



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 48 OF 2012**

**KESTEM COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**NDALA SHOP LIMITED.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

Kestem Company Limited (*hereinafter referred to as the plaintiff/applicant*) has come to court against Ndala Shop Limited and Commissioner of Lands and the Attorney General (*hereinafter referred to as the respondents*) seeking for a temporary injunction restraining the defendants/respondents and Japheth Kipkemboi Magut jointly and/or severally whether by themselves or through their servants or agents howsoever from selling transferring, charging subdividing alienating, developing and or in any other manner whatsoever dealing with titles No. Eldoret Municipality Block 10/48, Eldoret Municipality/ Block 10/1623, Eldoret Municipality/ Block 10/1373, Eldoret Municipality/Block 10/1374, Eldoret Municipality/Block 10/1377, Eldoret Municipality/Block 10/1378, Eldoret Municipality/Block 10/1383, Eldoret Municipality/Block 10/1384, Eldoret Municipality/Block 10/1385, Eldoret Municipality/Block 10/1386, Eldoret Municipality/Block 10/1379, 10/1380, Eldoret Municipality/Block 10/1381, Eldoret Municipality Block 10/82, Eldoret Municipality/ Block 10/1370, Eldoret Municipality/ Block 10/1371, Eldoret Municipality/Block 10/1372, Eldoret Municipality/Block 10/1375, Eldoret Municipality/ Block 10/1376, Eldoret Municipality/ Block 10/1398, Eldoret Municipality/Block 10/1395, Eldoret Municipality/Block 10/1394, Eldoret Municipality/Block 10/1391, Eldoret Municipality/Block 10/1390, Eldoret Municipality/Block 10/1387, Eldoret Municipality/Block 10/1397, Eldoret Municipality/Block 10/1396, Eldoret Municipality Block 10/1393, Eldoret Municipality/ Block 10/1392, Eldoret Municipality/ Block 10/1389, Eldoret Municipality/Block 10/1388, Eldoret Municipality/Block 10/1423, Eldoret Municipality/ Block 10/1422, Eldoret Municipality/ Block 10/1421, Eldoret Municipality/Block 10/1420, Eldoret Municipality/Block 10/1419, Eldoret Municipality/Block 10/1418, Eldoret Municipality/Block 10/1417, Eldoret Municipality/Block 10/1416, Eldoret Municipality/Block 10/1414, Eldoret Municipality Block 10/1412, Eldoret Municipality/ Block 10/1410, Eldoret Municipality Block 10/1408, Eldoret Municipality/ Block 10/1407, Eldoret Municipality/ Block 10/1415, Eldoret Municipality/Block 10/1413, Eldoret Municipality/Block 10/1411, Eldoret Municipality/ Block 10/1409, Eldoret Municipality/ Block 10/1406, Eldoret Municipality/Block 10/1405, Eldoret Municipality/Block 10/1404, Eldoret Municipality/Block 10/1401, Eldoret Municipality/Block 10/1400, Eldoret Municipality/Block 10/1399, Eldoret Municipality/Block 10/1402, Eldoret Municipality/Block 10/1403, Eldoret Municipality/Block 10/1363, Eldoret Municipality/Block 10/1364, Eldoret Municipality/Block 10/1369, Eldoret Municipality/Block 10/1368, Eldoret Municipality/Block 10/1365, Eldoret Municipality/Block 10/1362, Eldoret Municipality/Block 10/1361, Eldoret Municipality/Block 10/1366, Eldoret Municipality/Block 10/1367 pending the hearing and determination of this suit.

The application is based on grounds that the plaintiff is the original allottee of title No. Eldoret/Municipality/Block/10/48 and that the 1<sup>st</sup> Defendant and its Directors fraudulently transferred the said parcel of land to itself and thereafter to the said Japheth Kipkemboi Magut. The said Japheth K. Magut has subdivided the parcel of land and is likely to sell to defeat this claim. The application is supported by the affidavit of Stephen Kipleting Metto who states that sometimes in 1992, he jointly with the company of Kestem Company Ltd applied for and was allotted a vacant industrial plot within the then Eldoret Municipality.

According to Metto, the application for allotment of plot was approved by the then President, His Excellency the Honourable Daniel T. Moi on 27/6/1992. He paid for the premium and instructed Mr. Japheth Kepkemboi Magut the Director of Ndala Shop to assist in obtaining the title. The latter fraudulently caused it registered in the name of Margaret J. Twitoek who transferred the land to Ndala shop Ltd. The Plaintiff being aggrieved by the fraud filed the case No HCCC No. 137 of 2000 Kestem Co. Ltd Vs Ndala shop Ltd and 2 others. It is claimed that the file went missing after pleadings were closed. This matter was transferred to the Environment and land court at Eldoret in the year 2012 and was allocated the present case number. The plaintiff filed a complaint before the National Land Commission whilst the 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a petition before this court. This court found that the dispute was outstanding before the court. The applicant states that he is in the process of reconstructing the file and complains that Mr. Japheth K. Magut has subdivided the suit premises into 64 parcels of land.

Japheth Kipkemboi Magut in reply states that he is the proprietor of the properties listed in this Honourable court of 23/1/2018. He claims to be a transferee of L R No. Eldoret Municipality/Block 10/48 from Ms Ndala Shop Ltd. He states that the notice of motion is filed in ignorance of the facts of this case. According to Mr. Magut, the applicant filed Eldoret HCCC No. 137 of 2000, Kestem Co. Ltd -Vs- Ndala Shop Ltd and others in year 2000. The suit remained unprosecuted until when by Constitution of Kenya 2010 the Environment and Land Court was established. In the year 2012, HCC No. 137 of 2000 was transferred to the Environment and Land Court registry and re-registered as Eldoret Environment and Land Court No. 48 of 2012 - Kestem Co. Ltd -Vs- Ndala Shop Ltd. In the year 2013, the court files were re-designed and the present suit was re-registered as Environment and Land Court no 95 of 2013, Kestem Co. Ltd -Vs- Ndala shop Ltd and others. On 7<sup>th</sup> April 2015, the suit herein was listed before the judge and was dismissed for want of prosecution for 10 years and therefore there is no suit where an injunction would be issued.

In the supplementary affidavit filed by Stephen Kipleting Metto, he states that case number 95 of 2013 is unknown to him. The relevant case is No. 48 of 2012 given to the case number 137 of 2000 between Kestem Ltd -Vs- Ndala Shop Ltd and 2 others. He further states that Japheth Kipkemboi Magut filed petition in Eldoret Environment and Land Court petition number 7 of 2016 where the National .and Land Commission was prohibited from proceeding hearing matter before court where he stated that this matter was still subsisting.

Mr. Mutai, learned counsel for the applicant, argues that the application is intended to restrain the defendant from developing the various parcels of land. He refers to the suit No. 48 of 2012 which is pending in court. According to the Applicant, the land is registered in the names of the interested party albeit fraudulently as the same was allocated to the plaintiff who has two allotment letters. The land belongs to the plaintiff and that the factual assertion are not controverted. The 1<sup>st</sup> respondent and the interested party should be prevented from subdividing the suit property. The plaintiff submits that he has a prima facie case with probability of success if injunction is not granted, the plaintiff will suffer irreparable loss. He states that the 1<sup>st</sup> Defendant and interested party are one and the same persons. He submits that the court should pierce the corporate veil.

Mr. Mbugua, learned counsel for the respondents, submits that this matter was commenced in the year 2000 in case number 137 of 2000 where Kestem Ltd sought cancellation to title issued to Ndala Shop Ltd. The suit has never been prosecuted. The deputy registrar has availed a status report dated 19/3/2018 to the effect that the suit was dismissed for want of prosecution. Mr. Mbugua argues that the plaintiff should have made an application to resuscitate the matter. He argues further that the application to reconstruct the matter was heard exparte.

Mr. Bwire learned counsel on behalf of Japheth Magut argues that this is a court of record and therefore should strictly adhere to its records. The court record shows that the suit was dismissed for want of prosecution and therefore there is no basis for an injunction.

I have considered the application, preliminary objection and replying affidavit on record and do find that the application is made under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act Chapter 21, Laws of Kenya. Order 40 Rule 1 provides that a temporary injunction can be granted in any suit where it is proved by affidavit that any property is in danger of being wasted, destroyed or alienated by any party to the suit in execution of decree. The 1<sup>st</sup> issue for determination is whether there is a suit pending hearing and determination before this court. The main issue for consideration is whether there is a suit.

On the 16/1/2018, the applicant applied for the reconstruction of file number ELC No. 48 of 2012 Kestem Company Ltd Vs Ndala Shop Limited and 2 others and the application for injunction filed with the application. The application for reconstruction was not served but the orders were granted exparte. I do not see any letter by the applicant to the Deputy Registrar requesting her to produce the file herein. This court requested for a status report in this matter from the Deputy Registrar Environment Land Court Eldoret. According to the Registrar in the status report dated 19/2/2018, Eldoret ELC No. 38 of 2012 was filed in the registry and on the 13/12/2000 parties being Samuel Kiptarus Chengo -Vs- Daniel Kipkosgei Rono. The original number in this matter was HCCC No. 280 of 2000. The case was dismissed on 22/2/2013. This case is not relevant to this matter.

Eldoret Environment and Land Court No. 48 of 2012 was a double registration with Environment and Land Court NO. 95 of 2012. The original file was ELD HCCC No. 137 of 2000. The same was dismissed for want of prosecution. This court finds that HCCC No. 137 of 2000 was dismissed for want of prosecution and therefore it does not exist. I have looked at the file number 137 of 2000 and I do find that indeed the same was dismissed for want of prosecution. Having been dismissed unless reinstated there is no suit to be tried. I do find that there is no basis for an injunction suit to be granted as prayed. I will not belabor into the merits of an injunction as it will be in vain as there is no proper suit before this court the suit herein having been dismissed for want of prosecution. Application dated 18/1/2018 is dismissed with costs.

**Dated and delivered at Eldoret this 13<sup>th</sup> day of April, 2018.**

**A. OMBWAYO**

**JUDGE**