

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET
CIVIL CASE NO. 2 OF 2004

CHARTERHOUSE INVESTMENT LIMITEDPLAINTIFF

VERSUS

SIMON K. SANG 1ST DEFENDANT

MARGARET MUNYAO 2ND DEFENDANT

DISTRICT LAND REGISTRAR UASIN GISHU

(Through) ATTORNEY GENERAL..... 3RD DEFENDANT

RULING

This is an application by way of Chamber Summons under section 3A of the Civil Procedure Act and Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules. The application is dated 6th January, 2004 and seeks for orders that a permanent injunction should issue against the 1st defendant restraining him, his servants or agents from carrying out any construction work, transferring, charging, selling or in any other way dealing with land parcel number Eldoret Municipality Block 12/461. It also seeks that a temporary injunction be issued against the 2nd defendant restraining them from transferring, selling, occupying, charging, erecting structures or in any other way dealing with parcels of land **Eldoret Municipality Block 12/461, 462, 464. 465 and 466.**

When the application came before me on 7th January, 2004 I ordered that the other parties be served and I fixed the application for hearing on 12th January, 2004. At the hearing the 2nd defendant appeared through Mr. Ogeto. The 1st and 3rd defendants were not present. I was informed by counsel for the plaintiff/applicant that the 1st defendant was not served as the process server tried but was not able to trace him. A return of service dated 12th January, 2004 was filed. As for the 3rd defendant the plaintiff's advocate informed me that they were served, but they were not party to the application . No return of service was filed. Before I heard the application I granted leave for the application to be heard during the court vacation.

Mr. Chemitei for the plaintiff/applicant submitted that they were seeking orders for injunction against the 1st defendant and also against the second defendant. Their application was supported by an affidavit sworn on 6th January, 2004 by Sophie Chemengen. He submitted that land Eldoret Block 12/424 measuring 3.4 hectares was allocated to Mr. Mark Too who sold it to the plaintiff. The plot number **Eldoret Block 12/424** was an amalgamation of parcels 218, 143 and 144 which were amalgamated by the Commissioner of Lands. There were other pending High Court cases i.e. **Eldoret HCCC.64/2001** and **Eldoret HCCC.47/2003** wherein the court has granted an injunction in favour of the plaintiff against other parties who were encroaching on the land. As the plaintiff has a title to the plot they should be protected by way of an injunction. He submitted that having read the affidavit of the second defendant, he denies that there was fraud on the part of the plaintiff. A number of the annexures to the said affidavit were not in the possession of the plaintiff. He submitted that his client had demonstrated that there was an arguable case and that an order for injunction should issue. Mr. Ogeto for the 2nd defendant submitted that though the plaintiff was suing on plot **Eldoret Block 12/424**, that plot does not exist. He urged that the title to that plot was issued through fraud. He said that the title was issued on 18th May, 1999 while the title of his client on **Eldoret Block 12/218** was issued on 2nd February, 1998 which was much earlier. There were several correspondences and documents attached to the affidavit of the 2nd defendant which showed how the titles to the subject plots were issued. The Commissioner of Lands had cancelled title to

plot **Eldoret Block 12/424**. According to the records the plaintiff's plot is plot **Eldoret Block 12/143** and the second defendant's plot was Eldoret Block 12/218, which is the plot that was subdivided and sold to various parties including the 1st defendant. The 1st defendant is developing the plot that was sold to him by the second defendant. He submitted that on the authority of the case of **Giella –vs- Cassman Brown** the plaintiff has not established the grounds to be granted an injunction. He has not established a prima facie case, has not established that he will suffer irreparable damage and the balance of convenience is not in his favour.

I have considered the application, the documents filed in support of the application, the replying affidavit of the 2nd defendant and submissions made by counsel for the plaintiff/applicant and the 2nd defendant. It is apparent that this is a case that relates to titles that were issued by the Commissioner of Lands to different persons, which appear to be contradictory on their face. The plaintiff is arguing that his title is the genuine title while the second defendant is also arguing that her title is the genuine title. It is therefore quite difficult for the plaintiff to establish that he has a superior right to that of the 1st and 2nd defendant in this case. He seeks an injunction against both. On the basis of the case of **Giella –vs- Cassman Brown [1973] E.A. 358** I find it difficult to conclude that the plaintiff has a prima facie case with probability of success, when you weigh his position against other title holders. If the other parties did not have titles to the land then the balance of convenience would be in his favour.

I am not convinced that this is an appropriate case for me to grant an injunction. As the Commissioner of Lands has issued title, he should be sued to rectify the titles issued under review proceedings. I therefore decline to grant orders of injunction against 1st and 2nd defendants. In the result the application for injunction by the plaintiff is dismissed. I award costs of the application to the 2nd defendant, whose advocate appeared before me. It is so ordered.

Dated and Delivered at Eldoret this 13th Day of January, 2004 In the presence of Chemtei for applicant and Ngala for Ogeto.

George Dulu,

Judge

I certify this a true copy of the Original

DEPUTY REGISTRAR