Case Number:	Civil Suit 139 of 2004
Date Delivered:	09 Jun 2005
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Ruling
Judge:	Jeanne Wanjiku Gacheche
Citation:	Toroitich Misoi Mereng v Mohamed Ali & another [2005] eKLR
Advocates:	Lel for the respondent Kirui holding brief for Mr. Cheptarus for the applicant
Case Summary:	[RULING] Civil Procedure - interlocutory injunction - granting of an interim injunction is an exercise of judicial discretion - conditions for the grant of an interlocutory injunction.
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET
Civil Suit 139 of 2004

TOROITICH MISOI MERENG.....PLAINTIFF

VERSUS

MOHAMED ALI.....1ST DEFENDANT

SETTLEMENT FUND TRUSTEES.....2ND DEFENDANT

R U L I N G

The granting of an interim injunction is an exercise of judicial discretion. The conditions for the grant of an interlocutory injunction, that an applicant must show are, *"that he has a prima facie case. An interlocutory injunction will not normally be granted unless the applicant shows that might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience*" (Geilla v Cassman Brown & Co. Ltd (1973) E.A 358 at p. 360 Spry Vp.).

It is clear from the above legal principle that the onus to convince a court that it should exercise its discretion in his favour, lies on the applicant who must satisfy the above conditions.

In the application before me, Toroitich Misoi Mereng ("the applicant") who seeks an order to restrain Mohamed Ali and Settlement Fund Trustee (hereinafter called the 1st and 2nd respondents respectively) from entering into, trespassing upon, interfering with him "*in obtaining consent as well as obtaining title in respect of or dealing in whatever manner*" with his land namely KUINET SETTLEMENT SCHEME PLOT NUMBER 256 ("subject property") pending the hearing and determination of this suit.

It was the submission of Mr. Cheptarus, learned Counsel for the applicant, that the 2nd respondent released the Discharge of Charge over the subject property as well as the Transfer documents, to the 1st respondent who is now in the process of having the subject land transferred to him; despite the fact that it belonged to the plaintiff who has been in its occupation since 1983. He also took issue with the date of filing of the grounds of objection.

Mr. Lel, learned Counsel for the 1st respondent was however of the opinion that the applicant, having conceded that the documents of Discharge and Transfer were in the 1st respondent's possession, was good enough as admitting that he was the owner of the said land.

It is evident that the grounds of objection were filed on 16/5/2005 which was two days before the hearing of this application. Does that render them inadmissible as Mr. Cheptarus urges this court to find"

In my opinion the position is now well settled, it being that where such grounds are in place prior to the hearing, they should be considered by the court. I will therefore disregard his objection to consider the same.

I have thus taken into account the above submissions and it can not escape my attention though the

applicant entered into an agreement with the 2nd respondent by virtue of which he created a charge over the subject property in the 2nd respondent's favour, it is clear that he did not abide with the terms and conditions as stipulated in the said charge, for it is clear, that he did not remit payment of the sums payable in the half yearly instalments. In fact he concedes that he only paid an initial sum of Shs. 625/00 on 7/6/1983, which sum was payable upon accepting the offer of allotment of the subject property. No evidence of any further payment in line with the conditions of the charge has been provided. I have for that reason perused the letter of allotment as well as the charge document, and though, both are silent on the nature of action which should be taken in case of default, the Agriculture Act Cap 318 of the Laws of Kenya clearly stipulates at Section 174 that:

"(1) Where an advance has been made and secured upon any land under this Part, the Settlement Fund Trustees, or any person duly authorized by the Trustees in writing in that behalf, may exercise all such remedies for the recovery of the advance as the Agricultural Finance Corporation is empowered to exercise under the Agricultural Finance Corporation Act.

(2) If any sum of money, whether principal or interest, due in respect of any advance made by the Settlement Fund Trustees, such advance not being secured upon any land under this Part, is unpaid, that sum shall be a civil debt recoverable summarily.

(3) If any sum of money, whether principal or interest, due in respect of any advance made by the Settlement Fund Trustees, such advance not being secured upon any land under this Part, is unpaid for more than sic months, whether or not action has been taken under subsection (2), the Settlement Fund Trustees may, without recourse to any court, terminate any interest (whether express or implied) in land in respect of which the advance was made and which is vested in or deemed to be vested in the person to whom the advance was made, and thereupon that interest shall vest in the Settlement Fund Trustees, who may thereupon take possession of the land in question."

Of relevance therefore is Sections 31(a), 33 (1) of the Agricultural Finance Corporation Act Cap 323 of the Laws of Kenya stipulates that:

*"**31**. If a loan in made, and-*

(a) at any time any sum of money, whether principal or interest, due in respect of the loan is unpaid. the Corporation may in addition to any other remedies refuse to pay any portion of the loan which has been approved but not yet paid.

33. (1) In any of the circumstances events mentioned in section 31, the Corporation may, by notice served on the person to whom the loan has been made or his personal representative (in this section referred to as the debtor) personally or by post, demand repayment of the loan and, after due notice of such demand has been served in similar manner on all subsequent mortgages of the land on the security of which the loan was made, the Corporation may, without recourse to any court, enter upon the land and either take possession of or sell by public auction through a licenced auctioneer the whole or (where subdivision is not prohibited under section 34 of the Government Lands Act) any part of the land upon such terms and conditions as the Board may in all the circumstances consider proper."

Having defaulted in the payments and taking the above provisions of the law into account, he cannot now be heard to claim that he is the owner of the subject land. Needless to say, though he has remained in occupation, there is no evidence that he actually acquired the title at any one stage.

On that ground alone, I am afraid, he has not been able to satisfy the aforementioned conditions as in

my humble opinion he cannot be said to have a prima facie case with a probability of success.

I do in the circumstances find that this application is devoid of merit and it is dismissed with costs.

Dated and delivered at Eldoret this 9th day of June 2005.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Lel for the respondent

Mr. Kirui holding brief for Mr. Cheptarus for the applicant