

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 272 OF 2014

HEZRON OGARI ACHENCHI.....PLAINTIFF

VERSUS

SAMUEL KIPRONO KAPTINGEI.....DEFENDANT

RULING

This is the ruling in respect of an application dated 7th February 2017 brought by way of Notice of Motion by the plaintiff/applicant for orders :

- 1) THAT service of this application be dispensed with in the first instance and the same be heard on priority basis.
- 2) THAT there be interim orders of injunction restraining the defendant either by himself or through his agents, employees and/or servants from ploughing, selling, leasing out, occupying, transferring, charging, putting up structures, planting, wasting or otherwise interfering with the plaintiff's quiet possession of that parcel of land known as **MOIBEN/LOLKINYEI BLOCK 3(ITET/58)** pending the hearing and determination of this application inter-parties.
- 3) THAT there be interim orders of injunction restraining the defendant either by himself or through his agents, employees and/or servants from ploughing, selling, leasing out, occupying, transferring, charging, putting up structures, planting, wasting or otherwise interfering with the plaintiff's quiet possession of that parcel of land known as **MOIBEN/LOLKINYEI BLOCK 3(ITET/58)** pending the hearing and determination of the main suit.
- 4) THAT costs of this application be provided for.

This matter was brought under certificate of urgency on 8th February 2017 when the same was certified as urgent and orders granted in terms of prayers Nos 1 &2 pending the hearing of the application inter partes. On 13/6/17 counsel agreed to canvass the application vide written submissions after going through the motions of filing replying and further affidavits.

PLAINTIFF'S COUNSEL'S SUBMISSIONS

The plaintiff's counsel filed his submissions on 16/10/17 and submitted that the issues for determination of the court are as to whether the suit meets the threshold for granting injunctive orders, whether the court order issued on 14th October 2014 affect the plaintiff and finally whether the sale agreement between the plaintiff and the defendant exists?

Counsel relied on the case of *Giella vs Cassman Brown & Co. Ltd (1993) EA*, which laid down the principles for grant of injunction.:

- 1) The applicant must establish a prima facie case with a probability of success
- 2) That if an injunction is not granted, irreparable losses would arise
- 3) If the court is in doubt, it would decide on a balance of convenience

On the first limb of the applicant establishing that he has a prima facie case with a probability of success, Counsel submitted that the plaintiff entered into an agreement with the defendant on the 5th May 2004 and paid him Kshs. 231, 000/= in cash. He further submitted that the plaintiff has been in possession of the said land since then upto 2014 when the defendants started to frustrate him. He also stated that the sale agreement was witnessed by the defendant's wife of which he is now denying. Mr. Mitei submitted that the plaintiff had established that he has a prima facie against the defendant with a probability of success.

(ii) On irreparable loss Counsel for the applicant submitted that the plaintiff has been living on the suit of land with his family since the time that he purchased it to date. The applicant has also been cultivating the land and has undertaken some developments on the said portion. It was counsel's submission that the frustration by the respondent towards the applicant and threats to evict him has occasioned the plaintiff substantial loss. He submitted that the respondent has severally destroyed the applicant's crops which has made him to suffer irreparable loss which cannot be compensated by an award of damages.

Mr. Mitei Counsel for the Plaintiff/ applicant further submitted that the court has a wide discretion to give a lawful and justifiable decision over a matter being a court of equity and fairness and it's upon it to give its decision upon balancing between the rule of law and the principles of equity. He submitted that the applicant has approached the court with clean hands and that the balance of convenience should tilt to the applicant's favour as he has suffered great loss as a result of the defendants' acts.

On the second issue for determination as to whether the court order issued on 14th October, 2014 affects the plaintiff/applicant, Counsel submitted that the plaintiff is in occupation of three acres of the land parcel known as **Moiben/Lolkinyei Block 3 (Itet)/58** and not the entire parcel. It was his submission that the orders sought in the **Succession Cause No. 366 of 2009** affects the Interested parties known as **Sweetland Consultants** and not the plaintiff. The plaintiff has never been issued with a court order in respect of the suit land.

Lastly on the third issue for determination as to whether there is a sale agreement between the plaintiff and defendant exists, Counsel submitted that the plaintiff and defendant entered into an agreement on the 5th May, 2004 whereby the defendant sold him 3 acres for a consideration of Kshs. 231,000/ and the said agreement was signed by the defendant's wife together with the children as annexed to the supporting affidavit. Counsel therefore urged the court to allow the application as prayed.

The defendant/respondent's Counsel filed his submissions in response to the application.

DEFEDANT'S COUNSELS' SUBMISSIONS

Counsel for the respondent in opposing the application restated the plaintiff and the defendant's case as averred in the supporting and replying affidavit. He submitted that the the Respondent in his replying affidavit dated 9/3/2017 stated that the land parcel No. Moiben / Lolkinyei Block 3 (ITET) / 58 belonged to his late father William Kaptingei Arap Kirwa (deceased) and he annexed a copy of title to that effect.

It was the defendant respondent's case that although he attempted to sell the said parcel to the applicant sometime back the same was revoked as the agreement was void and the family of the late William Kaptingei (Deceased) agreed to refund the Plaintiff the purchase price. He further submitted that the Respondent requested the Plaintiff to collect his money from his advocate J. K Birir & Company Advocates but he refused to collect the said sum and that the suit land is subject to Eldoret Succession Cause No. 366 of 2009 — **In the matter of the estate of the late William Kaptingei Arap Kirwa (Deceased)** in which there is an order in favour of Jane Jeruto Meli to keep out purchasers until the hearing and determination of the said cause.

Counsel further restated the respondent's case that the applicant has never been in possession since 2004 and that he has not developed the said parcel of land since the Respondent's wife is the one who has been cultivating the said piece of land together with other beneficiaries of the estate of the late William Kaptingei (Deceased) It was also submitted by Counsel that the agreement became void immediately

upon 6 months expiry from the date of executing the agreement because the applicant has never sought the consent of Land Control Board.

It was Counsel's submission that the respondent did not have the capacity to sell the suit parcel of land because he was not the registered owner nor was he the legal administrator as the registered owner is a deceased person. He further submitted that the Respondent had not sought for letters of administration in respect of the deceased estate and that he sold the said land without consulting the family members and without the knowledge and or consent of family members.

Counsel submitted that given that the land belongs to a deceased person the suit is untenable in that the administrators have not been sued and the area covered by the order is not defined as the said land is 16 acres and occupied by various beneficiaries residing thereon. The sale agreement of the suit land between the Respondent and Applicant was void ab initio by dint of Section 45 of the Law of Succession Act Cap 160 Laws of Kenya and Land Control Act as it lacked consent of the Moiben Land Control Board. Counsel stated that courts have frowned upon intermeddling with the deceased's property by persons who are not administrators of the estate and cited several authorities to illustrate the same.

Counsel cited the case of **Francis Musyoki Kilonzo & Another =vs= Vincent Mutua Mutiso 2013) eKLR**. Where the court held that: "the deceased was survived by six other beneficiaries, disposing of the land belonging to the deceased was indeed intermeddling with the estate of the deceased". In the case of **Njiraini Warui & another =vs= Grace Wawira(2017) eKLR**, the court held that James Kiragu had no legal title which he could convey to Francis Njingi Wambugu.

Counsel also quoted the case of Re-estate of Michael Gachichi Mbui (Deceased) (2016) eKLR — where it was held that:

the person from whom Ndiritu Gikaria acquired the subject property was not the registered owner thereof, and therefore he could not possibly have had any legal title to convey to him. The said person was neither an administrator of the estate of the deceased... "

It was Counsel's submission that the suit land parcel No. Moiben/Lolkinyei Block 3 Itet 58 is subject to **Eldoret Succession cause No. 366 of 2009** in the matter of the estate of the late William Kaptengei Arap Kirwa (Deceased) in which there is an order in favour of Jane Jeruto Meli to keep out purchasers till the hearing and determination of the cause. He therefore submitted that the application lacks merit and does not fulfill the conditions for grant of injunction as the balance of convenience is in favour of the estate of the Late William Kaptengei Arap Kirwa and the same should be dismissed with costs to the defendant.

Analysis and Determination

This is an application for a temporary injunction pending the hearing and determination of this suit. The court has discretion to grant such remedies but there are established principles which must be adhered to as was enunciated in the known case of **Giella Versus Cassman Brown (1973) EA 358** which has also been relied upon by both Counsel.

- 1) Has the Plaintiff made out a prima facie case with a probability of success?
- 2) Is the Plaintiff likely to suffer irreparable injury which would not be adequately compensated by an award of damages?
- 3) In whose favour does the balance of convenience tilt if the court is in doubt?

Apart from these laid down principles the court is also alive to the fact Article 159 of the Constitution as well as the Overriding Objective as provided for under sections 1A & 1B of the Civil Procedure Rules obliges the courts to do substantive justice by interpreting the law in a much wider manner in order to act justly and fairly.

I have considered both the plaintiff/applicant and the defendant/respondent's pleadings and submission of counsel. I notice that it is not in dispute that the plaintiff and the defendant entered into a sale agreement for purchase of a portion of the suit land. The contention of the defendant is that the agreement became null and void due to lack of a consent from the Land Control Board the same having lapsed after six months. The other issue is that the defendant did not have capacity to enter into the transaction to sell the suit land as he was not the registered owner.

The defendant annexed a court order dated 14th October 2014 in respect of Succession Cause No 366 of 2009 to his replying affidavit. The order is in respect of six acres that were purchased by an interested party who was directed to stay out of the suit parcel of land until the total distribution was done. The order further stated that the earlier order issued on 18 /3/10 remains unaffected. The court has not been told of the content of that order and whether it affects the plaintiff or not.

On the face of the record it is clear that there was an agreement for sale between the plaintiff/applicant and the defendant/Respondent. The issue whether the agreement is null and void can be canvassed at the hearing of this suit. The other issue as to whether the defendant had capacity to sell or whether there was a Land control board consent is not part of this application. The application before me is for a temporary injunction and not a preliminary objection as to the validity of the suit. I will therefore deal with the issues at hand at this interlocutory stage. If the points of law were raised in a properly so-called manner, the court could have addressed itself on the issues above and made a decision.

I also notice that this matter was filed in 2014 and there have been no proceedings in this file until this application was filed in 2017. There is also no evidence that the summons has ever been served upon the defendant. I have just seen a memorandum of appearance which was filed after the service of the order in 2017. No defence has been filed yet. The question is what has been happening on the suit land? The plaintiff also seeks for an injunction and in the alternative a refund of the purchase price at market rates.

Having considered the pleadings, issues and submissions of both counsel together with the authorities cited and I find that this is a case where the court will exercise its discretion grudgingly in favour of the plaintiff using the last limb of the principle for grant of injunction where the court is in doubt to decide the case on a balance of convenience. The evidence before me is the plaintiff's word against the defendant's. Each says that they are the ones in occupation.

The upshot is that I allow the plaintiff's application for injunction but I order that this case must be fast tracked and be fixed for hearing upon complying with order 11 of the Civil Procedure Rules within 30 days.

Costs of the application in the cause.

Dated and delivered at Eldoret on this 1st day of November 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Mitei for Plaintiff/Applicant

Mr. Koech: Court Assistant

In the absence of the defendant