



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**CIVIL SUIT NO. 119 OF 2009**

**AGNETA AGISA MUDUKIZA ..... PLAINTIFF**  
**=VERSUS=**  
**TERESA NOEL AND KAITANO ANDUKU ..... DEFENDANTS**

**RULING**

The plaintiff seeks interlocutory injunctive relief to restrain the defendants, their agents/servants or anybody acting under their instructions from dealing in any way, interfering, building or occupying parcel number **656** Mautum (hereinafter “**the suit land**”) pending the hearing and determination of this suit. The application is supported by the plaintiff’s affidavit sworn on 30/6/2009. In the affidavit, it is deponed, *inter alia*, that the plaintiff was on, 15/6/1998, allocated the suit land and the defendants without any colour of right have interfered with the same by building thereon. It is further deponed that the defendants were convicted of trespass in **Eldoret CR.CC No. 6144 of 2004** and an appeal therefrom concluded that the matter was civil hence this suit. The plaintiff therefore contends that she has been denied full enjoyment of the suit land. Annexed to the affidavit are copies of the letter of offer from the Director of Land Adjudication and Settlement dated 31/7/2000 and the judgments in the criminal case and the said appeal.

The application is opposed and there is a replying affidavit sworn by the first defendant **Teresa Noel**. In the replying affidavit, it is deponed, *inter alia*, that they too were allocated plot number **656** in the same scheme in 1990 and that they are not trespassing on the plaintiff’s land which is comprised in **656, 656 “B” and 680 “B”**

The application was canvassed before me on 10/11/2010. Counsel restated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed both for and against the application and the submissions of counsel. Having done so, I take the following view of this matter. The principles for the grant of a prohibitory interlocutory injunction are well settled. The same were crystallized in **Giella –vrs- Cassman Brown & Company Limited [1973] EA 358**. They are as follows:-

- 1). An applicant must show a prima case with a probability of success at the trial.
- 2). An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.
- 3). If the court is in doubt, it should decide the application on a balance of convenience.

The affidavit evidence adduced before the court does not demonstrate with certainty the issue of ownership to enable the court to conclusively determine whether the defendants are trespassing upon the suit land. The plaintiff herself has exhibited “AM1” headed “PLOT ALLOCATION BY LUGARI DISTRICT PLOT ALLOCATION COMMITTEE ...” The exhibit is dated 15/6/1998 and is addressed to the plaintiff. In bold letters is plot number **680 B**. Number **656** is also seen but it is not highlighted. Exhibit “AM2” is dated 31/7/2000 titled “SETTLEMENT PLOT – LETTER OF OFFER.” The same is addressed to the plaintiff and is in respect of plot number **656** at Mautuma Settlement Scheme. Then there is the judgment of **Kaburu Bauni J** in Eldoret Criminal Appeal Number

76 of 2006. The learned Judge stated as follows:-

**“Though I quite agree with the learned state**

**Counsel that lack of title deed by the complainant did not show that she did not own the land in dispute, it is nonetheless clear there is a dispute between the two parties and it was not clear from the evidence who owned the plot. The complaint’s allocation letter was for plot No. 680 though she said this was changed to 656. This fact was not fully proved .....**”

Given the averments in the replying affidavit, the position does not seem to have changed hence my prima facie finding that the issue of ownership and of which title is yet to be settled - and cannot be resolved on the basis of material availed to the court.

The defendants have sworn that they have resided on plot No. **656** comprising three (3) acres since 1990 and have constructed houses thereon since then. That position is but tressed by the plaintiff in paragraph 7 of her supporting affidavit which reads as follows:-

**“7. That without any colour of right the Defendant / respondents have interfered with my parcel by building on it.”**

In those premises it would appear that the plaintiff’s real desire by her application is to evict the defendants. She should therefore have sought a mandatory injunction. She has not. To my mind, even if she had done so, she would be faced with a Herculean task to establish the same.

In the end, I am not persuaded that the applicant has established a prima facie case with a probability of success at the trial. Having come to that conclusion, I need not consider the other conditions for the grant of an interlocutory injunction. This application has no merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF DECEMBER 2010.**

F. AZANGALALA  
**JUDGE.**

Read in the absence of the parties and there advocates.

F. AZANGALALA  
**JUDGE**  
1/12/2010