



**REPUBLIC OF KENYA**

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

**E&L NO. 19 OF 2014**

**MARION LEAH NYAMBURA.....PLAINTIFF**

**VS**

**ALI JAMAA MOHAMED.....DEFENDANT**

***(Application for injunction; both plaintiff and defendant having bought same land from third party; both claiming rights over the said land; none of the purchasers having obtained consent of the Land Control Board; none with a prima facie case; balance of convenience; balance of convenience with the plaintiff as defendant has at some point rescinded his agreement; application allowed).***

**RULING**

This suit was instituted by way of plaint filed on 24 January 2014. In the plaint, the plaintiff pleaded that she purchased the land parcel Soy/Soy Block 10/843 from one Peter Kiplangat Kenduiywa on the 25 September 2013 at a consideration of Kshs. 500,000/=. The said Peter Kiplangat Kenduiywa had in turn purchased the suit land from one Jason Ongeri Mirumbi, in whose name the title to the suit land is still registered. The plaintiff has claimed that she entered into the suit land and made developments therein only for the defendant on diverse dates in December 2013 and January 2014, to attempt to evict her. It is the plaintiff's case that she is the sole legal owner of the suit land and she has sought a declaration to that effect together with an order of permanent injunction to stop the defendant from interfering with the suit land.

Simultaneously with the plaint, the plaintiff filed an application for injunction, seeking to restrain the defendant from interfering with the said land pending hearing and conclusion of the suit. It is that application which is the subject of this ruling.

Upon being served, the defendant filed defence and counterclaim, and a replying affidavit to the subject application. It is his case that he purchased the same land from Peter Kiplangat Kenduiywa through an agreement executed on 28 July 2013. He paid Kshs. 550,000/= for it. He has averred that upon purchasing the property, he took possession and made some constructions. He has averred that it is the plaintiff who is trespassing on his land, and that it is she, who should be restrained from the suit land. In his counterclaim, he has inter alia sought orders that he is the lawful owner of the suit land. The defendant also annexed a further replying affidavit sworn by Peter Kenduiywa himself, through which Peter Kenduiywa, has stated that he sold the suit land to the defendant. He has not mentioned the sale to the plaintiff, but has further added that it is the defendant who took possession of the suit land and built latrines although he does not live on the said land everyday.

The plaintiff filed a supplementary affidavit, in which she has averred that the sale between the defendant and Peter Kiplangat Kenduiywa never went through because the defendant only paid part of the purchase price, and the land was never transferred to him, and that it was agreed before the Assistant Chief that the

money be refunded. A note from the Assistant Chief to that effect was annexed.

It is with the above rival positions that I need to determine this application.

This is an application for injunction and the guiding principles were laid down in the case of ***Giella v Cassman Brown (1973) EA 358***. An applicant needs to demonstrate a prima facie case with a probability of success and where the court is in doubt, the court will decide the matter on a balance of convenience.

In this case, both parties state that they purchased the same land from Peter Kenduiywa on diverse dates. The agreement between the plaintiff and Peter Kenduiywa is dated 25 September 2013 and was prepared by the law firm of M/s Gicheru & Company Advocates, whereas the agreement between the defendant and Peter Kenduiywa is dated 28 July 2013 and seems to have been signed by the Assistant Chief of Soy Sub-Location. I have also seen the letter of the Assistant Chief annexed to the supplementary affidavit of the plaintiff. It is dated 10 December 2013 and its title is "Land Dispute Resolution Agreement." The contents of the letter are to the effect that Peter Kenduiywa sold the suit land to the defendant and a down payment of Kshs. 300,000/= was made. The same land was later sold to the plaintiff. The letter goes further to say that Peter Kenduiywa has agreed to refund the deposit paid by the defendant on or before 30 June 2014 and that not the plaintiff nor defendant would occupy the suit land until this refund is done. Although the plaintiff is mentioned, it is clear that she was not a party to the arrangement between Peter Kenduiywa and the defendant.

It will be noted from the above that none of the two parties herein have title to the suit land. They both claim rights over the land from Peter Kenduiywa who had bought the suit land from Jason Mirumbi. It is clear that the confusion herein has been brought about by Peter Kenduiywa who sold the same land to two people. This is deplorable conduct on his part. That said, the transactions herein have not yet received the approval of the Land Control Board and none of the parties can claim to have firm rights over the land. From the material before me, I do not think that any of the two parties has demonstrated to me a prima facie case with a probability of success. None of them can succeed in obtaining a declaration that they are entitled to the suit properties without there being a consent of the Land Control Board. That is my preliminary assessment but the parties will have a chance to convince me otherwise at the hearing of the matter.

But I still have to decide this application, and since I am in doubt as to the strength of the case of the parties, I will decide it on a balance of convenience. In my view, the balance of convenience lies with the plaintiff. Although the defendant also has an agreement with Peter Kenduiywa, it seems as if at some point, the two agreed that the same ought to be rescinded and the money deposited repaid by Peter Kenduiywa. It also seems to me that the plaintiff moved into possession. I do not know why, despite agreeing to rescind the agreement with Peter Kenduiywa, the defendant still wants to pursue the land. For the sake of preserving the subject matter, I order the plaintiff to be in possession, rather than the defendant.

I have made this ruling solely to preserve some sort of status on the suit land. However, my two cents advice to the parties is that they ought to go back to the drawing board and seek a compromise, for as I have mentioned before, if the material that has been presented at the time of this application is the same material to be relied upon at trial, none of the parties can be declared to be the rightful owners of the suit land. None of them seems to have any good title to the land. Both should appreciate that good title will flow from the registered owner, Jason Mirumbi, and not from Peter Kenduiywa and that consent of the Land Control Board must be obtained. From what I can see, this litigation is heading nowhere for both parties.

But for purposes of preserving the subject matter, I have ordered the plaintiff to be in possession. The application for injunction therefore succeeds. Costs of this application will be costs in the cause.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

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*Mr. F.O. Mukabane holding brief for Mr. Kidiavai of M/s Kidiavai & Co Advocates for plaintiff.*

*Mr. L.C. Kamau holding brief for Mr. J.K. Songok of M/s Nyaundi Tuiyot & Co Advocates for defendant.*