



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**LAND AND ENVIRONMENT CASE NO. 119 OF 2012**

**JANE WAFULA WANYAMA(suing through legal administrator in the estate of  
REUBEN WANYAMA WASWA..... PLAINTIFF**

**VERSUS**

**WENSLAUS WAMALWA**

**JAMIN YAURU**

**JOSEPH MASIKA**

**FRED WAFULA**

**JAFRED SIMIYU**

**ABSOLOM SARATUKI**

**JUDITH NASAMBU SIFUNA**

**PETER NKHOYWA ..... DEFENDANTS**

**RULING**

1. The 7<sup>th</sup> defendant/applicant has moved this court by a notice of motion dated 1<sup>st</sup> July 2013 brought under order 40 rule 1,2,& 3 of the civil procedure rules seeking for an order;

(a). The plaintiff by herself or agents and servants be restrained from occupying and/or collecting rents from the suit premises pending hearing inter partes.

(b). That the rents from the suit premises namely a butchery shop be deposited in court at the rate of kshs. 6,000/= per month till the full determination of the suit.

(c). Costs be provided for.

2. The application is supported by 5 grounds listed on the face of it and a 6 – paragraph supporting affidavit. The grounds inter alia are;

i. Plaintiff has entered and/or started collecting rents from the shop allocated to the 7<sup>th</sup> defendant/applicant.

- ii. The applicant relied on the rent allocations to educate her children.
- iii. The plaintiff was allocated her own shops
- iv. The rents ought to be protected and accounted for.

3. The motion is opposed by the plaintiff/respondent. In a replying affidavit filed on 10<sup>th</sup> July 2013, the plaintiff/respondent denies the applicant is a beneficiary to the estate of Reuben Wanyama Waswa. The Respondent deposes that the applicant's name was also not included during the clan distribution of the deceased assets, and she proceeded to annex as exhibit the clan list to her affidavit. According to her, the applicant went to her shop (suit premises) in July 2012 with threats to evict her. She deposes the application is an afterthought and no sufficient reasons have been given to show there is a valid claim. She urged the court to dismiss the application.

4. I have considered the rival submissions filed together with the pleadings herein. The applicant seeks temporary orders of injunction under order 40 of the Civil Procedure Rules. There are set principles which guide courts whether to grant or refuse injunctions i.e

- i. Whether the applicant has shown he has a prima facie case with chances of succeeding.
- ii. In whose favour balance of convenience tilts.
- iii. Whether irreparable loss which cannot be compensated by damages will be occasioned to the applicant.

5. In reading the application as presented, the applicant has failed to demonstrate to this court that she has ever received rents from the suit premises by annexing either receipts or tenancy agreement. In her supporting affidavit, she does not say how long she had been receiving rents and when the plaintiff stopped her from collecting such rent. In terms of suffering irreparable loss, she had not named the children whom she is paying for school fees from the rents collected. She does not disclose or show the school fees arrears and whether the said children are in or out of school. All she said is;

**“That I do not have any other source of income to educate and provide for the children of the deceased yet all of them are school going.”**

6. The respondent said the applicant went to the premises in July 2012 and threatened to evict her. The applicant has not denied this fact. As submitted by the respondent's counsel, the balance of convenience tilt in their favour as it is the respondent who is apparently in possession of the suit property. The applicant has thus failed to establish any of the principles for granting injunctions and her motion therefore fails in regard to prayer (a). In regard to prayer (b) for an order to deposit rent in court, there has been no basis laid before this court to restrain the respondent from collecting rent from the suit premises. It follows therefore that based on the court's finding above, the order requesting deposit for rent also fails. No satisfactory evidence has been placed before the court creating any nexus between the applicant and the suit premises.

7. In conclusion, I find the present application as lacking in merit and dismiss it with costs to the plaintiff/respondent.

**DATED, SIGNED and DELIVERED** in Bungoma this 30<sup>th</sup> day of Sept. 2014.

**A. OMOLLO**

**JUDGE.**