



**Chepawoy v Yano & another (Environment & Land Case  
E018 of 2023) [2024] KEELC 400 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 400 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E018 OF 2023  
EO OBAGA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**ROBERT OLEITEREM CHEPAWOY ..... PLAINTIFF**

**AND**

**EZEKIEL KEMBOI YANO ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN MARABA KEMBOI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of motion dated 24.10.2023 in which the Plaintiff/Applicant seeks the following orders:-
  1. Spent
  2. Spent
  3. That Respondent, agents, assigns, servants and any person/purchasers claiming under him be restrained from further constructing, trespassing, selling, disposing or in any manner interfering with that parcel known as Eldoret Municipality/Block 14/533 pending the hearing of the suit.
  4. That dealings in the land parcel Eldoret Municipality/Block 14/533 be restricted by way of registration of restriction by Land Registrar, Uasin Gishu County pending hearing of this application and thereafter pending the hearing and determination of the suit.
  5. That dealings in the land parcel Eldoret Municipality/Block 14/533 be restricted by way of registration of restriction by Land Registrar, Uasin Gishu County pending the hearing and determination of the suit.
  6. That the costs of the application be provided for.



2. The 2<sup>nd</sup> Defendant/Respondent is the registered owner of LR. No. Eldoret Municipality Block 14/533 measuring 0.4062 hectares (suit property). The 2<sup>nd</sup> Defendant sold the suit property to the 1<sup>st</sup> Defendant/Respondent. The suit property was sold before the process of succession in respect of the 2<sup>nd</sup> Respondent's father was completed.
3. On 13/7/2021, the 1<sup>st</sup> Respondent sold 0.2 hectares out of the suit property to the Applicant with the express permission of the 2<sup>nd</sup> Respondent. The Applicant purchased 0.2 hectares from the 1<sup>st</sup> Respondent at a consideration of Kshs 7,750,000/=. He paid Kshs 6,000,000/= and the balance of Kshs 1,750,010/= was to be paid upon the 1<sup>st</sup> Respondent producing a certificate of lease in his favour from the 2<sup>nd</sup> Respondent.
4. The 2<sup>nd</sup> Respondent has since had the suit property transmitted to him and is now the registered owner of the suit property. Unknown to the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent sold the entire suit property to a third party notwithstanding the fact that he had received Kshs. 6,000,000/= from the Applicant in addition to Kshs. 670,000/= which he received from the Applicant despite the fact that he had not obtained a certificate of lease in his favour as per the agreement. It is on this basis that the Applicant is seeking for injunctive orders against the 1<sup>st</sup> Respondent and for a restriction against any dealings on the suit property until this suit is heard and determined.
5. The Applicant contends that unless an injunction is granted, the third party who has already started construction on the suit property will complete the construction and therefore he will suffer loss which will not be compensated in monetary terms. The Applicant further contends that the 1<sup>st</sup> Respondent has already admitted that he is not in a position to refund the amount paid as he no longer has interest in the suit property having relinquished his interest to a third party.
6. The Applicant's application was opposed by the 1<sup>st</sup> Respondent based on a replying affidavit sworn on 15.11.2023. The 1<sup>st</sup> Respondent contends that he no longer has interest in the suit property having sold the same to third party and that there was no spousal consent granted by either party and as such the suit based on specific performance will not be successful as the agreement between the Applicant and the 1<sup>st</sup> Respondent was frustrated.
7. The 1<sup>st</sup> Respondent further states that grant of an injunction will hurt a third party and that the Applicant's money will be refunded. He further states that the 2<sup>nd</sup> Respondent did not give authority for the sale to the Applicant as alleged as he was not privy to the agreement. He further states that grant of orders of specific performance will cause hardship to both the Respondent and the third party.
8. The 2<sup>nd</sup> Respondent swore an affidavit on 22.11.2023 in which he supports the Applicant's case. He states that he sanctioned the sale of 0.2. hectares by the 1<sup>st</sup> Respondent to the Applicant but that he did not sanction the sale by the 1<sup>st</sup> Respondent to the third party. He states that as he has obtained title and that he is ready to have the suit property transferred to both the Applicant and one Koech whom I presume is the said third party. He states that he does not wish to be entangled in what might turn out to be a criminal act.
9. I have carefully considered the Applicant's application as well as the opposition to the same by the 1<sup>st</sup> Respondent and the support thereof by the 2<sup>nd</sup> Respondent. I have also considered the submissions by the parties herein. The only issues for determination are firstly whether the Applicant has met the threshold for grant of an injunction. Secondly, whether a restriction should be registered against the title prohibiting any dealings on the suit property until hearing and determination of this suit.
10. The principles for grant of an injunction were well set out in the celebrated case of *Giella – Vs- Cassman and Brown Co. Ltd* (1973) EX 353. First an Applicant has to demonstrated that he has a prima facie



case with probability of success. Secondly, an Applicant must demonstrate that he will suffer loss which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

11. In the case of *Mrao Ltd –Vs- First American Bank of Keya Ltd* (2003) eKLR, a prima facie case was defined as follows: -

“...in Civil cases, it is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. In the instant case, the Applicant has demonstrated that he has paid a substantial amount of the purchase price. What is owing is due to the non-performance of the terms of the agreement between him and the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent has sworn that he no longer has interest in the suit property as he has already sold the same to a third party. This clearly demonstrates that the Applicant has a prima facie case with probability of success.
13. On whether the Applicant will suffer loss which will not be compensated in monetary terms, it is important to note that the Applicant was taken to the suit property, saw it and liked it. This is why he paid his money for it. The 1<sup>st</sup> Respondent has gone ahead to sell the same to a third party. This court cannot hold that the 1<sup>st</sup> Respondent is capable of refunding him. No two parcels are the same. Even if the 1<sup>st</sup> Respondent were in a position to refund, in the circumstances of this case, the alleged refund will not be adequate compensation. I therefore find that any action of refund will not adequately compensate the Applicants.
14. On the issue of balance of convenience, the same tilts in favour of the Applicant who has paid a substantial amount of the purchase money and is willing to clear the balance in accordance with the agreement. As a sign of good faith, he has gone out of his way to pay Kshs 670,000/= to the 1<sup>st</sup> Respondent outside the agreed terms in the sale agreement. I therefore find that the Applicant’s application is well merited. The same is allowed in terms of prayers (3), (4), (5) and (6) of the Notice of motion dated 24.10.2023.
15. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Mwetich for Mr. Alwanga for Applicant.

Mr. Mitei for Dr. Chebii for 1<sup>st</sup> Defendant.

Court Assistant –Brian

**E. O. OBAGA**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2024**

