



**REPUBLIC OF KENYA**

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

**E&L 662 OF 2012**

*Formerly HCC 161 of 2010*

**SOLOMON ODIRA OKELLO & ANOTHER.....PLAINTIFF**

**VS**

**ESTHER LABOSO.....DEFENDANT**

***(Application for injunction by defendant; there having been an earlier application for injunction by plaintiffs which was granted; whether defendant can be heard on a second application for injunction; proper application being application to vary the earlier order of injunction; principles to be applied; on the facts, earlier order of injunction just to be varied;)***

**RULING**

The application before me is that dated 9 January 2014 filed by the defendant. It is an application brought under the provisions of Sections 3A and 63(c) and (e) of the Civil Procedure Act; Sections 13 (7) and 19 of the Environment and Land Court Act; and Section 108 of the Land Registration Act; and Order 40 Rules 1 (a) and (4) ; and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The defendant wants the plaintiffs restrained from interfering with the defendant's quiet possession of 3 acres of the land parcel Uasin Gishu/Illula Scheme/297 pending the hearing and determination of this suit. The suit land measures 5 acres and it is the contention of the defendant that the 1st plaintiff only purchased 2 acres of the land, but illegally transferred the whole of the said land to himself in the year 2010, way after the original owner had died. It is said that the defendant is the daughter of the original owner one Lomekur Loitakono.

In this suit, the 1st plaintiff contended that he purchased the whole of the suit land from Loitakono with the consent to transfer being issued in the year 1990. The 1st plaintiff became registered as proprietor in the year 2010 and in the year 2012, the 1st plaintiff transferred ownership of the suit land to the 2nd defendant.

After instituting this suit, the plaintiffs applied for an order of injunction against the defendant. The defendant who had only filed a defence, did not reply to that application and through a ruling of 20th December 2012, I allowed the application for injunction. Later, both plaintiff and defendant amended their pleadings with the defendant introducing a counterclaim seeking to nullify the transfer of the suit land to the 1st plaintiff and subsequent transfer to the 2nd plaintiff. She has pleaded that the transfers were fraudulent inter alia on the grounds that the documents of transfer were forgeries.

Although this application is said to be brought under the provisions of Order 40 Rule 1, which permits the court to issue an injunction, I think that since an order of injunction had already been issued, the proper application ought to have been under Order 40 Rule 7, which permits a party to make an application to

discharge, vary, or set aside an order of injunction. This is because it will be absurd for the court to issue two conflicting orders of injunction. The proper avenue where an injunction has already been issued to one party, is for the other party, not to apply for an order of injunction in his favour, but to apply to vary or discharge the original order of injunction. This is covered by Order 40 Rule 7 which provides as follows :-

*Order 40 Rule 7 : Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.*

I will therefore treat this application as one brought pursuant to the provisions of Order 40 Rule 7. In the case of ***Filista Chemaiyo Sosten vs Samson Mutai Eldoret E&L No. 942 of 2012***, I stated as follows on the principles to be applied to an application of this nature.

*"I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in the first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction."*

Also in the case of ***Ragui vs Barclays Bank of Kenya (2002) 1 KLR 647***, Ringera J stated that :-

*"It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged."*

In this application, the defendant has averred that she is the daughter and sole heir to the estate of the late Loitakono. She has further averred that no letters of administration have been issued in respect of his estate. She has stated that despite the lack of grant of letters of administration, the 1st plaintiff who had bought a portion measuring 2 acres of the suit land has acquired title to the whole land and transferred it to the 2nd plaintiff. She has contended that in her counterclaim, she has sought to have the transfer of the suit land to the plaintiffs declared null and void and that she be entitled to inherit the property of her late parents. It is stated that the 2nd plaintiff is likely to plough the land and grow crops this year to her detriment. She has asserted that her occupation of three acres of the suit land should be undisturbed until this suit is heard and finalized. To her supporting affidavit, the defendant has annexed an extract of the register of the suit land. I can see from the register that the suit land was initially under the Settlement Fund Trustees (SFT). Lomekur Loitakono became registered as second proprietor on 20 July 1988 and was issued with a title deed on 21 July 1988. The 1st plaintiff became registered as proprietor on 18 June 2010 and on 27 September 2012 the suit land was transferred to the 2nd plaintiff. It is the case of the defendant that the 1st plaintiff could not have become properly registered as proprietor in the year 2010 since Loitakono died in the year 2002 and his estate has not been distributed.

The application is opposed by the 2nd plaintiff who has filed a replying affidavit. She has contended that she is the sole proprietor of the suit land having purchased it from the 1st plaintiff. She has also pointed out that she has an injunction in her favour. She has asserted that the defendant is attempting to re-open a matter that has already been dealt with so as to circumvent the orders of injunction.

I have considered the application. When I dealt with the application for injunction, the defendant did not oppose it. The issues now being raised strictly ought to have been raised by the defendant at the time that the application for injunction was canvassed. I would not want to set a precedent where a person has an opportunity to respond to an application, but does not do so, then later comes with an application to vary or set aside the first order, through another application. That will not be proper practice. I will however make an exception in this matter given the weight of the issues being raised and consider whether it will be in the interests of justice, to vary, or set aside the initial order of injunction. In his application for injunction, the 1st plaintiff had deposed that he first bought 2 acres of the suit land on 6th June 1985 and

later 3 acres on 26th February 1986. He also stated that he made payments to the Settlement Fund Trustees (SFT) and annexed the receipts thereof. He further annexed a transfer by the Settlement Fund Trustees to himself, but which transfer to me appears undated, save for the year 2010 which is noted. He also annexed a charge in favour of the SFT dated 2nd August 1991. He also annexed a letter of consent to transfer issued in the year 1990 being consent permitting Loitakono to transfer the suit land to the 1st plaintiff.

Now, I am unable to comprehend why the land was still being charged to the SFT by the 1st plaintiff in the year 1991 yet the SFT had already transferred the land to Loitakono in the year 1988. I also do not comprehend why the SFT drew a charge instrument with the 1st plaintiff as chargor, in the year 1991, yet the land at that time was not registered in the name of the 1st plaintiff but in the name of Loitakono. Neither can I comprehend how the SFT could transfer the suit land to the 1st plaintiff in the year 2010 yet the proper transferor ought to have been Loitakono, since he was the registered proprietor of the suit land. I also am not able to see the place of the consent to transfer issued in the year 1990 in view of the other documents from the SFT.

I think the above issues invite questions as to how the 1st plaintiff got registered as the proprietor of the suit land. The defendant has placed before me some material which was not before me when I granted the order of injunction in the first place. Although I have not been given good reason why the material was not tendered before court when the application for injunction by the plaintiff was being considered, I think from what I see, it will be in the interests of justice that the suit property be preserved, as it is, pending the hearing of the suit.

The defendant has deponed that she occupies 3 acres of the suit land. This is not disputed by the plaintiffs. I think it will be fair that that status be maintained pending hearing and determination of this suit. I therefore vary the initial order of injunction to the above extent.

I so order.

**DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in open court in the presence of:-*

*Mr. Mokua holding brief for Mr. Magut of M/s Magut Terer & Co. for the defendant/applicant.*

*N/A for M/s Kitiwa & Co for plaintiff/respondent*