



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 58 OF 2014

FRIDAH NELIMA NASIUMA..... PLAINTIFF

VERSUS

JACKSON W. WETOSIDEFENDANT

RULING

1. The notice of motion coming up for ruling is the one dated 14th March 2014 and brought pursuant to Order 40 Rule 1,2,3 of the Civil Procedure Rules and Section 3,3A, 1A and 1B of the Civil Procedure Act. The prayer pending for determination is as set out in prayer (2); “That, pending the hearing and determination of the suit, the defendant, servant, agent or anybody else acting through him to be restrained from tilling, dealing or planting any crops on land parcel no. Kimilili/Kibingei/1755 and/or Kimilili/Kibingei/4581.” She also prayed for costs of the application to be provided.

2. The motion is premised on eight (8) number of grounds listed on its face and the affidavit sworn in support on 14.3.2014 by the applicant. The gist of the Applicant's claim is that she bought this piece of land some time in 1979 when the original number was Kimilili/Kibingei/1755. Upon subdivision, her share fell under parcel no. Kimilili/Kibingei/4581. She alleged the Respondent in early March invaded this land and destroyed her crops. She therefore wants the Defendant/Respondent restrained from doing anything on the land until her suit is heard and determined.

3. The application is opposed by the Respondent who has sworn an affidavit thereto. He depones that there was no restriction on this title when he purchased it on 22nd Nov 2012 from the registered owner. He denied the Plaintiff's house was on the land at the time he was being shown the suit land. He further depones that the Applicant purchased the suitland from Michael Wamatuba Masaba who is different from the person that sold the land to him. He concluded that the Applicant has not met basic principles for granting injunctions and urged the court to dismiss the application with costs to him.

4. I have considered the submissions presented for and against this application. While looking at the pleadings, it shows that the Respondent in his replying affidavit has not denied that he destroyed the Applicant's crops in early March 2014. He has also not denied that he was summoned by the police over the Applicant's occupation of the suit land. Further, apart from saying there was only a hut on this parcel of land; the Respondent does not mention whether or not it had any crops/trees growing on the land at the time of his visit.

5. The Respondent depones in paragraph 14 of his affidavit that he has entered an agreement with Nzoia Sugar for cultivation of cane on the suit land but none has been exhibited to this court. The Applicant on

her part has demonstrated that she has been using the land over 33 years. She has also demonstrated through the Agricultural Officers report that she had crops (whose value is given) at the time the respondent went to occupy the suitland.

6. The Applicant however failed to demonstrate that she had a restriction existing on this title when the land was sold. What she has exhibited is merely a receipt but no proof that the caution lodged was registered. The documentation also shows lack of vexus between her and the seller to the current respondent.

7. In spite of the prevailing situation, it will be unjust to close the door of justice by denying her the orders sought as doing so may render her suit nugatory and to encourage people such as the Respondent of dispossessing people in occupation of land through the back door. I do take into consideration the fact that the Respondent has spent Kshs. 750,000/= to purchase the suit land. He is also entitled to enjoy from the seat of justice.

8. In balancing these two competing interests of the parties, I will give conditional injunction. Consequently, I do grant prayer (2) of the motion for a limited period of time. The injunctive orders granted to remain in force until 18th December 2014 within which period I order the Applicant shall do either of the following;

i. Ensure that the process of substituting Simon Musokhe Wechuli as defendant in Bgm. HC E & L case no. 11 of 2013 is finalized or almost finalized to allow that matter to be fixed for hearing.

Or

ii. The preliminaries in this matter (exchange of documents and witnesses statements) are concluded and the same set down for hearing within the period provided.

8. Whichever of the options the Applicant opts to pursue, if she does not perform the conditions as by date set, the injunctive orders shall automatically be discharged. This will allow the Applicant not to take a back seat in this matter in enjoying the orders of injunction to the detriment of the Respondent. Each party will bear their costs of this application.

DATED, SIGNED and Delivered at Bungoma this 26th day of June 2014

A. OMOLLO

JUDGE.