



**REPUBLIC OF KENYA**

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

**ELC NO. 315 OF 2017**

**HOSEA BARMO CHEMWENO.....PLAINTIFF**

**VERSUS**

**SAMWEL KAMAU KAMARA.....1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SETTLEMENTS.....2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

This ruling is in respect of an application brought by way of a Notice of Motion dated 15<sup>th</sup> December, 2017 by the Plaintiff/applicant for orders that:

1. Spent.
2. That pending the hearing and determination of this application interpartes and thereafter this suit, this Honorable court be pleased to grant an order for a temporary injunction restraining the 1<sup>st</sup> defendant/respondent from interfering in any way with the plaintiff/applicant's use, possession and occupation of all that parcel of land by description L.R No. UASIN GISHU/KAHUNGURA SETTLEMENT SCHEME/321 measuring 5.0 acres.
3. That the costs of this application be provided for.

The plaintiff/applicant filed this application under certificate of urgency whereby the court certified it as urgent and urged the applicant to serve within seven days. The parties were served and later agreed to canvass the application by way of written submissions.

The defendants filed their submissions but the plaintiff applicant failed to file his submissions as ordered by the court.

The court therefore relied on the application and the supporting documentation on record together with the submissions by the defendants. It was the plaintiff/applicant's averment vide his supporting affidavit sworn on 15<sup>th</sup> December 2017 that he is the legal owner of all that parcel of land known as L.R No. UASIN GISHU/KAHUNGURA SETTLEMENT SCHEME/321 measuring 5.0 acres or thereabout having acquired the same from one MONICA MUGURE KARIUKI who is now deceased. He further deponed that he took possession of the land in 2004. The applicant also averred that the said MONICA

MUGURE KARIUKI was the first allottee of the suit parcel of land but he did not state how he came into possession of the suit land. He therefore urged the court to grant the orders as prayed pending the determination of the application and the suit.

The defendants were served with the application and filed replying affidavits denying the averments of the plaintiff applicant. The 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> defendants filed their submissions but the 3<sup>rd</sup> defendant who is the National Land Commission failed to do so.

The 1<sup>st</sup> defendant filed his submission and stated that he is the registered owner of the suit land having been registered as such by the 2<sup>nd</sup> defendant after due process was followed. Counsel for the 1<sup>st</sup> defendant submitted that the issues for determination are whether the plaintiff deserves an order for injunction and whether the 1<sup>st</sup> defendant is interfering with use and the possession of the land. Counsel cited the principles for grant of injunctions as was stated in the 1973 Giella Cassman Brown case which are now well settled. That the applicant must show a prima facie case with a probability of success, the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages and that if the court is in doubt, it will decide an application on the balance of convenience.

It was Counsel's submission that the applicant has not established a prima facie case with a probability of success to warrant the grant of a temporary injunction. She submitted that the applicant has not produced any documentation of the suit land and has not explained the relationship with the alleged MONICA MUGURE KARIUKI. Counsel further submitted that the applicant has no locus standi to claim land on behalf of a deceased person.

The plaintiff's Counsel therefore submitted that the balance of convenience does not tilt in favour of the applicant at all as the court cannot restrain an owner of land. It was Counsel's submission that the plaintiff's application be dismissed with costs as it does not meet the threshold for grant of temporary injunctions.

Counsel for the 2<sup>nd</sup> and 4<sup>th</sup> defendants filed submissions and reiterated the principles of grant of injunctions. It was Counsel's submission that the plaintiff has not established a prima facie case against the defendants as required. That the plaintiff failed to demonstrate any beneficial interest or ownership of the suit land by producing a title or letter of allotment.

Counsel cited the case of Panari Enterprises Limited V Lijoodi & 2 others (2014) eKLR where the issue of prima facie case was dealt with alluding to the case of MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125. It stated that it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter." ..

It was Counsel's submission that it is therefore incumbent upon the applicant to demonstrate by evidence that he has met the threshold. Further that the applicant must prove that he has a right to the said parcel and the said right has been infringed. Counsel also stated that on the contrary the 2<sup>nd</sup> and 4<sup>th</sup> defendant/respondent have clearly demonstrated that the parcel was properly allocated and title issued to the 1<sup>st</sup> defendant.

Counsel also cited the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86 which stated that if the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied-that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted however strong the applicant's claim may appear at that stage. Counsel therefore urged the court to dismiss the plaintiff's application with costs as it has not met the threshold for grant of injunctions.

### **Analysis and Determination**

This is an application by the plaintiff/applicant for a temporary injunction. The principles for grant of temporary injunctions are well laid down in the case of Giella Vs Casman Brown as stipulated above in Counsel's submission.

I wish to highlight that the applicant filed this case together with an application for a temporary injunction and parties agreed to file written submissions but the plaintiff's Counsel failed to do so. The court therefore relied on the grounds of the application together with the supporting affidavit of the plaintiff and the submissions by the defendants' Counsel to make a determination.

From the grounds of the application and the supporting affidavit, I do not find anything that demonstrates prima facie that the plaintiff has any beneficial interest or ownership of the suit land. The plaintiff just claims that the suit land was allocated to one MONICA MUGURE KARIUKI but does not state the relationship with the said Monica whom he claims to be deceased. There is further no documentation at all on the claim for ownership or proof that he has locus standi to sue on behalf of Monica who is deceased.

I will not belabor much to go into the substance of the case as this is an interlocutory application for injunction. The plaintiff has also not established that he will suffer any irreparable loss which is not capable of being compensated by way of damages if the injunction is not granted.

Having said that I find that the plaintiff has not established a prima facie case with a probability of success and that the balance of convenience would lie in favour of the 1<sup>st</sup> defendant who is the registered proprietor of the suit land as per the annexed copy of title deed and as reinforced by the 2<sup>nd</sup> and 4<sup>th</sup> defendants.

The upshot is that this is not a case for grant of a temporary injunction and therefore the plaintiff's application is dismissed with costs to the defendants.

Dated and delivered at Eldoret this 31<sup>st</sup> day of May, 2018.

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Kuria for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and in the absence of the other parties.

Application is dismissed with costs.