



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO.73 OF 2020**

**MARY NASIMIYU OMONYA.....PLAINTIFF**

**VERSUS**

**ISAYA EMEJE OMONYA.....1<sup>ST</sup> DEFENDANT**

**EMMANUEL OSIELI OMONYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated 7/12/2020 and filed in court on 23/12/2020 has been brought by the plaintiff under **Order Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act**, **Order 51 Rule 1** and **Order 40 1, 2 & 4** of the **Civil Procedure Rules**. The plaintiff seeks the following orders:-

(1) ...spent

....

....

(2) That the honourable court be pleased to issue restraining orders against the respondents jointly and/or severally, by themselves, their agents and/or any other person claiming through them from dealing, selling, leasing, charging and/or in any other way interfering with the 17 acres that were on 6<sup>th</sup> February, 1995 carved out of land parcel No. **KAKAMEGA/NZOIA/10/70** pending the hearing and determination of this application.

(3) That the costs of this application be provided for.

2. The application is supported by the affidavit of the plaintiff sworn on 9/12/2020. The grounds upon which the application is made are that the 1<sup>st</sup> respondent is the registered owner of land No. **Kakamega/Nzoia/10/70** who holds it in trust for the applicant's family and the husband and father to the applicant and the 2<sup>nd</sup> respondent respectively; that by an agreement dated 5/2/1995 between the applicant and the 1<sup>st</sup> respondent, 17 acres of land were carved out of land parcel No. **Kakamega/Nzoia/10/70** and given to the applicant in trust of and her children; that the applicant proceeded and subdivided the said 17 acres amongst some of her children; that the 1<sup>st</sup> respondent in cohorts with the 2<sup>nd</sup> respondent are now threatening to sell part of the 17 acres of land that had been given to the applicant and her children; that applicant's families already settled on the subject land and the respondents' actions might render them landless and that the applicant and her family will suffer irreparable loss if the respondents' threatened actions are carried out.

3. In response to the application the 1<sup>st</sup> defendant filed a replying affidavit sworn on 19/2/2021. He deponed that **Kakamega /Nzoia/70** does not exist; that the same was subdivided and yielded two portions one of which was given to the 1<sup>st</sup> defendant's two other wives who sold it and settled elsewhere, that the portion in question is now plot no **Kakamega /Nzoia/370** and it is also non-existent; that the applicant moved from the said plot to another parcel allocate to her by the 1<sup>st</sup> respondent, and out of that parcel (**Kakamega/Nzoia/370**) only parcel no **Kakamega /Nzoia/968** measuring 9 acres remains, the rest having been sold off some time back to buyers who have obtained title to their portions; that the 1<sup>st</sup> respondent has appointed the 2<sup>nd</sup> respondent as administrator of his estate and directed him on how to subdivide the remaining land and distribute it amongst various beneficiaries; that the applicant and the 1<sup>st</sup> defendant have never been separated and that the plaintiff, intent on benefitting from the land meant for her children has omitted some of their names and included others who should not be beneficiaries.

**Submissions**

4. The plaintiff filed her written submissions on **19/2/2021**. The defendants filed their submissions on **22/2/2021**. I have considered both sets of submissions.

#### **Determination**

5. The main issue for determination that arises in the instant application is whether this court should issue injunctive orders restraining the defendants from dealing, selling, leasing, charging and/or in any other way interfering with the suit land pending the hearing and determination of this application.

6. This court has noted that the defendants have given the correct number of the suit land and acreage in their response and given the brief period given for the determination of this application, this court is of the opinion that the defendant's objection to the application based on the wrong land reference cited by the plaintiff has no basis. This court faced with a situation where the correct numbers of subdivisions were not stated in the application in the case of **Paul Pkemoi Kide Vs Philip Kimutai Kibor and Others 2019 eKLR** nevertheless opted to do substantive justice to the parties and granted the injunction sought. In the instant case this court opts to consider parcel no **Kakamega /Nzoia/968** measuring **9** acres as the proper parcel subject matter of this suit as it is the parcel number that the plaintiff has disclosed. Under the provisions of **Section 1A** of the **Civil Procedure Act** and the inherent jurisdiction of the court, *suo motu*, and in the interests of justice I hereby order that the application

7. For an injunction to issue the applicant has to establish that he or she has a prima facie case and that he or she may suffer irreparable loss if the orders sought are not granted.

8. In this case the defendants have admitted that the suit land hosts what may be referred to as the host to the homestead of the 1<sup>st</sup> defendant who admits to being the husband to the plaintiff, and thus the plaintiff can be discerned to have a stake in the suit land at this juncture. Considering that the plaintiff has approached the court while citing the **Matrimonial Property Act No 4 Of 2013**, and that she appears to be claiming on her own behalf and on behalf of the children of her marriage with the 1<sup>st</sup> defendant, I find that a number of triable issues arise from the plaint and the defence and the plaintiff therefore has established a prima facie case against the defendants.

9. In the light of the possibility that the suit land could be matrimonial property, I find that the plaintiff may suffer loss that may not be compensated for by way of damages.

10. Consequently I find that the plaintiff has satisfied the two conditions for the grant of an interim injunction and I grant the application dated **7/12/2020** as amended herein above in terms of **prayer (4)** thereof. The costs of the application shall be costs in the cause.

11. It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 23<sup>rd</sup> day of February, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**