



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL CASE 76 OF 2007

ESTHER CHEBWOGEN MUTAI =====APPLICANT

V E R S U S

ELIZABETH CHERUGUT =====RESPONDENT

R U L I N G

The plaintiff has brought an application by way of a Notice of Motion. Through the said application, she seeks a stay of execution of the Decree in Kitale SPM Land Case No.54 of 1996. She also seeks an injunction to restrain the defendant from entering onto, alienating or doing anything on the suit property, until the suit is heard and determined.

The suit property was identified as being the land parcel whose registration particulars were *Title Number SABOTI/SABOTI BLOCK 2(BUKWET)/21.*

It is the plaintiff's case that she was the registered proprietor of the suit property, which measures 55 acres. The plaintiff produced in evidence a copy of the title deed for the suit property, which title was dated 31/8/1995.

Notwithstanding that fact, the plaintiff noted that on 29/8/1997, the Land Registrar, Trans-Nzoia District, had caused the publication of a notice in the Kenya Gazette, indicating that the Principal Magistrate's Court at Kitale had ordered that the suit property be transferred to ELIZABETH C. MUTAI.

The said Gazette Notice indicated that the plaintiff had failed to surrender the original document of title, for cancellation by the Land Registrar. Accordingly, the plaintiff was being placed on notice that if she failed to surrender the title for cancellation within 30 days of the Gazette Notice, the Land Registrar would dispense with the production thereof and proceed to issue a title deed to ELIZABETH C. MUTAI.

According to the plaintiff the order by the Principal Magistrate's Court was made in Kitale SPMC Land Case No.54 of 1996, which was a case between Elizabeth Cherugut Mutai Vs Esther C. Mutai & Elizabeth Chebeth Barngoino.

Essentially, that case was said to have been the culmination of the proceedings before the Land Disputes Tribunal, which sat at Kiminini.

From the copy of the proceedings before the said tribunal, the parties to this suit were both involved in the proceedings before the tribunal. After the panel of elders had heard the evidence, the tribunal held that the defendant herein was the first wife to the late Joseph Arap Mutai. The said tribunal also held that the

plaintiff herein was the second wife to the late Joseph Arap Mutai.

In those circumstances, the tribunal held that the plaintiff should give to the defendant 20 acres, whilst the plaintiff would retain 35 acres.

Subsequent to the decision by the tribunal, the defendant herein applied to the Senior Principal Magistrate's Court, for the adoption of the award, as a judgment of the court.

On the face of it, provided that the Decree in *Kitale SPMC Land Case No.54 of 1996* was still subsisting, the defendant ought to be entitled to execute it. That would imply that she would be entitled to some twenty acres of land, to be carved out of the suit property.

However, the plaintiff has demonstrated to this court that she has been served with a Notice requiring her to show cause why she should not be evicted from the suit land.

In the light of the material before me, any attempts to evict the plaintiff from the entire suit property would be irregular, as there has been no court order for her eviction. Therefore, it is only reasonable that the intended execution be stayed.

Secondly, as the plaintiff has at all material times been in occupation of the suit property, the balance of convenience tilts in her favour. The defendant, who has not been in occupation of any part of the suit property would not be prejudiced, if she continued to be kept out of it, whilst the substantive suit went to trial.

As I see it, the sub-division of the suit property at this stage may well occasion irreparable loss to the plaintiff, because it is not known what portion of the suit property may be claimed by the defendant. In the event that the defendant should choose the part upon which the plaintiff is currently resident on, the plaintiff's life may never be the same again.

For those reasons, I find that it would be in the interests of justice to have both parties maintain the prevailing status quo until the suit is heard and determined. In effect, an injunction will issue against the defendant, restraining her from entering onto or alienating or doing anything on the suit property. Simultaneously, and in the interests of safeguarding the subject matter of the suit, the plaintiff shall not in any manner encumber the suit property, or have it alienated until the suit is heard and determined.

The costs of the application are awarded to the plaintiff.

Dated and Delivered at Kitale, this 30th day of October, 2007.

FRED A. OCHIENG

JUDGE