

Prayers 3 relates to a temporary injunction restraining the Plaintiff, its servant and agents pending the determination of the suit.

The Defendant/Applicants counsel **Mr. Kiboi** submitted that:

- (a) **A prima facie case with probability of success had been made out against the Respondents.**
- (b) **That damages would not be an adequate remedy.**
- (c) **That the balance of convenience was tilted in favour of the applicants.**

Indeed for such an application to succeed the applicant must satisfy the court on the above ingredients submitted by counsel for the Defendant/Applicant. The authorities submitted by counsel are supportive of these three key ingredients. Nevertheless, I find that on the basis of the Elders Award made herein the Defendant/Applicant has not made out a prima facie case with a probability of success as the purported acts of the Elders and the Iten court were declared a nullity and the same was stayed by this Honourable court on the 16th July, 2008 by the Honourable Mwilu J. The main suit relates to proprietary rights and both parties are claiming ownership. This would therefore mean that neither party has a better title than the other.

Secondly, this application is brought under Rule 40 (1) & (4) of the Civil Procedure Rules. I concur with the Respondent counsels argument that it is upon the Applicants to substantiate the acts of interference by giving specific dates, specific acts of interference and which specific persons committed the above acts and to also support the same with photographic evidence and or a **Valuation Report** (emphasis mine). The Defendant/Applicant has deponed to scanty, vague and sparse averments of the acts of trespass. The issues of how the suit property is in danger of being wasted and or damaged was not clearly canvassed or brought out leaving room for doubt as to whether the preservatory orders sought are indeed necessary.

At this juncture I would also like to point out that the remedy sought is also discretionary.

The Applicant has not convinced me on the need to exercise this discretion. I am satisfied that this application has no merit and hereby dismiss the same. As regards prayer (4) on the issue of costs. I am inclined to award the costs of this application to the Defendant/Applicants reasons being that had the Respondents counsel extracted and served the order of 16th July, 2008 the courts time would not have been spent on this application.

Order: Application dismissed with costs to the Defendant/Applicant.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF OCTOBER 2011.

A. MSHILA
JUDGE