



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Civil Case 40 of 2009**

**RUTH NYABOKE ONDIEKI.....PLAINTIFF**

**VERSUS**

**LABAN OCHAKO NYAKABA..... DEFENDANT.**

**RULING.**

The plaintiff filed an application seeking orders of injunction to restrain the defendant from re-entering, trespassing onto, cultivating or in any other manner whatsoever dealing with a parcel of land known as L.R.NO. BASSI/BONDONYA/3011, hereinafter referred to as “**the suit land**”, pending the hearing and determination of this suit.

In her affidavit in support of the application, she stated that she is the registered proprietor of the suit and annexed thereto copies of the Title Deed and a Certificate of official search. She further stated that she is residing and cultivating on the suit land. Sometimes in February, 2008 the defendant trespassed upon the suit land and cut down 92 coffee trees. As a result, the plaintiff filed a civil suit against the defendant, **Kisii Civil No.586 of 2008**, but the same was struck out for want of jurisdiction. The Plaintiff also lodged a criminal complaint against the defendant and the defendant was arrested and charged for the offence of malicious damage to property in **Ogembo SRM. Criminal Case No.781 of 2008**. The aforesaid civil suit was struck out on 25<sup>th</sup> February, 2009 and on the following day, 26<sup>th</sup> February, 2009 the defendant continued to trespass upon the suit land.

The defendant filed a replying affidavit and stated that the registration of the suit land in the name of the defendant was done fraudulently. He stated that the plaintiff was brought to the suit land by his elder brother, Samwel Nyakaba, and it was misrepresented to the area Land Registrar that the Plaintiff was the only wife of Nyakaba Nyandumo, the defendant’s father. The defendant further stated that he has all along lived on the suit land together with his eight brothers and the coffee trees that are on the land were planted by his mother who has since passed away. The defendant added that the suit land actually belongs to his father who is still alive. He urged the court to dismiss the plaintiff’s application.

The plaintiff filed a further affidavit and stated that indeed she is the wife of Nyakaba Nyandumo who was the registered proprietor of L.R.NO. BASSI/BONDONYA/2996. Her husband caused that parcel of land to be subdivided into two portions. He transferred the suit land to her and he retained the other portion in his name. She further stated that the defendant has his own land at Nyangusu where he has a house and cultivates and it was only in 2008 that he started his acts of trespass onto the suit land. The defendant was now contending that the suit land ought to have been given to him for and on behalf of his late mother and that was why he was trespassing on the same, the plaintiff added.

The defendant also filed a further affidavit in an effort to show that the plaintiff acquired the suit land fraudulently.

Mr. Oguttu for the plaintiff and Mr. Sagwe for the defendant made brief submissions in elaboration of their respective clients’ affidavits.

I have considered the said submissions.

There is no dispute that the plaintiff is the registered proprietor of the suit land. The suit land is a subdivision of the original parcel of land known as L.R.NO. BASSI/ BONDONYA/ 2996 that was registered in the name of NYAKABA NYADUMO; who transferred the suit land to the plaintiff. Although the defendant alleged that the transfer and registration of the suit land was done fraudulently, no suit was filed to challenge the plaintiff’s acquisition of the suit land. Nyakaba Nyadumo is still alive and it is only him who has capacity to allege that his property was fraudulently acquired by the plaintiff. The defendant lacks capacity to question the plaintiff’s title, unless granted due authority by his father.

In the circumstances, the plaintiff should be permitted to use her land without any interference from anyone else. As regards the coffee trees that are standing on the suit land, it is trite law that the definition of land includes trees which may be growing on the land, see **CHEROTICH V TIMSALES LTD**, KLR [E & L] 1 611. Even if the coffee trees

growing on the suit land were planted by the defendant's mother, the suit land and everything thereon now belongs to the plaintiff.

Where it is shown that a respondent is infringing on the rights of a registered proprietor of land, an injunction ought to be granted as equity does not assist law breakers, see AIKMAN V MUCHOKI [1984] KLR 353.

I am satisfied that the plaintiff's application meets all the conditions for grant of an interlocutory injunction as stated in E.A. INDUSTRIES LTD VS TRUFOODS LTD [1972] EA 420. I therefore grant the orders as prayed. The defendant shall bear the costs of the application.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16th DAY OF June, 2009**

**D.MUSINGA.**

**JUDGE.**