



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L CASE NO. 9 OF 2021**

**TAMUREI KOBILO CHEPKAITANY.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHEPKAITANY KAIMUGUL.....DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application by the plaintiff/ Applicant dated 27<sup>th</sup> January 2021 seeking for the following orders:

- a) Spent
- b) Spent.
- c) There be an interim order of injunction restraining the respondent, his servant or agents from surveying, subdividing, altering the existing boundaries, ground status, erecting or destroying fence, felling trees or in any other way deal in the land parcel KAPTAGAT/KONGASIS BLOCK 1/4 pending the hearing and determination of the originating summons.
- d) Costs be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

**APPLICANT'S SUBMISSIONS**

Counsel for the applicant submitted that the applicant has satisfied the conditions necessary for the grant of interlocutory injunction by demonstrating that she has an interest in parcel of the land number KAPTAGAT/KONGASIS BLOCK 1 /4 not as a spouse to the Respondent but as a purchaser and therefore the Respondent holds the title deed in trust for her benefit.

Counsel also submitted that the Respondent had made attempts to sell the suit land without any consent and blessings from the Applicant and further that the respondent has given out a portion of the land in settlement of a liquidated claim which claim the applicant was not a party.

It was counsel's further submission that the Plaintiff/Applicant and the Defendant/Respondent are married although no evidence has been adduced to prove this fact, the existence of the marriage is not contested.

Mr. Nyekwei submitted that the defendant interfered with the applicant's possession and occupation on the strength of the Court order issued in **ELDORET CMCC MISCELLANEOUS CIVIL CASE NO. E003 OF 2020 CHEPKAITANY KAIMUGUL V SILAS KAITANY & THOMAS KAITANY.**

Counsel cited the principles that are laid down by Dr. Ian SPY'S book on equitable remedies 6<sup>th</sup> edition I-BC page 44 where he stated thus interlocutory injunction concerned with;

- a) The maintenance of a portion that will more easily enable justice to be done when its final order is made and.
- b) An interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

Mr. Nyekwei urged the court to allow the application as the applicant has met the threshold for grant of interlocutory injunctions as laid down in the case of **GIELLA CASMAN BROWN.**

**RESPONDENT'S SUBMISSIONS**

Counsel for the respondent submitted that the applicant is the wife of the respondent as deposed to in the supporting affidavit but that the respondent is the sole absolute proprietor of land parcel known as KAPTAGAT/KONGASSIS BLOCK ¼ as exhibited in the search certificate and in the sale agreement annexed by the applicant.

It was counsel's submission that the applicant was never intended to be a co - owner as she is clearly indicated in the agreement drawn by the Advocate as a witness when the respondent was selling a portion of 10 acres. Further that the applicant never contributed anything towards the acquisition and purchase of the land as the respondent took a loan from the Agricultural Finance Corporation which he paid and obtained a discharge on the 5<sup>th</sup> December, 2013.

Counsel also submitted that the applicant was not the purchaser of the land as she had no means to pay the purchase price as even in her affidavit in support of the originating summons filed in Eldoret ELC. No. 110 of 2014 — Tamuret Kobilu Chepkaitany v Joanes Ochiel Nyawara & Chepkaitany Kaimugul the applicant deposed to the fact that the respondent purchased for her 0.1 Hectares of the land parcel known as UASIN GISHU/KIMUMU/983

Counsel submitted that there was there was no mutual consent entered with the applicant that the respondent was to hold the land as a trustee for the applicant. Therefore the applicant's claim to the land may only exist under the non — monetary contribution upon divorce.

Counsel relied on the case of P N N v Z W N (2017) eKLR in which Justice Kiage JA held that:

*"Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty, What the Matrimonial Property Act has done is recognize at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting."*

Counsel therefore submitted that if the applicant intends to file any claim on the land she has to establish that it is matrimonial property and follow the procedure laid down in the law on dealing with rights in matrimonial property. That neither separation nor divorce proceedings have been filed and the same have to be filed in the competent court to deal with such issues. Counsel urged the court to dismiss the application with costs.

### **ANALYSIS AND DETERMINATION**

This is an application for temporary injunction to preserve the suit land pending the hearing and determination of this suit.

The issues for determination are whether the court has jurisdiction to hear and determine the suit and whether the applicant has met the threshold for grant of temporary injunction. The respondent had raised an issue that the court does not have jurisdiction to hear and determine this matter.

The application involves interest in land and the applicant is not seeking the suit land as a wife but a purchaser. Section 13(1) and (2) of the Environment and Land Act which provides as follows:

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes:

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

It follows that this court has jurisdiction to hear and determine the case. If the applicant is seeking the division of the suit land as matrimonial property, then she has to move to the relevant court and seek for such orders.

In the case of GLADYS MUTHONI KIBUI V GEOFFREY NGATIA [2021] eKLR the Court held thus:

*“There is no doubt from the foregoing that this Court has jurisdiction to determine the dispute before it which revolves around title*

*to land. On whether the Court can determine a dispute over matrimonial property, so long as the dispute is over the use, occupation or title to land, this Court has jurisdiction to determine it whether such land is classified as matrimonial property or not.”*

The Plaintiff/ Applicant has alleged and the Defendant/ Respondent has confirmed in his Replying Affidavit and his submissions that he intends to sell the suit land herein since he has indefeasible title and further that he is the only one with proprietary rights to the suit land. This admission threatens the preservation of the suit land and if an order is not granted to preserve the substratum of the case then by the time the case is heard and determined, there might be no subject matter to litigate upon.

In the case of **PHILIP M NYUTU & 3 OTHERS V MARY WANJIRU GATHERU & 2 OTHERS [1990] eKLR** the Court held as follows:

*Whether or not to grant an injunction is in the discretion of the court. The discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.*

In the case of **JOHNBOSCO KISOME MUTISYA & 8 OTHERS V GABRIEL MULEMBA [2021] eKLR** the Court made the following observation:

*“The other factor that is relevant to an Application for injunction is the extent to which the determination of the application, at an interlocutory stage, will amount to a final determination of the rights and obligations of the parties. That issue was addressed in *NWL Limited v. Woods [1979] WLR 1294* by Lord Diplock as follows:*

*“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”*

I have considered the application and the submissions by both counsel and find that it would be in the interest of justice to grant an order of temporary injunction to preserve the substratum of the case, the respondent having admitted that he may sell the suit land. The applicant has also met the threshold for grant of application for temporary injunction.

**DATED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF JULY, 2021**

**M. A. ODENY**

**JUDGE**