



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 150 of 2009

JENIFFER CHEPKIRUI MBERIA:.....PLAINTIFF

VERS

PATRICK KIMUTAI CHUMBA:.....1ST DEFENDANT

JOHN KIPKORIR MBERIA:.....2ND DEFENDANT

R U L I N G

The Applicant is the Plaintiff in the suit herein. She has taken out chamber summons under order XXXIX Rules 1, 2(1) 3(1) and 9 of the Civil Procedure Rules. She prays for an injunction to issue against the Defendants restraining them by themselves agents, servants, employees and/or otherwise from trespassing onto, occupying, ploughing, plucking tea thereon, interfering with, erecting thereon structures, planting maize thereon or doing any other acts which are prejudicial to the applicant's proprietary interest in LR. No.Nandi/Chepterit/446. She prays that once the order is issued the same be enforced by the Officer Commanding Station, Kapsabet Police Station. The application is brought on the grounds that the Applicant is the registered proprietor of the subject parcel of land and the Defendant's have no legal right to occupy work and/or interfere with it whatsoever and unless the orders sought are granted the Applicant will suffer irreparable loss and damage which might not be adequately compensated in monetary terms. The applicant swore the supporting affidavit to which is annexed a copy of the Title Deed in respect of the Suitland and a certificate of official search and minutes of a meeting held between the Plaintiff and the 1st Defendant with the area chief and several others persons.

In the Replying Affidavit sworn by the 2nd Defendant /Respondent he depones that the suit land was bought by his late father and he wondered how the Plaintiff came to be registered as proprietor. He annexed to the Replying Affidavit approval by the Kapsabet Town Council dated 27/06/1986 for the Suitland to be bought by Nicholas K. Mberia from Kibiwot S/O Chebochok. Such approval is headed REF: LR. NO.NANDI/Chepterit/446 purchase and Loan. The 2nd Respondent also annexed to his Replying Affidavit the Last Will and Testament of his late father Nicholas Kipchumba Mberia in which he, the 2nd Respondent is named executor and wherein he states that the suit land is bequeathed to an heir of his deceased father. There is also annexed a document titled receipt which relates to the suit land and more particularly the purchase thereof by Nicholas K. Mberia. In the will the family is requested by the testator to pay for the balance of the purchase price of that land. The 2nd Respondent further depones that his late father's family has lived on the Suitland since 1993 and have worked on the land and developed it with a tea plantation and have drawn their income form the land even during the lifetime of the deceased purchaser.

It is an appropriate time to consider the application. Whereas the applicant states that the Suitland is registered in her name and has produced a copy of Title deed to prove that, she has not filed a further affidavit to controvert the assertion by the 2nd Respondent that the Suitland was bought by the late Nichcholas K. Mberia who is the Applicant's husband and the Respondent's father. She has not made an attempt to deny what is stated in the Will of her late husband about the land or the allegation that she became registered as proprietor of the land through ways not known to the Respondents. No Reply to Defence has been filed controvertig what is stated in the defence and reiterated in the Replying Affidavit. In light of the above where the registration of the applicant as the registered owner is questioned and where she has opted to give no answer to such allegations and considering what is stated in the Will and the Respondents saying that their mother cannot inject them from using their father's land, I come to the considered view that the Plaintiff/Applicant fails to make out a prima facie case with a probability of success at trial. The Applicant is not in occupation of the Suitland and the Respondents who have been in occupation since 1993 and who have worked on the land may be the ones who would suffer loss. The balance of convenience tilts to their favour and that is my finding. No case for the grant of an injunction has been made out here and the application under consideration is found to be without merit and it is accordingly dismissed with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF MAY 2010

**P.M.MWILU
JUDGE**

IN THE PRESENCE OF:-

Mayolei holding brief for Orina Advocate for Plaintiff/Applicant

Alwanga - Advocate for Defendant/Respondent

Andrew Omwenga - Court clerk

**P.M.MWILU
JUDGE**