



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO.91 OF 2017

BRIGID JEROTICH CHEMIRMIR.....PLAINTIFF

VERSUS

STEPHEN MUGWIRA.....1ST DEFENDANT

GRACE CHEPKEMEI.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 2nd March 2017 brought by way of notice of motion by the plaintiff/applicant for orders :

- a) That the court be pleased to grant a temporary injunction restraining the respondent whether himself his agents and/or servants from trespassing on, wasting, constructing on, cultivating, remaining on, alienating, offering for sale, charging, leasing, subdividing or otherwise interfering or dealing with the plaintiff's property known as ELDORET MUNICIPALITY BLOCK/903 pending the hearing and determination of this application.
- b) That the court be pleased to grant a temporary injunction restraining the respondent whether himself his agents and/or servants from trespassing wasting, constructing on, cultivating, remaining on, alienating, offering for charging, leasing, subdividing or otherwise interfering or dealing with the plaintiff's property known ELDORET MUNICIPALITY BLOCK 5/903 the hearing and determination of the suit.

Counsel agreed to canvass the application by way of written submissions. This matter came up for mention on two occasions but Counsel for the plaintiff did not file his submissions. Submissions in opposition to the application were filed by Counsel for the defendant.

Defendant's Submission

Counsel submitted that the applicant deponed that or about. March, 2002, she was allotted by the by the government of Kenya parcel known as ELDORET MUNICIPALITY BLOCK 5/903 and paid a stand premium, stamp duty, planning and other fees amounting to Kshs. 108,240/= on 4th September as per the terms of the allotment.

Counsel further submitted that the 1st Respondent in opposition to the application deponed that he bought plot known as Eldoret Municipality Plot 17/95/266A plot No. G on 3rd May 2001 measuring approximated 0.20Ha. from JANE WAHITO MUIGAI who was the original allottee having been allotted by the defunct Municipal Council vide allotment letter reference No. EMC/ADM4/40/A/52(1). That upon purchase he constructed temporary structures and has been in open and uninterrupted occupation for 16 years while the 2nd respondent deponed stated that she was allotted parcel of land

known as RESIDENTIAL PLOT ELD. 17/95/266 A PLOT NO. J measuring approximately 0.20Ha. on the 8th December, 1995 through allotment letter reference No. EMC/ADM4/40/A/52(1) and has been living on the land for the past 20 years whereby she has constructed a residential house thereon.

Counsel further submitted that for an application for injunction to succeed, a party must meet the threshold for grant of such orders as per the *GIELLA VERSUS CASSMAN BROWN* (1973) E.A 38, case which stated as follows:-

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience':

Counsel submitted that the applicant has not met the threshold for grant of injunctions as the applicant contends that she was allotted ELDOROT MUNICIPALITY BLOCK5/903 on the 26th April, 2002 but looking at the said letter of allotment under paragraph 2 on special conditions, the applicant was required to send a letter of acceptance together with stand premium, rent, conveyancing fee, rates, stamp duty, survey fee and planning fee within one month to the Commissioner of Lands, failure of which the offer was to lapse.

Mr. Mathai submitted that from annexure 2 which is a payment receipt indicates that payments were made on 4th September, 2002, five months after the date she was required to have made those payments and it therefore meant the offer had lapsed by the time payment was being made. Counsel cited the case of *MBAU SAW MILLS LTD -VS- ATTORNEY GENERAL FOR AND ON BEHALF OF THE COMMISSIONER OF LANDS & 2 OTHERS* [2014] eKLR Justice Ombwayo stated

" I have considered the evidence on record and the submission of the parties and do find that a letter allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days He did not do so and thereafter offer lapsed 30 days after it was made accordance with the allotment letter having failed to accept the offer as stipulated in the letter of allotment Mr. -7.K Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and grand rent "

Mr. Mathai therefore submitted that upon the lapse of the offer the applicant did not acquire any proprietary rights over the suit land as it had been allotted to other people.

Further that the 1st and 2nd respondents are in occupation of the land and granting an order of injunction would amount to an eviction. Counsel stated that the defendants have annexed photographs of her residential house where she has been living for the past twenty years and therefore the applicant is guilty of material non-disclosure of facts.

Counsel relied on the case of **Bahadurali Ebrahim Shamji V- Al' Noor Jamal & 2 others civil appeal No. 210 of 1997** where the Court of Appeal stated that

"it is perfectly well settled that a person who makes an ex-parte application to the court that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage from the proceedings and he will be deprived any advantage he may have already obtained It had been for many years the rule of court to maintain that when an applicant comes to the court to obtain relief on an ex-parte statement he should make a full and fair disclosure of the material facts. facts not law, He should not mistake the law if he can he/p put it- the court is supposed to know the law but it

knows nothing about the facts and the applicant must state fully and fairly the facts and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement".

Counsel therefore submitted that the plaintiff has not made the relevant disclosure to the court and that the balance of convenience lies in favour of the defendants. He therefore urged the court to dismiss the application with costs to the defendants.

Analysis and Determination

The plaintiff filed this application and Counsel agreed to canvass it by way of written submissions. The plaintiff's Counsel did not file the submissions as agreed. The defence counsel filed submission and opposed the application on grounds that the plaintiff has not established a prima facie case to warrant the grant of orders sought. The court therefore analyzed the grounds on the face of the application and the supporting affidavit which was very scanty. There was nothing much to show that she had a prima facie case at the interlocutory stage. Even if Counsel had filed submissions it would not have changed the situation as the affidavit they intended to rely on did not have much information.

From the replying affidavit and the annexures by the defendants, together with the submissions of Counsel I find that the plaintiff has not established a prima facie case and that the balance of convenience lies in favour of the defendants who are in occupation of the suit land.

Having said that I decline to grant the orders of temporary injunction. The plaintiff's application is therefore dismissed with costs to the defendants. Parties to comply with order 11 within 30 days and fix the matter for hearing.

Dated and delivered at Eldoret on this 8th day of April, 2019.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr.Kandie holding brief for Mr.Mathai for defendant/Respondent and in the absence of Mr.Bundotich for the Plaintiff.

Mr. Koech – Court clerk.