



**REPUBLIC OF KENYA**

**ELDORET**

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

**E&L NO. 967 OF 2012**

**FORMERLY 164 OF 2012**

**DAVID BISEM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF**

**THE LATE JOSIAM KIBISEM SANG – DECEASED.....PLAINTIFF**

**VS**

**JEROTICH TABRNO SANG .....1ST DEFENDANT**

**JOSEPHAT ARAP LETTING.....2ND DEFENDANT**

***(Application for injunction to restrain plaintiff from interfering with suit lands pending hearing of suit; plaintiff having filed suit by virtue of being administrator of an estate of a deceased person; plaintiff's grant being subject of nullification; suit having been stayed pending the hearing of the nullification proceedings; plaintiff then moving into the suit land; whether such action is maintainable; whether the court can entertain the application while there is an order of stay of proceedings; application allowed on the basis that 2nd defendant was in possession and balance of convenience is in his favor)***

**RULING**

This ruling is in respect of an application dated 21 March 2014. It is an application filed by the 2nd defendant seeking to have the plaintiff restrained from trespassing, entering into, ploughing, erecting structures, or in any other way interfere with the 2nd defendant's possession of the land parcels Nandi/Lessos/555 and Nandi/Lessos/564 until this suit is finally heard and determined. I certified the application as urgent and directed that it be heard on 23 April 2014. I heard the submissions of both Mr. Onyinkwa for the applicant and Mr. Momanyi for the respondent, and owing to the urgency of the application coupled with the reason that I was proceeding on leave, I made a ruling on the same day, allowing the application, but reserved the reasons and the full text of the ruling for 16 July 2014 after coming back from leave. The following is therefore the full text of the ruling.

The plaintiff, David Bisem, instituted this suit on 2 August 2012 by way of plaint against two defendants, Jerotich Tabarno Sang and Joseph arap Leting. He has instituted this suit in his capacity as administrator of the estate of the late Josiah Kibisem Sang. It is his case that the deceased was the registered proprietor of the land parcel Nandi/Lessos/317 measuring approximately 14.4 hectares. It is averred that in the year 1986, the 1st defendant, who is the plaintiff's step mother, filed an incompetent succession proceeding in respect of the estate of Kibisem Sang, being Succession Cause No. 39 of 1986 filed before the Chief Magistrate's Court at Eldoret. It is further averred that the letters of administration were obtained by way

of fraud as it was not disclosed that the plaintiff was one of the beneficiaries. Upon receipt of the confirmed grant, the 1st defendant proceeded to sub-divide the land parcel Nandi/Lessos/317 into three parcels, namely, Nandi/Lessos/554, Nandi/Lessos/555 and Nandi/Lessos/564. She thereafter transferred the latter two parcels into the name of the 2nd defendant. It is contended that the transfer of the two parcels into the name of the 2nd defendant was done fraudulently, inter alia for the reasons, that invalid letters of administration were utilized and that the consent of the Land Control Board was irregularly obtained. It is also stated that the 1st defendant did not have good title to pass to the 2nd defendant. The plaintiff therefore wants the court to declare that the title of the 2nd defendant was obtained through a process that was illegal and to have them cancelled. He also sought an eviction order to remove the 2nd defendant from the two suit lands.

Upon service, the 1st defendant entered appearance through the law firm of C.F Otieno & Company Advocates, whereas the 2nd defendant appointed the firm of M/s Onyinkwa & Company Advocates.

In her statement of defence, the 1st defendant disputed the capacity of the plaintiff as administrator of the estate of Kibisem Sang . The grant of the plaintiff is pleaded to have been obtained in Nairobi High Court Succession Cause No. 2334 of 1997 which is stated to be subject to revocation proceedings in Eldoret High Court Succession Cause No. 120 of 2010. The 1st defendant however admitted filing Eldoret SRM Succession Cause No. 39 of 1986 but denied that the proceedings were incompetent. She has also admitted that the succession proceedings were later revoked. She has admitted sub-dividing Nandi/Lessos/317 into three parcels, but stated that she transferred two of the sub-divided parcels to the 2nd defendant on the instructions of one Kipchumba Sang, who was the one entitled to the two parcels. It is said that the plaintiff's interest lies in a land parcel Nandi/Lessos/181 which was left to the plaintiff's mother. It is denied that the land was fraudulently transferred to the 2nd defendant. It is also contended that the plaintiff has filed summons in Eldoret High Court Misc. Succession Cause No. 143 of 2004 seeking similar orders. It is also averred that this suit is time barred.

The position of the 2nd defendant is that the letters of administration in Succession Cause No. 39 of 1986 were obtained regularly and that he obtained title after all proper procedures were followed.

After close of pleadings, the main suit was fixed for hearing on 25 July 2013. On that day, it was brought to my attention that the plaintiff's grant of letters of administration were the subject of nullification proceedings in Eldoret P & A Cause No. 120 of 2010. My view was that this suit has to be stayed pending the outcome of the nullification proceedings, for if the nullification proceedings succeed, then that will have a direct impact on the capacity of the plaintiff to file this suit. I therefore stayed this suit and ordered either party to move the court after the determination of the nullification proceedings.

The matter went quiet until this application was filed by the 2nd defendant. What provoked the application is that on 16 March 2014, the plaintiff entered the two suit lands and started planting maize therein. It is said that this was done despite the fact that the 2nd defendant still has title to the two suit lands and of which he has been in possession for the last 18 years. The applicant is further aggrieved by the actions of the plaintiff in entering the land while this suit is pending.

In his reply, the plaintiff has stated that the 2nd defendant has no enforceable claim over the two suit lands and has repeated that the 2nd defendant obtained title irregularly. He has contended that the proceedings herein were stayed and therefore the 2nd defendant cannot file the present application while the proceedings have been stayed. He has averred that the applicant ought to have referred his grievance to the succession cause and not in this matter. He has also contended in his reply that the court orders of 24 March 2014 (probably meant 25 July 2013) ought to be vacated as they were issued irregularly. He has stated that he is in possession of the two suit lands and has ploughed and planted maize thereon.

I have considered the application which is essentially an application for injunction. The general ingredients when determining an application for injunction were laid out in the case of **Giella v Cassman Brown (1973) EA 358** wherein it was stated that one needs to lay out 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 issued unless damages are an inadequate remedy; and if in doubt, the court ought to decide the matter on a

balance of convenience. It should also not be lost, that the essence of an injunction is to preserve the subject matter of the suit.

In this instance, there is no doubt that there is great controversy as to whether the 2nd defendant obtained good title to the two parcels of land that are the subject of litigation. I would not dwell too much on whether or not the 2nd defendant has a prima facie case, for the subject matter of litigation is highly contested. In my view, this application is best determined by looking at the balance of convenience which in my view lies with the applicant. The applicant still holds title to the two parcels of land in as much as they are the subject of revocation in these proceedings. He became registered as proprietor in the year 1998 and I have no reason to doubt that he is the one who has been in possession and occupation of the two suit lands since then. Indeed if he was not, then the plaintiff would not have in his pleadings, asked for an order of eviction.

In my view, it is wrong for the plaintiff, while the matter is still pending, to take the law into his hands and proceed to evict the 2nd defendant before a determination is made in this suit. Neither can I allow him to try and take advantage of the fact that the proceedings herein have been stayed. The fact that proceedings have been stayed does not authorize anyone to apply the law of the jungle. Neither does a stay of proceedings mean that a party who is aggrieved by an action of the other is now devoid of remedy from the court. What was stayed was the hearing of the matter, and the reasons for so staying the suit was because the plaintiff's grant, which is the foundation upon which he has filed this suit, is the subject of nullification. It will be futile to proceed for hearing, for if the grant of the plaintiff is nullified, then the proceedings will have lost substratum and will be in vain.

If the plaintiff wants the order staying proceedings set aside, then all he needs to do is file an appropriate application for consideration. Alternatively, if he feels that I was wrong in staying these proceedings, then he can of course file an appeal against my order and the same will be considered on merit, and if it turns out that I erred in staying the proceedings, then I will graciously stand guided. The fact that there is a stay of proceedings does not at all mean that no party can make an application for any relief. The only thing that was stayed is the hearing of the suit and that does not imply that no party can make any sort of application in the matter. The hearing of the matter will be revisited after the court seized of the nullification proceedings makes a determination. It is not that this suit will never be heard and if he succeeds in the nullification proceedings, the plaintiff will certainly have his day in court.

It is for the above reasons that I have to allow the application by the 2nd defendant and bar the plaintiff from interfering with the possession of the 2nd defendant in the two parcels of land while this suit is still pending.

I therefore allow the application for injunction and issue the following orders :-

(1) The plaintiff is hereby restrained from entering, being upon, utilizing, or in any other way interfering with the quiet possession of the 2nd defendant on the parcels of land Nandi/Lessos/555 and Nandi/Lessos/564 pending hearing and determination of Eldoret High Court P&A Cause No. 120 of 2010 and this suit or pending any further orders of this court.

(2) The 2nd defendant to remain in occupation and utilization of the land parcels Nandi/Lessos/555 and Nandi/Lessos/5564 pending hearing and determination of Eldoret High Court P&A Cause No. 120 of 2010 and this suit or pending any further orders of this court.

(3) The plaintiff shall bear the costs of this application.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF JULY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***N/A for M/s Anassi Momanyi & Co for plaintiff/applicant.***

***N/A for M/s Onyinkwa & Co for defendant/respondent.***