

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L NO. 53 OF 2014

DINAH J. MARITIM.....PLAINTIFF/APPLICANT

VS

JOHN MITEL.....DEFENDANT/RESPONDENT

(Application for injunction; plaintiff's case being that her husband sold land to the defendant secretly; plaintiff seeking to have the sale revoked; whether prima facie case demonstrated; no proof of ownership of suit land; scanty material provided by plaintiff; balance of convenience; defendant having been in possession since the year 2007; balance of convenience in favour of defendant; application dismissed but no orders on costs)

RULING

The application before me is an application for injunction filed by the plaintiff and seeking to bar the defendant from ploughing or tilling the land parcel described as Kong'ata Plot No. 108 measuring 1/2 of an acre pending the hearing of the suit. Although the application is said to have been brought pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules, it is obvious that Order 45 which relates to reviews does not apply, but rather the correct provisions are those of Order 40 which relate to injunctions. I will consider this as an application brought pursuant to Order 40 and not Order 45 of the Civil Procedure Rules.

The application is supported by the affidavit of the plaintiff. It is a brief affidavit in which it is stated that the suit property is family property. It is the case of the plaintiff that she is the wife of Barnaba Bii Korir. It is said that the said Korir secretly sold the disputed portion of land to the defendant, without the consent of the plaintiff, or that of his children. The plaintiff has deponed that she sought help from a village elder in vain. It is said that a demand letter was issued to the defendant and that it was agreed that the sum of Kshs. 50,000/= be deposited in the advocates' offices so that he can collect the same but he has never turned up. It is said that that land is the only land that the plaintiff cultivates and gets food to feed her children. It is further said that the defendant has gone ahead to plough the suit land and unless the court intervenes, the plaintiff stands to suffer irreparable loss.

In the plaint, the plaintiff has pleaded that in the year 2007 she saw the defendant coming to prepare part of the suit land. Upon inquiry, her husband informed her that he had leased the land for a period of 3 years. She therefore patiently waited for the three years to lapse. The three years lapsed but the defendant did not move out and it is when she was informed by her husband that the land has been sold. The plaintiff has sought orders inter alia that the agreement made between the defendant and her husband be declared null and void.

The defendant, has so far not entered appearance and neither has he filed any reply to the subject application. The only material before me is therefore that provided by the plaintiff. That does not however mean that I must decide the application in favour of the plaintiff. This being an application for injunction, I need to be satisfied that the principles set out in the case of *Giella v Cassman Brown (1973) EA 358* have been met. In the said case, it was stated that an applicant needs to demonstrate a prima facie case with a probability of success; that the court needs to be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and if in doubt, the court ought to decide the matter on a balance of convenience.

I have already set down the plaintiff's case which principally is that the suit land is family property and that her husband ought not to have sold the land without her consent. These no doubt are weighty issues that have been tabled by the plaintiff. However, the plaintiff has brought absolutely no material to demonstrate to me who the registered proprietor of the suit land is. There is no copy of title and no search certificate to show me how the suit land is registered. I am therefore unable to make any assumptions regarding the ownership of the suit land. It is also said that there was an agreement for the sum of Kshs. 55,000/= to be collected by the defendant (presumably being a refund), but no such agreement was demonstrated to me. I cannot therefore assume that such agreement exists.

I think the plaintiff has left out a lot of material which would have assisted her in demonstrating to me that she has a prima facie case. That said, I do not think that the case of the plaintiff is hopeless, as she has raised fairly weighty legal issues which deserve to be given a hearing. But given the dearth of material before me at this stage of the proceedings, which makes me handicapped to state that the plaintiff has demonstrated a prima facie case, I must fall upon the balance of convenience to determine this application. It appears that the defendant has been on the suit land since the year 2007, and I think, in the circumstances, the balance of convenience lies in favour of the defendant.

For the above reasons, I decline to allow this application for injunction. I dismiss the same but make no orders as to costs. The plaintiff will of course have a chance to ventilate her case in full at the main hearing.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

N/A for M/s Chepkitway & Co for plaintiff

N/A for defendant who has not entered appearance