

4. It is contended that the respondent intends to dispose off the suit premises in order to defeat the defendant's claim in this suit. In the event that the suit property is sold, the defendant claims that he will suffer irreparable loss as he lives in the suit property. Thus the plaintiff should be ordered to deposit the title in court until the determination of the suit.

5. This application was opposed by the plaintiff/respondent; counsel relied on the replying affidavit sworn by Ben Cherop Masibai on 15th November, 2010. It is contended that the plaintiff bought the suit premises but since he was a teacher at Mt. Elgon, he had trusted the defendant as his brother to cultivate and settle the Settlement Fund Trust loan. Sometimes in 1989, the plaintiff claims that he became very sick and was transported to the suit premises so that in the event that he should die, he should be buried on his piece of land. However the defendant put him on a wheelbarrow and deposited him on the nearest bus station to take him back to Mt. Elgon. The defendant claims that he processed the title to the suit land himself and paid the requisite registration fees. He claims the title belongs to him but the defendant unfairly placed a caution on his property in a bid to deprive him of his constitutional rights to the ownership of his property. This application was further faulted because it was brought by the defendant and is not supported by any prayer in the counterclaim.

6. This application seeks for both temporary and mandatory orders of injunction. The principles to guide the court on whether or not to grant the orders are well settled. The applicant has to establish that he has a prima facie case with a probability of success. Secondly, irreparable harm which may not be compensated for in damages will arise and if the court is in doubt, the matter is determined on a balance of convenience (see the oft' cited case of **GIELLA VS. CASSMAN BROWN & CO. LTD. [1973] EA 358.**

7. Also the Court of Appeal has further explained what constitutes a prima facie case in the case of **MRAO LTD. VS. FIRST AMERICAN BANK OF KENYA & 2 OTHERS [2003] KLR 125** in the following words:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

8. The dispute in this case involves two brothers; the defendant claims to have purchased the suit premises and registered it in the name of plaintiff who is his brother. On the other hand, the plaintiff claims to be the registered proprietor of the suit premises and he claims to have allowed his brother, the defendant to cultivate the land but the defendant turned hostile and refused to allow the plaintiff access to his own land. Merely going by the averments in the supporting affidavit by the defendant and also the prayers sought in the counterclaim, there is no substratum to support the defendant/applicant's prayers for an interlocutory order of injunction leave alone the mandatory order of injunction to deposit the title in court.

9. It is also a settled a principle of law that mandatory orders of injunction are granted in very clear cases and where there are special circumstances. In this case the claim by the defendant is denied in total by the plaintiff. The title is registered in the name of the plaintiff since 2007. The defendant filed a caution on the title prohibiting the plaintiff from dealing with the suit premises. The plaintiff claims the caution was irregularly placed which has interfered with his constitutional rights to the ownership of the property.

10. Taking all the material before this court, I am not satisfied that the plaintiff's application meets the threshold of granting the order of injunction, firstly it is not supported by the prayers in the counterclaim. Secondly, the issue of ownership of the suit premises is not clear and plain, indeed it is denied and there are no documents to show ownership. Lastly this application seeks for mandatory orders and ought to have been brought by way of notice of motion and not chamber summons. For the aforesaid reasons, the application is dismissed with costs to the plaintiff.

Ruling read and signed on 3rd December, 2010.

MARTHA KOOME.
JUDGE.