



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 53 OF 2010

SARAH JELAGAT MARITIM:.....:PLAINTIFF

VERSUS

KIMELI ARAP KOGO:.....:DEFENDANT

RULING

By her Notice of Motion dated 21st January, 2011, the plaintiff/applicant (hereinafter called “the applicant”) seeks one order of the court namely that the defendant/respondent (hereinafter “the respondent”) his servants and/or agents be restrained by a temporary injunction from trespassing, planting, ploughing or in any other manner dealing with land parcel No. Nandi/Kurgung/281 (hereinafter “the suit land”) pending the hearing and determination of the suit.

The application is supported by an affidavit sworn by the applicant and is based on the grounds that the applicant and her family have been residing on the suit land since 1971 while the respondent resides on LR No. Nandi/Kurgung/280; that the respondent fraudulently took the title to the suit land and registered himself as proprietor thereof; that on 16th January, 2011, the respondent unlawfully and without any colour of right unilaterally ploughed 2 acres of the suit land and had the intention of continuing unless restrained by an order of injunction.

In the supporting affidavit, it is deponed, *inter alia*, that the suit piece of land was bought by the applicant’s father the late **Kipyego Maritim** through the respondent from one **Kimngetch s/o Kipkemei Maritim**; that the plaintiff and her siblings have since lived thereon and extensively developed the same; that on 16th January, 2011, the respondent unilaterally and without any colour of right ploughed about 2 acres of the suit land which action is not only unlawful but malicious and is meant to frustrate the applicant and her siblings and that in the premises the respondent should be restrained.

The application is opposed and there is a replying affidavit sworn by the respondent. The gist of his response is that indeed the **Late Kipyego Maritim** through him purchased only six (6) acres of the suit land whilst he purchased 5.7 acres of the same land and they have been utilising their respective portions. However, according to the respondent, the applicant and her siblings now claim the entire title to which they are not entitled. The respondent also avers that there is between them Kapsabet Resident Magistrate’s Court Civil Case No. 147 of 2008 over the same land by reason whereof this suit should be stayed.

When the application came up for hearing before me on 27th July, 2001, counsel agreed to file written submissions which submissions were duly in place by 19th October, 2011. Those submissions

substantiate the parties' stand-points taken in their affidavits and pleadings.

I have considered the application, the affidavits both for and against the application. I have further given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. The principles for the grant of a temporary injunction were crystallised in the case of **Giella - Vs- Cassman Brown & Company Limited [1973] E.A. 358**. They are as follows: - First an applicant must show a prima facie case with a probability of success at the trial. 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 the application on the balance of convenience. In this case, the applicant's claim to the suit land is not entirely disputed by the respondent. While the applicant avers that she and her siblings are entitled to the entire suit land, the respondent depones that they are entitled to only a portion comprising six (6) acres thereof whilst he is entitled to 5.7 acres of the same land. The actual position on the ground cannot be determined on the affidavit evidence adduced. I am however, persuaded that the applicant has demonstrated a prima facie case with a probability of success at the trial. The subject matter is land which is always an emotive issue in this country. That being the case, I am satisfied that unless the interlocutory injunction is granted the applicant stands to suffer irreparable injury which would not adequately be compensated by an award of damages.

On the balance of convenience, the same in my view tilts in favour of granting the injunction. I am so persuaded because such an injunction operate to preserve the suit land pending determination of this suit or until further orders of the court.

The respondent has argued that this suit should be stayed by reason of the suit he has filed in Kapsabet Principal Magistrate's Court being Kapsabet PMCCC No. 147 of 2008. There is however, no application to stay this suit. This suit cannot be stayed without such an application. The Kapsabet suit is therefore not a bar to the granting of the orders sought herein on an interlocutory basis.

I have also taken into account the fact that the parties to this dispute are blood relatives. The respondent is an uncle to the applicant as she is the daughter of the respondent's deceased brother.

In the premises I allow the application as prayed in paragraph 2 pending the hearing and determination of this suit. The injunction is granted on condition that the applicant files an undertaking as to damages within three (3) days of the date hereof.

Costs shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 30TH DAY OF NOVEMBER, 2011**

**F. AZANGALALA
JUDGE**

**Read in the presence of:
Mr. Okara H/B for Mr. Birech for the respondent and
Ms. Nyamweya H/B for Mr. Kathili for the applicant.**

**F. AZANGALALA
JUDGE
30TH NOVEMBER, 2011**