

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 133 OF 2015

JOSEPH KIMUTAI KIPTUI.....PLAINTIFF

VERSUS

SAMUEL KIPTUM CHELAL.....DEFENDANT

RULING

Joseph Kimutai Kiptui hereinafter referred to as the plaintiff has come to court against *Samuel Kiptum Chelal* hereinafter referred to as the defendant claiming that in the year 2006, the plaintiff and defendant entered into a land sale agreement whereby the plaintiff was to sell and the defendant was to purchase a portion of land reference number Mosop/Chepkorio/75 and that land reference Mosop/Chepkorio/75 belongs to the late Kiptui Maluei who passed away on 17th September, 1973 and therefore the plaintiff had no capacity to transact business over the deceased's estate and the sale was null and void and illegal *ab initio*.

The defendant in ignorance of the law was allowed into possession of a portion of the deceased's land reference number Mosop/Chepkorio/75 measuring approximately 50 x 100 feet and he has been in possession thereof since August or September, 1996. The sale between the plaintiff and the defendant over land reference number Mosop/Chepkorio/75 was dealing in agricultural land and constituted a controlled transaction as well as inter-meddling with the estate of a deceased person. The transaction between the plaintiff and the defendant was not executed as per the requirements of the Law of Contract Act Cap. 3 Laws of Kenya and is unenforceable. According to the plaintiff, the sale became null and void 6 months after the transaction and in unenforceable owing to the provisions of the Land Control Act.

That the plaintiff seeks to have the agreement dated 2006 or any other entered between him and the defendant over the suit land declared a nullity and void and illegal. That the defendant ought to be ordered to vacate the portion he occupies on land reference number Mosop/Chepkorio/75. The plaintiff avers that there is no suit pending in any court of law nor are there any previous proceedings between the plaintiff and the defendant over the same subject matter save Eldoret High Court Succession Cause No. 319 of 2004 and Eldoret Environment and Land Case No. 471 of 2012.

On 8.10.2015, the plaintiff filed a notice of Motion dated 7.10.2015 praying for an order of injunction to restrain the defendant from constructing a house and/or any structures on the land reference Mosop/Chepkorio/75. The application is based on grounds that the plaintiff is the holder of a limited grant of letters of administration to the estate of the late Kiptui Maluei who is the registered owner of the suit land whilst the defendant is a trespasser on the suit land as the agreement pursuant to which he entered the land is null and void. Despite being a trespasser, the defendant has delivered building stones on the land in readiness to start construction thereon. The defendant ought to be restrained from constructing a house on the suit land. The plaintiff has a *prima facie* case with a probability of success. The plaintiff and the deceased's estate stand to suffer irreparable loss unless the order sought is granted. The defendant has refused to enter appearance and file a defence despite being served.

The application is supported by the affidavit of Joseph Kimutai Kiptui who states that he holds a limited grant to the estate of his late father Kiptui Maluei and that the defendant has trespassed into the land on the basis of an agreement which is null and void by virtue of the law. The defendant intends to put up another house or structure on the suit land to the detriment of the estate of the deceased and has delivered building stones on the land in readiness to start construction. That unless the defendant is restrained from putting up a structure on the suit land he will surely proceed to do so. That it is unfair to have the

defendant construct another house on the suit land during the pendency of the suit.

The application is opposed by the defendant who filed a replying affidavit stating that the application and the entire suit is brought in bad faith with the intention to circumventing the other on going case No. Eldoret Hccc Environment and Land Case No. 471 of 2012 which is substantially heard and is at defence case. That in Environment and Land Case No. 471 of 2012, the plaintiff herein brought a suing against him over the same parcel of land and is seeking similar prayers as sought herein. That he filed his defence and counterclaim in response, the pleadings closed the plaintiff testified and closed his case and the case is at defence hearing. That indeed the defence case was scheduled for hearing on 16th October, 2015 but could not proceed. He believes the same is in the cause of being listed for hearing and knows of his knowledge that at some point during the proceedings, the plaintiff sought to amend his plaint to introduce another claim, the application was heard and dismissed on 25th November, 2014. That for the plaintiff to introduce the same claim again through this suit, he believes is unprocedural in bad faith, unjust and ought to be disallowed. That he has been in actual physical and peaceful occupation of the subject parcel since 1996 when he acquired it and has established a house therein. He has developed it with various structures including residential houses, stores and other structures. The plaintiff does not and has never resided on the subject property. That the limited grant he now claims to have was granted him to file suit which he already has done vide Environment and Land Case No. 471 of 2012. That this current suit is therefore an abuse of the said grant. That he is rightfully on the land with the knowledge and express authority of the plaintiff. He purchased the portion he now occupy from the plaintiff and he paid a price for it. That the plaintiff cannot have both the land and the money. That he has nothing to loose should the orders not be granted. He is not the registered owner and neither has he even used the land. That if anything, the orders shall prejudice him and his children and his entire family.

in *Mrao Limited vs First American Bank of Kenya [2003] KLR 125* it was held that:

“...a prima facie case in a Civil Application includes but is not confined to a “genuine and arguable case.” 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...”

This court continues to hold the foregoing view that, the applicant for interlocutory injunction must not only show that he has an arguable case but must also prove that a legal right has been infringed or is about to be infringed on by the defendant and that he has come to court in good faith and the application is not an abuse of court process.

I have considered the submissions of the plaintiff/applicant and the submissions of the defendant/respondent and do find that that the plaintiff has a prima facie case with a likelihood of success as he is the holder of a limited grant in respect of the Estate of Kiptul Maluei who is the registered proprietor of the suit property however on the issue of irreparable harm it cannot be said that the building of a structure on the premises will cause injury that cannot be compensated with damages. On balance of convenience it tilts towards maintaining status quo as the defendant has been residing on the parcel of land for a long period of time with the knowledge of the plaintiff. Moreover, an order of injunction being an equitable remedy should be granted where a party who seeks the same acts in good faith. In the matter before me the application is brought on a suit that appears *sub-judice* as the parties herein and in Eldoret Environment and Land Case No. 471 of 2012 are the same, the cause of action appears the same save that the latter suit was filed based on a transaction that was carried on in the year 2006. The plaintiff in both suit seeks to nullify sale of a portion of land sold to the defendant. The application herein ought to have been filed in the Environment and Land Case No. 471 of 2012 which is part heard. I do decline to grant the orders sought in exercise of my discretion as the application appears an *abuse of court process. The application is dismissed with costs.*

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF MAY, 2016.

ANTONY OMBWAYO

JUDGE