REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 182 OF 2011

BENJAMIN KIPTANUI MITEI...PLAINTIFF/ APPLICANT

VERSUS

MARY CHEMWENO CHESAINA...DEFENDANT/RESPONDENT

RULING

The application by the applicant/plaintiff dated 25th October 2011 is essentially for a temporary injunction against the defendant/respondent restraining her and/or her agents and/or her servants from trespassing, ploughing, planting, harvesting, grazing, transferring, selling, leasing and/or in any other way dealing with the suit property land parcel, **TEMBELEO/ELGEYO BORDER BLOCK 10/KAPTUKTUK)366** pending the hearing and determination of this suit in which the plaintiff is praying for a permanent injunction against the defendant and for a rectification of the land register by substituting the name of the defendant for that of the plaintiff as the legal owner of the said parcel of land. The application is founded on the following grounds:-

1. **That the plaintiff is the legal owner of the suit property.**

2. **That the defendant has without any colour of right fraudulently caused herself to be registered as the owner of the suit property.**

3. **That the defendant's actions are illegal as she is not entitled to the ownership of the suit property.**

4. **That the defendant due to fraudulent registration has denied the plaintiff rightful enjoyment of the suit property.**

5. **That it is fair and just that the prayers sought be granted to the plaintiff.**

6. **That this application has been brought promptly and without any unreasonable delay.**

7. **That the plaintiff stands to suffer irreparable loss and damage if the application is not allowed.**

The said grounds are fortified by the facts contained in the plaintiff's supporting affidavit dated 25th

October 2011.

The defendant opposes the application on the basis of the facts contained in her replying affidavit dated 31st October 2011. The application was argued on behalf of the plaintiff by the learned Counsel, **MR. CHEPKWONY**, while the defendant appeared in person and opted to fully rely on her replying affidavit.

Basically, the principles upon which a Court may grant a temporary injunction were set out in the case of **GIELLA VS. CASSMAN BROWN & ANOTHER (1973) EA 358**. These are that:-

(a) An applicant must show a prima facie case with a probability of success.

(b) An injunction will not normally be granted unless the application might otherwise suffer irreparable injury.

(c) When the Court is in doubt, it will decide the application on the balance of convenience.

With regard to the first principle, it may be stated that the fact that the plaintiff holds a title deed to the suit property is prima-facie evidence showing that he is the lawful owner of the suit property and has a good case against the defendant. The said title deed is dated 14th December 1994 and is annexutre marked exhibit "**BKM1**" in the plaintiff's supporting affidavit. However, the defendant also holds another title deed respecting the suit property. The said title deed is dated 8th July 2011 and is annexture marked exhibit "**MCC5**" in the defendant's replying affidavit. This second title deed creates doubt as to whether the plaintiff's first title deed is valid.

In an attempt to explain the existence of the defendant's title deed, the plaintiff states in paragraph 4 and 5 of his affidavit that, sometimes in the year 2002, the defendant lodged a complaint against him with the Moiben Division Land Dispute Tribunal challenging the validity of his title. A judgment was entered in favour of the defendant in Edoret CMCC Award No. 82 of 2002. The plaintiff challenged the award vide HCCC. No. 92 of 2006. A copy of the High Court Judgment is annexed to the plaintiff's affidavit and marked exhibit "**BKM 2**". It shows that the order made in Eldoret CMCC No. 82 of 2002 was found to be null and void with the result that a permanent injunction order was issued against the defendant restraining her from taking possession of the suit property.

From the foregoing, it would follow that as at the time the defendant's title deed was issued on 8th July 2011, there was in existence a permanent restraining order issued against the defendant in a Judgment delivered by the High Court on 15th July 2009. However, the plaintiff has not shown whether the defendant was made aware of the Judgment. Considering that the proceedings, leading to its delivery were conducted ex-parte after her failure to enter appearance or file a defence after being served with the necessary summons.

In her replying affidavit, the defendant states that the suit property was purchased by herself and her late husband. A portion measuring eight (8) acres was purchased way back in 1989 (See, annexure marked exhibit "**MCC 1**"). However, the plaintiff encroached on the parcel of land prompting the defendant to refer the matter to the Moiben Division Land Disputes Tribunal which awarded her the property vide Award No. 82 of 2002. A decree was subsequently issued followed by an application by the defendant to have the Court's executive officer to sign the requisite transfer forms. The application was served upon the plaintiff but he allegedly refused to attend Court. The Court granted the order sought. A copy of the order is annexed to the replying affidavit. It shows that the order was issued on 3rd February 2010 but was made on 26th January 2010.

All these happened after the judgment of the High Court on 15th July 2009 but the defendant contends

that she did not obtain her title deed fraudulently. Whether this was in fact so can only be determined at the trial of the suit. The defendant also contends that she was not served with the necessary summons respecting HCCC. No. 92 of 2006. She thus implied that she was not aware of the suit and the judgment delivered against her.

The defendant alleges that she became aware of the High Court case when auctioneers went to her with a view of proclaiming her property for purposes of execution of the judgment. Immediately thereafter, she filed an application for stay of execution and leave to file her defence. She said that the application is dated 13th July 2011 in the same HCCC. No. 92 of 2006 and that it is scheduled for hearing on 21st December 2011. The defendant indicates that the suit property is properly and lawfully registered in her name.

With the existence of two title deeds in respect of the suit property and there being no dispute that the defendant has filed an application to have the ex-parte judgment of the High Court reversed and/or set aside which application is slated for hearing on 21st December 2011, it is doubtful whether the plaintiff has established a prima facie case with a probability of success.

With regard to the second principle for the grant of a temporary injunction, there has been no attempt by the plaintiff to demonstrate how he would suffer irreparable injury if an injunction is not granted at this stage.

With regard to the third principle, it has been implied that the plaintiff is in possession of the suit property. Consequently, the balance of convenience dictates that the existing "*status quo*" be maintained and so as to leave no doubt as to what is meant by "*status quo*" herein, the application is allowed in terms of prayer (c). Costs of the application be borne by each party.

Ordered accordingly.

J. R. KARANJA
<u>JUDGE</u>

[Read and signed this 10th day of November 2011]
[In the presence of Mr. Chepkwony for applicant and the plaintiff]