



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC 113 OF 2015**

**HELENA KIMOI CHEBON .....PLAINTIFF**

**VERSUS**

**LINA CHEPNGETICH .....DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; plaintiff having purchased property from defendant's husband; defendant alleging that the property was fraudulently transferred into the husband's name; both parties having tabled issues for trial; best to determine the application on a balance of convenience; balance of convenience tilting in favour of the plaintiff who is in possession and who has already constructed on the suit property; but property to be preserved by an order of inhibition)***

1. This suit was commenced by way of plaint filed on 16 April 2015. Together with the plaint, the plaintiff filed an application for injunction which is the subject of this ruling. The case of the plaintiff as pleaded in the plaint, and as contained in the supporting affidavit to the application, is that she purchased the land parcel Rongai/Lengenet Block 4/436 from one Luka Rotich Chesire and the property was transferred to her. In the last months of the year 2014, she embarked on developing the property and it was while she was constructing, that the defendant emerged and stopped her and stated that the property belongs to her. The plaintiff has averred that she did not know the defendant before and has never transacted with her over the suit property. In the suit, the plaintiff wants the defendant permanently restrained from the suit property, general damages for trespass, costs and interest.

2. In the application for injunction, the plaintiff wants the defendant stopped from interfering with the suit property, pending hearing and determination of the suit. To her supporting affidavit, she has annexed a copy of the sale agreement dated 8 July 2014, entered between herself as purchaser, and Luka Rotich Chesire as vendor. She has also annexed a copy of a search done before the sale, which shows that the property belonged to Luka Rotich Chesire. She has further annexed a copy of the title deed which shows that she is now the registered proprietor of the property. She is currently developing residential units which are at a fairly advanced stage of construction.

3. The defendant entered appearance and filed a reply to the subject application. In her replying affidavit, she has stated that she is the widow of Luka Rotich Chesire (now deceased) having been married to him under Kalenjin customary law in the year 2003. She has averred that she purchased the suit property through a sale agreement dated 2 September 2013, but did not immediately transfer the same into her name, and that her husband kept custody of the documents. In October 2014, she noticed construction on the plot, and when she inquired from her husband, he informed her that he has sold the plot to the

plaintiff. She immediately lodged a complaint with the Chief who referred them to the Deputy County Commissioner, Rongai Sub-County, who called them for a mediation. Her husband did not turn up and the plaintiff sent her son, one Leonard Kimosop. She has stated that a compromise was reached and she offered to refund the plaintiff the purchase price together with the value of the developments on or before the 5th December 2014. She has annexed a copy of an agreement dated 6 November 2014 signed by her, Leonard Kimosop and one Lucy Ndemo. On the appointed day, the plaintiff did not show up but she handed over to Leonard Kimosop a sum of Kshs. 58,750/= being the cost of roofing materials and cash of Kshs. 20,000/= for labour in the presence of the District Commissioner. She has stated that she never gave consent for the transfer of the property to the plaintiff and that the title was fraudulently transferred to her husband. It is her position that she is the owner of the suit property. She has stated that she needed to give her consent as spouse before the property was transferred to the plaintiff and that she has an overriding interest. She has averred that she is willing to refund the applicant the purchase price together with the costs of construction. She has stated that she bought the property with the intention of putting up their matrimonial home and that she has an attachment to the same.

4. I have considered the application and the submissions of both Mrs. Omwenyo for the plaintiff, and Mr. Oumo for the defendant.

5. This is an application for injunction, and I stand guided by the principles laid out in the case of ***Giella vs Cassman Brown (1973) EA 358***. An applicant needs to demonstrate a prima facie case with a probability of success, and also show that he stands to suffer irreparable loss if the injunction is not granted. If the court is in doubt, it will decide the application on a balance of convenience. I only wish to add that in an application for injunction, what the court is essentially being asked to do, is to make a determination of how best to preserve the suit property pending hearing and determination of the suit. This will depend on the unique circumstances of each case.

6. In our instance, the plaintiff is currently the registered proprietor of the suit property. It is her case that she purchased the property without any notice of any encumbrance. The defendant's position is that the property belongs to her, as she is the one who had purchased it, and that her late husband fraudulently transferred the property to himself and later to the plaintiff. I cannot at this point in time make a final determination of all these issues that have been raised by the parties, for that will have to await the trial. Both parties have set down what I would consider to be triable issues. I opt to avoid going into an in-depth assessment of the issues at this stage, and I think that it is best that I decide this application on the balance of convenience.

7. In my opinion, the balance of convenience tilts in favour of the plaintiff. She is currently the registered proprietor of the suit premises and has developed the same. She is also the one in possession. The construction is actually almost complete. If the defendant noticed the construction at the commencement stage, as she has stated in her affidavit, then she needed to have moved the court immediately, if she felt strongly that the property needed to be preserved. She never did. If indeed the plaintiff wanted to develop their matrimonial property, then she needed to move with haste to stop construction, since what the plaintiff is developing are several rental units, and not a single dwelling house. She could have noticed that the property was being wasted in a manner that was not commensurate with her intended use but she did nothing. I am aware that she tried to have the authorities mediate, but I have not seen any evidence that the plaintiff was a party to such mediation, which in any event was non-binding. I have no evidence that the said Leonard Kimosop, said to be son of the plaintiff, was actually acting as agent of the plaintiff and that he had capacity to enter into the agreement of 6 November 2014. Clearly, the balance of convenience lies with the plaintiff in so far as possession of the property is concerned.

8. However, so that the property may be preserved, I am of the opinion that the plaintiff needs to be stopped from selling, charging or in any other way adversely dealing with the title or making any further developments to it. She can however complete the already existing structures.

9. I therefore make the following orders, pending hearing and determination of this suit :-

(i) *The defendant is hereby restrained from the land parcel Rongai/Lengenet Block*

4/436.

(ii) *The plaintiff shall not sell, charge or in any other way encumber the suit property.*

(iii) *An order of inhibition is hereby issued barring the registration of any dealings in the register of the suit property.*

(iv) *Possession of the property will remain with the plaintiff, who is free to complete the construction that she has started, but she shall not commence the development of any new structures.*

10. The costs of the application shall be costs in the cause.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 23<sup>rd</sup> day of September 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :**

N/A for M/s Omwenyo & Co Advocate for plaintiff

N/A for M/s Oumo & Co Advocate for defendant

Court Assistant : Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**