

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 58 of 2009

LOICE KOBILO KIPNGOCHOI.....APPELLANT/APPLICANT

VERSUS

ISAIAH DAVID.....RESPONDENT/DEFENDANT

R U L I N G

This Ruling is in respect of the Notice of Motion dated 5th November 2009 taken out under the provisions of Section 3A and 63C of the Civil Procedure Act and Order XXXIX Rules 2, and 2A and Order XLI Rule 4 of the Civil Procedure Rules and all the enabling provisions of the Law. It prays for orders for a temporary injunction restraining the Respondent from erecting, bringing materials, constructing, selling, charging and/or interfering with the Applicant's lawful use of that parcel of land known as plot No.66 of PDP Ref No. R/B/358/99/07 located within Marigat Township pending hearing and determination of the appeal. That there be stay of further proceedings and/or execution pending the hearing and determination of the appeal.

The grounds upon which the application is grounded are that the Appellant has an arguable appeal pending the hearing of which the Respondent should be restrained as above else the Appellant will be occasioned loss and damage. That the new subdivision of the suit land which resulted in the present dispute between the parties was not approved as required and that at the commencement of the suit the Appellant held the letter of allotment to the suitland. Affidavit in support of the application was filed.

It was submitted in favour of the Applicant that she was allotted the suit land in 1989, took possession and substantially developed the same and any interference with the same would result in her suffering substantial loss. Those developments are admitted by the Respondent. That the trial court granted an injunction but for 100 days only and hence the present application.

In opposing the application the Respondent filed a Replying Affidavit and it was submitted that the intended appeal had no merit whatsoever and had no probability of success. That the Respondent had taken out a Kshs 1 million loan and was in part possession and in any event the Applicant will not suffer any damage at all if the application is refused.

In deciding this application I will be guided by the well known guideline in this type of cases and it is whether the Applicant will suffer substantial loss if the orders sought are not granted. Admitted facts are that the Applicant was allotted the plot in 1989 and has developed the same and it was upon such basis that the trial court granted an injunction albeit for 100 days. The Applicant's letter of allotment was first in time and further that the subdivision which resulted in the letter of allotment to the Respondent was not even approved as at the time of going to court. I find that an arguable appeal exists and so that the same is not rendered nugatory and further that the Appellant's developments are not interfered with in a manner that may result in her suffering substantial loss and so that the subject of the appeal is preserved, I hereby order that there shall issue an order restraining the Respondent as prayed for in the application. There is also ordered a stay of execution of the trial court's judgment until the appeal herein filed is heard and determined. Because of the nature of the subject matter of the appeal the Appellant is hereby ordered to set down the appeal for hearing within ninety (90) days of today in default of which the same shall automatically stand dismissed.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF JUNE 2010.

P.M.MWILU
JUDGE

IN THE PRESENCE OF

Alwang H/B Gicheru - Advocate for Plaintiff/Applicant
Mwetich H/B Chebii - Advocate for Respondent
Andrew Omwenga - Court clerk.

P.M.MWILU
JUDGE