



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 393 OF 2013

ABIGAEL BARMAOPLAINTIFF

VS

MWANGI THEURI.....DEFENDANT

(Application for injunction; applicant filing application after lapse of 4 years; whether applicant guilty of laches; application disallowed; matter to be set down for hearing)

RULING

This is an application for injunction filed by the plaintiff under the provisions of Order 40 Rule 1 of the Civil Procedure Rules. The plaintiff has sought the injunction to restrain the defendant from alienating, encroaching upon, disposing, trespassing upon, intermeddling with and/or in any way interfere with the property Uasin Gishu/ Kahungura Scheme/237 measuring 1.964 hectares pending the hearing and determination of this suit.

This application was filed on 23 July 2013 contemporaneously with the filing of the plaint. It is the case of the applicant that she is the registered proprietor of the suit land having purchased it for value in the year 2009. A certificate of

official search is annexed to the supporting affidavit and it indicates that the plaintiff became the registered proprietor on 20 April 2009. It is pleaded in the plaint that on diverse dates in September 2009, the defendant without any colour of right trespassed onto the suit land and erected structures thereon. The prayers in the plaint are for orders of eviction to remove the defendant from the suit land, an order of permanent injunction, general damages and mesne profits.

The defendant despite being served with the application has not filed a response thereto. Indeed, he has not even entered appearance nor has he filed a defence.

There is no doubt that the plaintiff is the registered proprietor of the suit land and ordinarily, an injunction would probably have issued without much fuss. My concern is that the plaintiff claims that the defendant entered the suit land in the year 2009 but there has been no explanation whatsoever as to why the plaintiff has never taken possession of the suit land or why she has waited for a period of 4 years before seeking relief. Delay is one of the factors that a court may consider before issuing an order of injunction.

The remedy of injunction is founded in equity and one of the maxims of equity is that "delay defeats equity". I cannot state it better than to quote the text Hanbury and Maudsley, *Modern Equity*, 10th Edition at page 92 where it is stated as follows :-

"As we have seen, the plaintiff must come promptly in the case of an ex parte injunction, as any delay

illustrates that his case is not urgent. Where the plaintiff has voluntarily delayed his motion for an interlocutory injunction, he is unlikely to establish that his case is such that it would be unreasonable to make him wait until trial..."

In Snell's *Equity*, 30th Edition at p 33 para 3-16(quoting Lord Camden L.C in *Smith v Clay (1767) 3 Bro. C.C. 639n . at 640n*) it is asserted that a court of equity "*has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.*"

My view of this application is that the plaintiff has been guilty of laches. If a proper explanation had been provided as to why there has been a delay of more than 4 years, then probably I would have been moved to grant the injunction. But no explanation has been given, and I can only conclude that the plaintiff is guilty of delay. There is no doubt that 4 years before seeking relief is a period that is inordinately too long. I therefore decline to grant the injunction sought but make no orders as to costs. I direct the plaintiff to set down the suit for hearing and the matter to be determined on merits.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. Y.M. Barasa advocate holding brief for Mr. Chepkonga for the plaintiff.

No appearance for the defendant.