



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND OF KENYA**

**AT ELDORET**

**E & L CASE NO. 221 OF 2017**

**PIUS KIPCHIRCHIR KOGO.....PLAINTIFF**

**VERSUS**

**FRANK KIMELI TENA.....DEFENDANT**

**RULING**

The plaintiff applies for an order of restriction and or conservatory orders to restrain the defendant, his agents, servants from subdividing, transfer sale or any other manner dealing with any portion of Nandi/Kamobo/4027. The application is based on grounds that the suit is still pending in court and yet the defendant has initiated the process of sale, subdivision and transfer of the intended portion. The application is supported by the plaintiff's affidavit wherein he states that the defendant is subdividing the land and yet there is no consent of the land control board.

The defendant filed a replying affidavit stating that the suit is stale, time barred as the cause of action arose on 11.11.1998. Moreover, that the plaintiff has no locus standi as he has no letters of administration.

I have considered the application, supporting affidavit, replying affidavit and do find that the suit is premised on fraud and that time begins running when the fraudulent act is discovered and therefore, it would be premature to apply the provision of Limitation of Actions Act without hearing the plaintiff as it cannot be ascertained when fraud was discovered.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) whether the applicant has demonstrated a prima facie case with a probability of success.**
- 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.**
- 3) Where the balance of convenience tilts if the court is in doubt.**

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. This court finds that though the plaintiffs have established that they are the proprietors of the suit property through transmission, it is arguable by the defendant that she has unregistered rights in the property being the widow to the deceased.

**Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing.

The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

On whether the plaintiff has established a prima facie case with a likelihood of success, I do find that the plaintiff has not established any legal right to the property as he is not the registered proprietor of the property and is not claiming beneficial interest. Moreover, the plaintiff has not established by affidavit that he is likely to suffer any irreparable harm.

On the balance of convenience there is no material before the court that the inconvenience caused to plaintiff would be greater than that

which may be caused to the defendant. The application herein is dismissed with costs in the cause.

**Dated and delivered at Eldoret this 29<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**