



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CIVIL CASE NO. 24 OF 2011.**

**V.C.K..... PLAINTIFF.**

**VERSUS**

**J.M.K..... DEFENDANT.**

**R U L I N G.**

1. The plaintiff and the defendant were divorced as per the decree issued in Kapenguria SRMC DIV. Cause No.[...]. There was another decree in another suit being Kitale HCCC No. 74 of 2002, in which the defendant had sought to have the names of the plaintiff deleted from Title Nos. WEST POKOT/KERINGET 'A'/4051 and WEST POKOT/SIYOI 'A'/2026 and the defendant be registered as the sole proprietor of the two parcels. By a judgment dated 20<sup>th</sup> April, 2006, the court in this suit ordered that the register of lands be amended to the effect that the plaintiff owns one half share of that land in trust for her 4 children with the defendant while the defendant was to be registered as the owner of the other half.

2. Following that decree, the two parcels were sub divided into parcel no. WEST POKOT/KERINGET 'A'/2728 and 2729 and No 2728 was registered in the names of the plaintiff in trust of her children while parcel no. 2729 was registered in the name of the defendant. By the plaint filed on 17<sup>th</sup> March, 2011, the plaintiff complained that the defendant has forcefully cultivated a portion of No 2728 thus depriving the plaintiff and her four children the use of the land. Despite a notice requesting the defendant to desist from interfering with the plaintiff's parcel of land, he has failed to do so.

3. Thus the plaintiff filed a notice of motion on 24<sup>th</sup> March, 2011 seeking for an interim order of injunction to restrain the defendant, his agents or servants from entering, cultivating, ploughing or using the plaintiff's land in whatever manner until the determination of this suit. This application is supported by the grounds on the body thereto and the matters deposed to in the supporting affidavit. The applicant annexed copies of the abstract of the title that shows the plaintiff is registered as proprietor of the subject parcel of land in trust of her 4 children.

4. In further argument to support this application, **Mr. Kiarie**, learned counsel for the plaintiff submitted that the defendant has no legal interest on the suit property. There is no reason why he should deny the plaintiff and the children their right to occupy and make a living from the suit property. The defendant does not deny that the property is registered in the name of the plaintiff in trust of the four children. Thus the plaintiff has demonstrated a *prima facie* case with a probability of success and should be granted the orders prayed for.

5. This application was opposed by the defendant; Mr. **Nyakundi**, learned counsel for the defendant relied on replying affidavit sworn by the defendant on 8<sup>th</sup> April, 2011. It is not denied that the plaintiff is registered as trustee for the 4 children with the defendant. The 4 children are the issues of the marriage between the plaintiff and the defendant. Therefore the defendant has an interest over the suit property until the children attain the age of 18 and the land is eventually transferred to them. It was argued that the land has been lying fallow without any cultivation from 2006 because the applicant got married to somebody else and she has begotten 2 children. Counsel urged the court to find that the defendant has beneficial interests over the suit premises on behalf of the 4 children.

6. The principle element to determine in this application is whether the plaintiff has established a *prima facie* case with a probability of success. Secondly, the court should establish whether irreparable harm which cannot be compensated for in damages, would arise. And if in doubt, the court is supposed to determine the matter on a balance of probabilities. In the case of; **MRAO LTD. VS. FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS [2003] KLR 125** the Court of Appeal has succinctly explained what constitutes a *prima facie* case in the following:-

**“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

7. Applying the above principles in the present case, it is not disputed that the plaintiff is the registered proprietor in trust of the 4 children of Title No. WEST POKOT/KERINGET ‘A’/2728 thus it is the plaintiff who has the legal rights to determine what to do with the land as long as it is not to the detriment of the children who are the eventual owners of the land. By virtue of the registration, the defendant has nothing to do with the suit premises in law he cannot purport to utilize it or deal with the land without the consent of the plaintiff. The plaintiff contends that the defendant has forcefully cultivated the suit land and thus deprived the plaintiff and the 4 children the use of the land. The fact that the plaintiff is the one who is registered as trustee of the title, I find she has established a *prima facie* case against the defendant.

8. The defendant has no proprietary rights and cannot cultivate on the parcel of land without the permission of the plaintiff. The allegations contained in the affidavit of the defendant to the effect that the plaintiff is married to another man and has borne other children have no relevance at all with the plaintiff’s proprietary rights over the suit premises. Those allegations are misplaced as the dispute has nothing to do with personal matters but legal rights of a piece of land.

Accordingly, I allow the application and the defendant, his agents, and or servants are hereby restrained by an order of injunction from entering, cultivating, ploughing, using or disposing or interfering in the plaintiff’s user of the land comprising in the title Title No. WEST POKOT/KERINGET ‘A’/2728 until the suit is heard and determined. The plaintiff shall also have the cost of this application.

**Ruling read and signed this 24<sup>th</sup> day of June, 2011.**

**MARTHA KOOME.  
JUDGE.**