



**REPUBLIC OF KENYA**

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

**E&L CASE NO. 152 OF 2017**

**CECILIA WACUKA NG'ANG'A.....PLAINTIFF**

**VERSUS**

**SYLVIA WAMBUI KURIA.....DEFENDANT**

**RULING**

**INTRODUCTION**

This is a ruling in respect of an application brought by way of Notice of Motion dated 3<sup>rd</sup> April 2017 where the plaintiff/applicant is seeking for the following orders:

1. That the application be certified as urgent and be heard on priority basis.
2. The service of the application be dispensed with in the first instance.
3. That the defendant/respondent, her servants and/or agents or any other persons be restrained by a temporary injunction from selling, charging, transferring, cultivating, constructing, developing, wasting and/or further constructing or in any way dealing with the property known as ELDORET MUNICIPALITY BLOCK 26 (MUTAMAIYU)<sup>46</sup> pending the hearing and determination of this application inter-parties.
4. That the defendant/respondent, her servants and/or agents or any other persons be restrained by a temporary injunction from selling, charging, transferring, cultivating, constructing, developing, wasting and/or further constructing or in any way dealing with the property known as ELDORET MUNICIPALITY BLOCK 26 (MUTAMAIYU)<sup>46</sup> pending the hearing and determination of this suit.
5. Costs of the application be provided for.

This matter was brought under certificate of urgency on 4<sup>th</sup> April 2017 whereby the court certified the same as urgent and directed that the application be served for inter partes hearing on 11/4/17. The same came up on 31<sup>st</sup> May 2017 for hearing of the application whereby both Counsels for the plaintiff and the defendant opted to canvass the application by way of written submissions. Counsels filed their submissions on 23<sup>rd</sup> June 2017 and the court gave a ruling date.

**Plaintiff's Counsel's Submissions**

The Plaintiff's Counsel relied on the supporting affidavit of the plaintiff applicant and submitted on the

issues that the application raised. Counsel submitted that the issues for determination were:

1. Whether the applicant is entitled to the injunction sought.
2. Whether there is any prejudice that can be occasioned to the respondent.

Counsel relied on the principles of granting temporary injunctions which I need not repeat as they are well known. She proceeded to submit that the plaintiff applicant had established a prima facie case by proving that the respondent had infringed on the plaintiff's right to own land. She stated that the plaintiff entered into a sale agreement which was attached as an annexure to the affidavit. She also submitted that the defendant being the personal representative of the deceased estate of her husband is under an obligation to transfer the land to the plaintiff /applicant. She therefore submitted that the plaintiff had established a prima facie case with a probability of success against the defendant.

On the issue on whether the applicant will suffer irreparable harm, Counsel submitted that the applicant will suffer irreparable harm which cannot be compensated by way of damages. She took issue with the fact that the defendant has transferred the suit land to her name and is likely to transfer to 3<sup>rd</sup> parties.

On the issue of balance of convenience Counsel submitted that it tilts in favour of the applicant and relied on the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR, stated as follows;**

*As for the balance of convenience, I reiterate what I stated above, "the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies." Considering the facts of this case in totality, I find that the balance of convenience demands that the status quo be retained.*

Counsel urged the court to grant the orders as prayed.

### **Defendant's Counsel's Submission**

The plaintiff/applicant's application was opposed and Counsel relied on the replying affidavit by the defendant. It was Counsel's submission that the Plaintiff sought to enforce a court order dated "9/6/2017" which awarded her the suit land as part of division of matrimonial property between her ex-husband and herself.

Counsel further submitted that the Plaintiff only expressed an interest to purchase Plot No. 2 Mutamaiyu Farm Eldoret which interest was reduced into writing but the Plaintiff and her ex-husband breached the terms of the agreement as they never paid the purchase price or any amount towards purchase of the subject property. She also stated that neither the Plaintiff nor her ex-husband laid any claim to the subject land and only opted to wait for 26 years to bring this suit.

It was also Counsel's submission that during the succession proceedings leading to the Defendant/Respondent's appointment as administrator of the estate of the Late husband, John Kuria Ngomi, the Plaintiff and her husband never expressed any interest or made any claim to any part of the estate, in particular, the subject land. Counsel therefore submitted that the Plaintiff/applicant has not made out a prima facie case against the Defendant/Respondent to warrant the grant of the orders sought on the following grounds:

1. That the agreement which the Plaintiff seeks to give effect to was made on 24/1/1991, well over 26 years ago between the Plaintiff, her ex-husband and the late John Kuria Ngomi ( the Defendant/Respondent's husband)
2. No evidence was exhibited by the Plaintiff/Applicant to prove that they had paid any

consideration towards the purchase of the suit land as per the agreement. In contrast, the Defendant/Respondent exhibited a note book and receipt book which revealed that the Plaintiff/Applicant never made any payments towards the purchase of the suit land.

3. No evidence was exhibited to show that any Land Control Board Consent was obtained within six months as per the provisions of Section 6 as read with section 8 of the Land Control Act which provides that any transaction and/or action undertaken on the suit property after the expiry of the 6 months and without the consent of the Land Control Board is a nullity.

4. No explanation has been tendered as to why the Plaintiff/Applicant never made any claim to the suit land during the late John Kuria's lifetime or even when the succession proceedings were ongoing.

Counsel therefore submitted that the claim is statute barred and the Plaintiff/Applicant's claim based on an agreement well over 26 years ago runs against Section 7 of the Limitation of Actions Act, CAP 22, Laws of Kenya and the injunctive orders being sought cannot be granted on a suit that is bad in law.

On the issue of irreparable injury counsel submitted that the plaintiff has not tendered any evidence that she would suffer any harm if the orders sought are not granted. She further submitted that the balance of convenience tilts in favour of the Defendant/Respondent as she is the legal owner of the said parcel of land which she has been occupying and utilizing. As such granting the orders sought would amount to evicting the Defendant/Respondent from the suit land. Counsel relied on the case of **Panari Enterprises Limited v Lijoodi & 2 others [20141 eKLR]** where the court held as follows:

*"There is no doubt that the Respondents have been on the disputed land for a while for such developments to have occurred thereon. To grant the Plaintiff an interlocutory injunction at this stage would amount to an eviction order of the Respondents at an interlocutory stage of these proceedings. It is noteworthy that the only prayer the Plaintiff has made in its Plaint dated 25<sup>th</sup> June 2013 is a permanent injunction against the Respondents. I am of the view that granting an interlocutory injunction at this stage will be granting a final order which is inappropriate at this stage. Such an order will amount to an eviction order even before this suit has been tried and concluded finally. Accordingly, my finding is that the balance of convenience tilts in favour of the Respondents rather than the Plaintiff. "*

Counsel therefore urged the court to dismiss the application with costs.

### **Analysis and determination**

The issues for determination are as to whether the plaintiff applicant has established a prima facie case to warrant grant of temporary injunction. I will not belabor much on this case as the case is straightforward. The principles of grant of temporary injunctions are well stated by both counsels.

From the affidavit evidence, I agree with the defendant's counsel that there was no evidence that the purchase was ever paid. No receipt of payment was annexed. The agreement states that Kshs 40,000/ was to be paid as 1/3 of the purchase price. The agreement does not show whether this money was paid upon execution of the agreement or thereafter. Such evidence should have been tabled.

The order giving the plaintiff the suit land as part of the matrimonial property share might have been the ex – husband's easy way to be out of the quagmire. I will not dwell much on that as this will be canvassed during the hearing of the case. I will also not determine whether the case is time barred or not, whether the transaction is a nullity for lack of land control board consent at this stage. My task is to determine whether the plaintiff has established a prima facie case or not.

From the above analysis, I find that this is not a case for grant of temporary injunction. The plaintiff has failed the test and the threshold for grant of such orders.

The upshot is that the plaintiff's application for temporary injunction fails.

Costs of this application in the cause.

Parties to comply with order 11 within 30 days.

Orders accordingly.

Dated and delivered at Eldoret on this 31<sup>st</sup> day of July, 2017.

**M. A. ODENY**

**JUDGE**

Read in open court in the presence of:

Mr. Kamau for Plaintiff/Applicant

Mr. Koech: Court Assistant

In the absence of:

Mr. Nyairo for defendant.