



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 120 OF 2010**

**RICHARD KIPKERICH BIWOTT:.....PLAINTIFF**

**VERSUS**

**JOSHUA KIMAIYO BIWOTT:.....DEFENDANT**

**RULING**

I have before me an application primarily for a temporary injunction by the plaintiff against the defendant restraining the latter, among others, from moving into 13 acres of land parcel number Uasin Gishu Kormaet Scheme/45, alienating, ploughing, planting, leasing out or doing anything in any manner that will interfere with the plaintiff's possession and occupation of the said 13 acres (herein after "the suit land.") The application is expressed to be brought under sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1, 3, and 4, Order 50 Rules 1, 3, 4 and 10 of the Civil Procedure Rules and all enabling provisions of the law. The application is supported by an affidavit of the plaintiff.

The gist of the plaintiff's case is that the suit land was purchased jointly by him and the defendant from their deceased father and they commenced utilising their respective portions until January, 2011, when the defendant's sons entered his portion and ploughed the same without his consent or authority. Although the suit land was jointly purchased, it was registered in the name of the defendant which registration, according to the plaintiff, was obtained by means of fraud. The plaintiff has therefore, in his plaint, sought subdivision of the suit land and a permanent injunction restraining the defendant and others from entering upon, staying in, remaining or in any way whatsoever dealing with the said portion including charging transferring and sub-dividing the suit land to the plaintiff's detriment.

In the interim the plaintiff has sought the injunction in the terms given above.

In opposition to the application, the defendant has filed a replying affidavit in which he has deponed, *inter alia*, that he is the registered proprietor of the entire suit land having purchased the same from **Nandi Tuiyott Farm Estate Limited** and that the plaintiff has no proprietary claim over the same; that he allowed the defendant to utilize the same for six years and in January, 2010, terminated the authority; that notwithstanding the termination, the plaintiff has been trying to use force to continue utilizing the suit land which event culminated in breach of peace after which the plaintiff and others were charged before Eldoret Chief Magistrate's Court and that it is therefore fair, just and necessary that the plaintiff's application be disallowed. The defendant has exhibited copies of a land certificate of the suit land, and a share certificate issued by the said Nandi Tuiyot Farm Estate Limited.

When the application came up before me for hearing on 6<sup>th</sup> March, 2011, counsel agreed to file written

submissions which were in place by 30<sup>th</sup> of the same month. The submissions substantiated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The plaintiff's claim is premised upon a sale transaction purportedly entered into jointly with the defendant. The subsequent registration was however, according to the plaintiff, effected in the defendant's sole name fraudulently. At the trial therefore, the plaintiff will be expected to adduce evidence of the joint purchase and the alleged misrepresentation. At this stage, the plaintiff had to satisfy the prerequisites for the grant of an interlocutory injunction as set out in the precedent setting case of **Giella –vrs- Cassman Brown & Company Limited [1973] E.A 358**. They are: First he had to establish a prima facie case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not be adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. The plaintiff has not exhibited any evidence of a joint purchase or indeed any purchase of a portion of the suit land. He has not even indicated the purchase price of the suit land and his share thereof and how much he paid. He has further not specified when the purchase took place.

On his part, the defendant has exhibited the land certificate of the suit land. It is in his name and it shows that he was registered as proprietor in 1985. Under section 32(2) of the Registered Land Act (Cap 300 Laws of Kenya), the said Certificate is prima facie evidence that the plaintiff is the registered proprietor of the suit land. The defendant's rights are therefore protected by section 28 of the same Act.

On the above facts, I find, prima facie, that the plaintiff's challenge against the defendant's title may not succeed. However, a conclusive determination of that issue will have to await the trial. For now, however, I have found and hold that the plaintiff has failed to establish a prima facie case with a probability of success at the trial. I need not therefore consider the second and third criteria for the grant of an interlocutory injunction. However, even if it would have been necessary to consider the second criteria, I would have had no difficulty in holding that the injury to be suffered by the plaintiff is clearly capable of being quantified and damages would provide adequate compensation. The plaintiff has not alleged that he has any sentimental attachment to the suit land.

With regard to the balance of convenience, I am of the view that the same tilts in favour of declining the temporary injunction in view of the plaintiff's superior title to the suit land.

The upshot of this matter is that the plaintiff's application for injunctive relief dated 17<sup>th</sup> January, 2011, is declined. The same is dismissed.

Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVDRED AT ELDORET  
THIS 24<sup>TH</sup> DAY OF MAY, 2011.**

**F. AZANGALALA  
JUDGE**

***Read in the presence of:-***

Mr. Manani holding brief for Tutei for the Defendant.

**F. AZANGALALA,  
JUDGE  
24<sup>TH</sup> MAY, 2011**