suit land; right to access the movable property; previous suit; what constitutes a previous suit; prima facie case; whether plaintiff has established a prima facie case; application for injunction allowed)

R U L I N G

A. INTRODUCTION

Before me is an application dated 26 of October 2012 filed by the Plaintiff under Certificate of Urgency. The said application is a Notice of Motion brought under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act and under Order 40 Rules 1 & 2 of the Civil Procedure Rules. The principal prayer in the application is prayer 3 which as drafted prays that :-

A temporary injunction be and is hereby issued restraining the Defendants, their servants and or agents from trespassing into, entering upon and or otherwise interfering with land parcel numbers NGERIA/MEGUM BLOCK 4 (SAINA)/39, NGERIA/MEGUM BLOCK 4 (SAINA) 40, NGERIA/MEGUM BLOCK 4(SAINA) 48 and NGERIA/MEGUM BLOCK 4(SAINA) 49 pending the hearing and

determination of this application this suit (sic).

Although not perfectly drafted, it is clear that the applicant is seeking an injunction to restrain the defendants from interfering with the four parcels of land pending the hearing and determination of this suit and I will deem the application as asking for the said order.

The grounds upon which the application is founded are that

i. The Plaintiff is jointly registered as the owner of the suit parcels of land with one Peter Ole Sabay.

ii. Peter Ole Sabay is the plaintiff's husband.

iii. The plaintiff and Peter Ole Sabay were blessed with three children.

iv. The Plaintiff's husband however neglected to provide for the children of the marriage and the plaintiff.

v. The Plaintiff therefore decided to institute Children's Case Number 139 of 2012 at the Children's court in Eldoret.

vi. The Plaintiff obtained an order of custody of the children and the court ordered that two children who her husband had in his custody in the United States of America be returned to Kenya and be enrolled in school in Kenya.

vii. Upon the making of the order the Plaintiff's husband left the jurisdiction of the court and has never returned.

viii. The Plaintiff's husband also refused to maintain the Plaintiff and the last born child of the marriage who is in the Plaintiff's custody.

ix. The plaintiff instead purported to give a power of Attorney to the 1st to the 4th Defendants who are her brothers.

x. The 1st to the 4th Defendants have used the power of Attorney to harass, intimidate and intrude into the Plaintiff's privacy.

xi. The 1st to and 4th Defendant now enter and l the suit parcels of land which are registered in the joint names of the Plaintiff and her husband at will without any regard to the law and decency.

xii. The Plaintiff is apprehensive that unless this conduct is restrained she and her child are in real physical danger of suffering harm and destination.

xiii. The restaurant business which the Plaintiff and her child were depending on has brought to it's knees by reason of the Defendants conduct.

xiv. The plaintiff will therefore suffer irreparable loss and damage unless the injunction sought is granted.

This being an application for injunction, I will follow the time-tested principles laid out in the case of *Giella vs Cassman Brown*.[1] Essentially, I have to be satisfied that the plaintiff has set out a prima facie case with a probability of success; that irreparable loss which may not be compensated by way of damages may be occasioned to the applicant; and finally if in doubt, decide the matter on a balance of probabilities. To determine whether the test in *Giella v Cassman Brown* is satisfied, I will need to look at the pleadings of the applicant alongside his application and supporting affidavit, and gauge the same with the pleadings and replying affidavit of the respondent. It is from a preliminary assessment of this material that I will determine whether the plaintiff has set out a prima facie case. If there is a competing claim

raised by the defendant, I will also need to assess this claim against the plaintiff's suit and determine whether it raises issues that may impugn on the case of the plaintiff. If I will be in doubt, I will decide the matter on a balance of probabilities while at the same time being alive to the principle that an injunction will not normally be granted if damages would be an adequate remedy. Let us now consider the applicant's case.

B. APPLICANT'S CASE.

The applicant's case is set out in her plaint and in the supporting affidavit to the subject application. The supporting affidavit is a lengthy one going to 26 paragraphs and for brevity, I will set out what I feel is the gist of her depositions which is contained in paragraphs 3,4,5,6,7,12,13,14,15,16,17,18.

The appplicant has deponed that on or about 24th December 1998 she got married to Peter Ole Sabay under the Provisions of the African Christian Marriage and Divorce Act (Cap 151) of the Laws of Kenya. The marriage between her and Ole Sabay was blessed with three children. Ole Sabay lives in the United States of America with the first two children of the marriage while the applicant lives in Kenya with the last born daughter. It is the contention of the applicant that since her husband left for the United States of America he has not been supporting the applicant and the last born child of the marriage. However Ole Sabay decided to visit Kenya during the month of May 2012 when the applicant then sought an order of custody of the three minors together with maintenance orders for herself and the children in ELD Children's case No. 139/2012. The applicant has further contended that the court granted her custody of all the three children and directed the two minors who were living with her husband to be returned back to Kenya and be enrolled at a local school. She has deponed that one of the conditions agreed in compromising the Chidren's matter was that Ole Sabay would receive back his passport to enable him go back to the United States of America and process the travel documents for the children to enable the applicant pick them up. The applicant asserts that upon receiving the passport from court, her husband went back to the United States of America, and cut off all contacts between her and the children.

It is the applicant's case that by a purported power of Attorney dated 29th May 2012 Ole Sabay appointed the 1st to the 4th Defendants to act as his Attorneys. She contends that this appointment was purely for the purposes of harassing and tormenting her under the guise that they were acting on behalf of Ole Sabay. She has also attacked the power of attorney as not being properly registered.

It is the plaintiff's case that during the time she and her husband were in good terms, they acquired and were jointly registered as the owners of the four suit properties i.e NGERIA/MEGUM BLOCK 4(SANIA)39, NGERIA/MEGUM BLOCK 4(SAINA)40, NGERIA/MEGUM BLOCK 4(SAINIA)48 and NGERIA/MEGUM BLOCK 4(SAINA)49. She has averred that she opened a restaurant on the said parcels of land to enable her seek money to sustain herself and the minor child in her custody. It is the applicant's case that immediately the 1st to the 4th Defendants who are her husband's brothers received the purported power of Attorney, they started visiting the property and harassing the applicant's employees. She avers that the 5th defendant another brother of Ole Sabay was brought to serve as a watchman on the property. She has further stated that on 15/10/2012 the 1st to the 5th Defendants destroyed the padlock to the suit land and brought two guards from the 6th Defendant, a security firm, who locked the entrance to the property.

It will be discerned that the plaintiff is registered as proprietor jointly with her husband, one PETER OLE SABAY of the four suit properties i.e NGERIA/MEGUM BLOCK 4 (SAINA) 39,40, 48 AND 49. The Plaintiff and Peter Ole Sabay are not in good terms. Ole Sabay lives in the USA whereas the Plaintiff lives in Kenya within the jurisdiction of this court. As laid out in the Affidavit, the plaintiff has attempted to make use of the four suit lands but her possession has been interfered with by the defendants. The defendants are brothers to Peter Ole Sabay, the Plaintiff's husband. The 6th defendant is a security firm employed by the 1st-5th defendants to guard the suit lands.

C. DEFENDANTS' CASE

There are six defendants/respondents in this matter. The first five respondents are brothers to Ole Sabay,

the joint owner of the suit lands and the estranged husband to the plaintiff. The 6th defendant/respondent is a security firm employed by the first five defendants to guard the suit lands. The first five defendants have entered appearance and filed a Defence whereas the sixth defendant despite being served has failed to enter appearance nor file Defence. The first five defendants have opposed the present application through two Replying Affidavits. The first is sworn by Samwel Tirop Rotich (the 1st defendant/respondent) and the second is sworn by John Rotich (the 5th defendant/respondent). The 5th respondent has deponed that he has been residing on the suit property since July 2012 through the instructions of the joint owner, Peter Ole Sabay. He has annexed what he calls a letter of instructions as JR-1. I feel that the contents of the letter are important and I will set them out in full. The letter is as follows :-

"To whom it may concern

July, 10th 2012

To my representatives(those whom I have given my power of attorney)

To my advocates

To Isabel,

I write this to confirm the following, and consequently give further instructions

That I am the legal owner of Kapseret property jointly with Isabel

That I have full right and access to the property through my representatives or my caretaker.

That Isabel has equal right and she already has her own Representative and her interests are taken care of.

Let it be know that I have given my elder brother John K. Rotich as a caretaker in this property until all issues with Isabel and I are resolved John has a right to live and participate fully in the upkeep of the compound and any other assignments I will give him on a daily basis.

I am therefore assigning John K. Rotich along with my representatives (as depicted in the power of attorney) to urgently prepare the house situated in the property Kapseret so that my mother can move..... she has been critically sick and I need to monitor her cares and being around there enables her to receive faster access to medical care..... I also plan to come to Kenya soon and this is the only home I have..... I was in Kenya for almost two months and I end up suffering staying in peoples home and yet I have a home in which I build..... It is a shame that not only did Isabel objected to me accessing my property but denied me my home. I have equal rights just like her and so I am entitled to that home as my place so I would like for John and whomever my other representatives designates to help prepare the house and allow my mother to come and stay in there until I come or until issues with Isabel and I are resolved.

John must be allowed a place to stay (live in) while my house in the compound is being prepared. I urge Isabel's representative not to overstep his authority by disrespecting John They both may live in harmony because they are there as our representatives until the case between Isabel and I is resolved John is in there on my instructions and in the capacity as a caretaker so I expect that he be granted due respect and access to the property as my representative. I am doing this because I have done all I could to have a dialogue with Isabel and she refused all possible reconciliations including her own relatives coming to help resolve.

I am therefore giving instructions that two of the beds be moved from the business side into that house which is going to be my home. One bed to be put on the main living room shall be my bed and the other bed will be for my mother meanwhile John would continue to use my bed until I come.

Let it also be known that the two of our children are here with me in the USA and Isabel has one child whom I do not know where she lives with... She was further given 1.5 million to come and get the other two children but she has since been unable to come all she keeps complaining is that I have taken the kids away from her. The kids are still here with me where she left them almost three years ago.....

I am protecting my property and because I am not there to watch everything going on myself I have appointed John K. Rotich as my caretaker and along with my representatives the will follow and reinforce my wishes.

If you need to get in touch with via phone please call me at +15072020854 or email me for any clarifications.

Thank you all for your cooperation

sincerely

Peter Ole-sabay

The entry by the 5th respondent into the suit lands was not taken kindly by the Plaintiff. This comes out clearly in paragraphs 4-13 and paragraphs 21-22 of the Replying Affidavit of the 5th respondent which are as follows

4. That I have been residing on the suit property since July 2012 when my brother (Peter) asked me to do so that I make secure his interests and security of the house and medical equipment in the compound (annexed is a letter of instructions emailed to my brother marked "JR1"

5. That the plaintiff herein was so upset and disrespectful when I moved in as she threw my clothes outside one of the houses in the suit property whereupon we reported to the police at Langs Police station.

6. That after we reported the police came and took action by arresting one ROBERT KILEL who was involved in trying to evict me.

7. That thereafter I settled peacefully guarding the property until 28th October 2012 when the plaintiff and hired goons broke into my dwelling house and threw my belongings outside.

8. That despite extreme provocation I maintained my cool and went to report at Langs Police station vide O.B. 34/29/10/2012.

9. That at the time I did not even know that I had been sued and/or that the plaintiff had obtain any order.

10. That I am still residing in the premises as I have not been served with eviction orders or any order.

11. That among the properties in the suit properties are 2 containers and a big generator which require security as I am informed by my brother (Peter) that the containers he set from U.S.A. Contain medical equipment worth over Kshs.10 million.

12. That the plaintiff has been acting badly towards us and even her own relatives as we have attempted reconciliation in vain.

13. That my brother (Peter) is so upset by the actions of the plaintiff which is demonstrated by a secret sale of 3 containers which she did behind our brothers (Peter) back (annexed and marked "SR2" is an e mail form my brother (Peter).

The 1st respondent in his Replying Affidavit has shed further light into why they are on the suit property. This comes out clearly in paragraphs 7-12 and 17-20, 27, 29, 30 of the Replying Affidavit. The same are set out below ;-

7. That my brother (Peter Kosgei Ole Sabai) donated pwer of attorney to me and my other brothers and we have duly registered the power of attorney giving us the legal mandate to protect his interests. While he is away(annexed is a copy of power of attorney marked "ST1").

8. That we took action to protect the properties at Kapseret owing to the fact that the stated properties NGERIA/MEGUN BLOCK 4(SINA) 39, 40, 48 and 49 were left unguarded by the plaintiff forcing us in consultation with our our brother (Peter) employed JOSKI SECURITY to man security in the premises and the entire property.

9. That we took the action to protect the property in good faith as we are aware that the differences between the plaintiff and our brother (Peter) are protected and may take long to resolve.

10. That I am aware of the divorce proceedings between the plaintiff and my brother (Peter) in Eld HCC Divorce Cause No. [...] (annexed is a divorce petition marked "STS").

11. That I am also aware of a matrimonial cause No. [...]which is cause touches on the subject matter in this case (annexed is a copy of O.S marked "ST3")

12. That the plaintiff applicant has concealed these material facts in this case in bad faith as she knows that the court is yet to determine how the matrimonial property will be divided.

17. That we took action and placed our elder brother the 5th respondent there to take charge of security and also ensure that the containers were safe, and my brother has been residing in the premises peacefully from 10th July 2012.

18. That the plaintiff and one Robert Kilel broke into one of the houses where our elder brother resided and threw out his belongings and we reported the matter at Langas Police Station vide OB 39/3/8/2012.

19. That the police took action and arrested Mr. Robert Kilel but we do not know if he was charged in court.

20. That we have not intruded into the plaintiff's privacy as we do not even know where she lives.

27. That the plaintiff's right over the suit premises cannot override my brother's (Peter) rights and she has no basis to evict my brother (Peter) or his agents.

29. That we have no personal interests on the properties in dispute our interest is to protect our brother's interests which is the mandate given to us by our brother.

30. That we have not and we have no intention of harassing or intimidating the plaintiff or anybody including her servants in the premises and infact we have been cordial and civil in our undertakings despite extreme provocation exhibited by the plaintiff applicant.

There are other depositions in the affidavit which reveal the severity of the differences between the plaintiff and Ole Sabay but which to me do not go to the root of the subject matter in this case.

The gist of the defences by the 1st -5th defendants is that they are on the suit land on instructions of the second joint owner, Ole Sabay. This is in order to "protect his interests" in the suit lands as the said Ole Sabay is estranged with the other joint owner, the Plaintiff. The 1st-5th Defendants concede that they are on the suit lands but say that they are there on the instructions of Ole Sabay. They have annexed a Power of Attorney which to me looks like a general power of attorney and have argued that by virtue thereof they stand in the same position as Ole Sabay. It is further their argument that there are containers with

expensive equipment owned by Ole Sabay which are on the suit lands and which need to be protected by them as Ole Sabay is apprehensive that if left unguarded, the Plaintiff will vandalize the same.

D. ARGUMENTS OF THE PARTIES

The application was canvassed before me on 22 November 2012. Mr. Omusundi appeared for the Plaintiff whereas Mr. R.K. Limo appeared for the defendant. Mr. Omusundi urged me to allow the application. He took me through the grounds of the application and the Supporting Affidavit of the Plaintiff. He implored me to find the 1st -6th Defendants/Respondents to be trespassers in the suit lands. He argued that the plaintiff has a right to enjoy the quiet and peaceful ownership of the suit lands. As to the Power of Attorney, it was Mr. Omusundi's position that this does not give the defendants any right to interfere with her possession of the suit lands. He attacked the registration of the power of attorney, his argument being that the same is invalid as a proper power of attorney can only be registered in Nairobi. To him, it was not a valid Power of Attorney. He also contended that the other joint-owner, Ole Sabay, is out of the country and has left the Plaintiff to solely cater for one minor out of the three issues that they have. He stated that as a joint proprietor she has the power to utilize the properties to take care of the minor and that the plaintiff has done so by putting up a restaurant business on the suit lands.

Mr. Limo for the 1st-5th respondents naturally urged me to dismiss the application. He similarly took me through the Replying Affidavits of the 1st and 5th Respondents which I have alluded to above. It was Mr. Limo's assertion that since the plaintiff is a joint owner together with Ole Sabay, her rights on the suit lands are not exclusive. He stated that the plaintiff has to share the suit lands as joint owner by virtue of Section 93 of the Land Registration Act, 2012.

He referred me to the Power of Attorney and stated that the 1st-5th defendants as holders of a general power of attorney are now in the position of Ole Sabay, the second joint owner of the suit lands. He maintained that the presence of the 1st-5th respondents on the suit lands is only to protect the interests of the second joint owner. He argued that the plaintiff cannot claim to be entitled to more rights than the second joint owner. He referred me to the averment that there are movables on the suit land which belong to Ole Sabay, and which need to be guarded because the Plaintiff may access the same and sell them hence the presence of the respondents on the suit lands. As to the argument that the Power of Attorney is not valid, Mr. Limo proclaimed that the same was a valid Power of Attorney which is duly registered. He also said that the issues herein are pending in Divorce Cause No.[..,] and Matrimonial Cause No.[...], and Children's Case No.139 of 2012. He asserted that the current suit is therefore *res judicata*. He averred that the plaintiff cannot use this suit to determine matters of parental responsibility. For the aforesaid reasons, Mr. Limo declared that the plaintiff has not set out a prima facie case with a probability of success and urged me to dismiss the application.

E. DETERMINATION BY COURT

Following the principles in *Giella vs Cassman Brown*, I first need to determine whether the Plaintiff has set out a prima facie case with a probability of success.

It is discernable that it is the plaintiff's case is that the respondents are trespassers and have no rights over the suit lands. The response by the respondents is that they, as holders of a power of attorney, stand in the shoes of the other joint proprietor and that the other joint proprietor has a right to enjoy the suit lands and is so enjoying his proprietorship rights through the respondents as holders of a power of attorney. It is also their case that they are on the suit lands to protect the movable assets of the second joint owner.

The issue in this suit squarely touches on the rights of joint owners of land. The other numerous depositions which relate to the matrimonial and family differences are to me sideshows not related to the gist of the issue in this suit. The matter herein boils down to the rights of joint owners. At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts, Megary & Wade, *The Law of Real Property*[2] and

Cheshire & Burn's, *Modern Law of Real Property*,[3]. According to Burn, " ...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares…"[4]. Further, that "there is a thorough and intimate union between joint tenants. Together, they form one person."[5]

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and "four unities". The right of survivorship *(jus accrescendi)* means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

(i) The unity of possession.

(ii) The unity of interest.

(iii) The unity of title.

(iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s.[6] One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate.[7] Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants.[8] In other words they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.

Both types of tenancies, i.e the Joint Tenancy and Tenancy in Common are recognized in Section 91(1) of the Land Registration Act, 2012. Section 91(4) provides that

If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) dispositions may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or

(c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

Under Section 91(7) of the Land Registration Act, Joint tenants are free to sever the tenancy which severance must be completed by registration.

The position in this matter is that the four suit lands comprise a joint tenancy between the Plaintiff and one Peter Ole Sabay. Being joint tenants, the two in legal theory are actually regarded as one in so far as the holding of the suit lands is concerned. The joint tenancy has not been severed to date. It cannot therefore be argued that one person is entitled to one half of the suit lands and the other to the other half or to any other portions at all. The two joint tenants hold the property as one. That being the case, the plaintiff has a right to occupy and possess the whole of the suit lands. The other joint tenant is also possessed of an equal right. The difficulty in this matter is whether the defendants can be said to be trespassers if they hold a valid general power of attorney. This is a novel issue of which my research so far has not unearthed a direct authority. Unfortunately, the counsels for both applicant and respondents did not submit on this important point.

My preliminary position at this stage is that the holder of a power of attorney may be a trespasser in relation to the other joint tenant. This flows from the nature of the joint tenancy because the joint tenants are in law regarded to be one. The introduction of the holder of the power of attorney into the suit land to me may destroy the unity of possession which can only be held by the two joint tenants and not by one joint tenant and a holder of a power of attorney. I am not convinced at this preliminary stage that one joint tenant can transfer to a holder of a power of attorney the right of possession and occupation of a jointly held property without the permission of the other joint tenant. I do not think that it is in the contemplation of the law of joint tenancy that one joint owner can impose and thrust on the other joint tenant a stranger with full rights of occupation by virtue of a power of attorney. Moreover, by dint of S.91(4)(c) of the Land Registration Act, a tenant can only transfer his interest *inter vivos* to the other joint tenant but to no other person, and any attempt to so transfer an interest to any other person shall be void.

It must be understood that although the purpose of donating a power of attorney is to allow a 3rd party to perform what the donor would otherwise do, and that the donee is legally in the shoes of the donor, this position does not apply to all situations. For example one cannot engage a power of attorney to represent him in a suit as this would be tantamount to having an unqualified person representing a litigant. This was the basis of the decision in ***Khanjira & Another vs Safaricom,[9].*** In this matter the 1st plaintiff donated to one Peter K. Kalama a special power of attorney inter alia giving him power to represent him in court for all intents and purposes in connection with the above suit. Peter Kalama was not an advocate of the High Court of Kenya and the court held that the functions donated to him could only be performed by a person authorized by law, i.e an Advocate. The court refused to allow Peter Kalama to act in accordance with the special power of attorney.

There are public policy considerations which limit the extent to which one can utilize the instrument of a power of attorney. To press the point home, and on a light note, a holder of a general power of attorney, cannot wave a general or special power of attorney at the spouse of the donor, assert that by virtue of the power of attorney he now stands in the shoes of the donor, and claim conjugal rights. In the same vein, the position of joint tenants, to me, is so intimate as not to be disturbed by a 3rd party claiming under a power of attorney.

From the aforestated reasons, I feel strongly that the Plaintiff has laid out a prima facie case of trespass against the respondents. It will be for the respondents to rebut this position when the matter goes to hearing on merits. I need not therefore go to the validity or otherwise of the Power of Attorney for it is my position that there is a prima facie case of trespass against the respondents even on assumption that the power of attorney is valid and a *fortiori* if the power of attorney is invalid.

There is the issue of valuable movable assets said to be in containers which are on the suit land . These are movable assets on immovable property. They do not form part of the jointly held immovable property . However, they are on the suit lands and the plaintiff by virtue of being a joint owner is entitled to possession and occupation of all of the nooks and crannies of the suit lands. I cannot for now make any determination on the movable assets suffice to say that the plaintiff cannot be limited in her movement or occupation of some of the areas of the suit lands for the reason that there are movable assets in one corner

of the suit lands that belong to the other joint owner. She can of course access even this corner of the suit lands by virtue of having possessory rights over the suit lands. If she interferes with the movable assets, it is upon the joint tenant to enforce his rights over the movable assets without limiting the bundle of rights that the plaintiff has as joint owner of immovable property.

There is the other matter of other suits having been filed and which Mr. Limo, learned counsel for the applicant, has stated that they relate to the same subject matter of this suit and that this suit therefore offends Section 6 of the Civil Procedure Act. Section 6 of the CPA provides that :-

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

I have considered this point but I do not think that the subject matter of this suit offends the provisions of Section 6 of the CPA. For Section 6 to apply, the subject matter of the subsequent suit must be *"directly and substantially in issue in a previously instituted suit or proceeding between the same parties …"* . I do not think that the subject matter in this case is the same as in Children's Case No.139 of 2012, Divorce Cause No.[...] and Matrimonial Cause No. [...] The subject matter of this case is trespass against the six named defendants. The Children's matter touches on the maintenance of the children of the plaintiff and Peter Ole Sabay. It does not relate to the allegation of trespass over the suit lands by the defendants herein. So too the Divorce matter and the Matrimonial Causes suit. The parties to those suits are also not the same parties as in this suit. The parties in the Children's matter and the Matrimonial Causes matter are the plaintiff herein and Peter Ole Sabay. Peter Ole Sabay is not a party to the proceedings in this matter. Neither are the defendants herein parties to the Children's matter, the Divorce matter and the Matrimonial Causes matter. For those reasons, I am not convinced that this suit offends Section 6 of the Civil Procedure Act.

I have held that the plaintiff has demonstrated a prima facie case with a probability of success. There is no doubt that she stands to suffer irreparable loss which may not be compensated by an award of damages if she is denied full access to all the portions of the suit lands. I therefore allow this application and order that pending the hearing of this suit, the defendants or their servants/agents be restrained from trespassing into, entering upon, or in any other way interfering with the parcels of land identified as NGERIA/MEGUM BLOCK 4(SAINA) 39, 40, 48 AND 49, pending the hearing and determination of this suit. I also award the plaintiff the costs of this application.

DATED and DELIVERED at Eldoret this 11th day of December 2012.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT ELDORET

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

[2]Megary & Wade, *The Law of Real Property* , 6th Edition.

[3]Cheshire & Burn's, *Modern Law of Real Property*, 16th Edition.

[4]Ibid, at p242.

[5]Ibid.
[6]Supra note 2, at p477.

[7]Ibid, p478.

[8]Ibid, p480.

[9]*Khanjira & Another vs Safaricom Limited* , Mombasa HCCC No. 231 of 2011 (2012) eKLR.