



**REPUBLIC OF KENYA**

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

**ELC LAND CASE NO. 9 OF 2021**

**ISAAC KIBIEGO KITUR.....PLAINTIFF**

**VERSUS**

**FLORA YEGO.....1<sup>ST</sup> DEFENDANT**

**LEAH YEGO.....2<sup>ND</sup> DEFENDANT**

**JANE YEGO.....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Application**

1. The application dated **19/3/2021** and filed in court on **22/3/2021**, has been brought under **Sections 1A, 1B, 3 & 63(e)** of the **Civil Procedure Act, Order 40 Rule 1,2,3 and 4, Order 51 rule 1** of the **Civil Procedure Rules**. The plaintiff seeks the following orders:-

**(1) ...spent**

**(2) ...spent**

**(3) That a temporary interlocutory be and is hereby issued restraining the plaintiff/respondent either by himself, his agent, servants, employees or by acting on his behalf or otherwise from trespassing onto, entering into, evicting the defendant, cultivating, demarcating, planting crops, wasting, causing damage or destruction thereon or any manner dealing with or interfering with estate of the late Zipporah Jepkoech Yego measuring 16 acres and the 2<sup>nd</sup> defendant's shares measuring 5 acres respectively comprised in title No. Cherangani/Kichibora Block 1/Osorongai/48 which is identifiable, demarcated and marked on the ground pursuant to a decree issued in Kitale SPMCC Land Case No. 14 of 2005 pending the hearing and determination of the suit herein.**

**(4) That the order be directed upon the OCS Cherangani for enforcement.**

**(5) This court be pleased to make any other orders for the ends of justice**

**(6) Costs be borne by the respondents.**

2. The application is supported by the affidavit sworn on **19/3/2021** by the **1<sup>st</sup>** defendant on her own behalf and on behalf of **2<sup>nd</sup>** and **3<sup>rd</sup>** defendants. The grounds upon which the application is made are that the defendants are daughters of the plaintiff who belong to the **2<sup>nd</sup>** and **3<sup>rd</sup>** **house** who reside on the suit land as a matter of right; that the defendants have been utilizing their portions since **2005** after the Land Disputes Tribunal awarded land and a decree was issued in **SPM Land Case No. 14 of 2005**; that the plaintiff, pursuant to an award of the tribunal, remained with **45 acres** to which he should confine himself to; that the plaintiff intends to allocate whatever belongs to the defendants, who belongs to **house No. 1** and **3** to **house No. 4** which is entitled to **45 acres** that was retained after the decree; that it is in the interest of justice that the plaintiff be restrained from committing acts of intermeddling; that unless restrained the defendants are likely to be exposed to great loss and damage which cannot be quantified in monetary terms; that the defendants solely rely on the land for food and for eking a living; that the plaintiff is aged and is being controlled by the wife and children from **4<sup>th</sup>** house and that the plaintiff took advantage of the interim orders earlier granted to invade the defendants' portion.

**The Response**

3. The plaintiff filed a replying affidavit sworn on **21/4/2021**. He deponed that he has already planted crops on the land which have since

germinated and so the injunction order sought cannot issue; that the defendants do not stay on the suit land but were married women who live in their respective homes with their husbands; that his deceased wife **Zipporah** who is the defendants' mother was not farming on the **16 acres** of land and that no demarcation in favour of Zipporah was done pursuant to the decree issued in **Kitale SPMCC Land Case No 14 of 2005**. The plaintiff further asserts that the decree from that suit is stale and enforceable. He also denies that any land was demarcated in favour of the 3<sup>rd</sup> defendant. He claims ownership of the whole parcel of land comprised in **Cherangani/Kachibora Block 1/Osorongai/48**.

4. The parties filed their written submissions on **26/4/2021**. **Determination**

5. I have considered this application at length. It comes hot on the heels of a Ruling dated **16/3/2021** in which the court declined to grant the plaintiff an injunction to restrain the activities of the defendants on **Cherangani/Kachibora Block 1/Osorongai/48**.

6. This is essentially a family dispute between a father and her daughters who claim their mother's entitlement under a decree issued a court case **Kitale SPMCC Land Case No 14 of 2005** which the plaintiff has dismissed as incapable of implementation at present due to limitation. In the Ruling dated **16/3/2021** this court observed as follows:

**“The supplemental claim by the plaintiff that the decree relied on by the defendants is more than 12 years and cannot be implemented now is staled in the face by the allegation that a government surveyor implemented the decree on the ground and that the plaintiff thwarted his wife's attempts at obtaining title. It is further watered down by the claim that the defendants only claim the land that was so demarcated in favour of their mother and nothing more and that they are already in occupation of that land. In addition it is clear to this court that the instant application has sprung out of the denial by the Land Control Board of an application by the plaintiff for consent to subdivide the suit land as he wishes. That application must have been made under the Land Control Act and in this court's view the remedy to a denial of a consent under that law does not lie in this court as a first instance remedy”.**

7. The fundamental issues arising in this suit include whether the decree was implemented on the ground and, if it was not, whether it is now stale and incapable of execution. Each of the parties holds a different view. Those issues once determined, are sufficient to dispose of the instant suit. It is not safe to dispose of those issues by way of affidavit evidence at an interlocutory stage while the suit pend.

8. I am aware that the main task of this court is to examine whether the applicants have a *prima facie* case and whether they would suffer loss that can not be compensated for by way of damages in accordance with the rule set forth in the celebrated case of **Giella -vs- Cassman Brown [1973] EA 358**. However this court must approach the suit at hand with caution where the attempts to apply that test may prejudice the main trial. In any event, I have considered that the exclusion of the applicants from the land by the plaintiff may attract damages against the plaintiff which can be easily assessed by an expert and claimed since the basic mode of production applied in the land is agricultural. The applicants have not stated anything that would demonstrate or prompt inference of a contrary user.

9. That said however, it would be quite improper on the part of the plaintiff if he, as stated by the defendants invaded any portion occupied by the defendants pursuant to an interim order of this court restraining the defendants from interfering with the land. This court does not want to be seen to condone any defiance of court process. Though there were no express orders barring him from acting as he has been alleged to have done, in this court's view, the most that he should have done should have been to maintain the *status quo* of the land pending hearing of the main suit. The plaintiff conduct, if the defendants' claims turn out to be true, would be quite suspicious.

10. If the decree in **Kitale SPMCC No. 14 of 2005** was implemented on the ground as stated by the defendants that would dispose of the plaintiff's preliminary objection regarding limitation.

11. Upon a comprehensive perusal of the file record I find that the issues arising in this application can only be determined upon a full hearing. It is not safe it make any orders on the basis on the evidence on the record which is so scanty. For example the supporting affidavits annexed to the instant application are very brief and they fall short of annexures and explanatory statements in respect the few attached. I have no material before me upon which I can ably apply the test set out in **Giella -vs- Cassman Brown [1973] EA 358**.

12. Consequent to the above observation I dispose of the instant application by issuing the following orders:

**a) The application dated 19/3/2021 is dismissed with no orders as to costs.**

**b) The plaintiff shall comply with the rules and file and serve a consolidated bundle of copies of documents to be relied on in the hearing within 7 days of this order.**

**c) The defendants shall comply with the rules and file and serve a consolidated bundle of copies of documents to be relied on in the hearing within 7 days of the last date on which service of the plaintiff's bundle in (b) above is due, whether that service issues or not.**

**d) The hearing of the main suit shall proceed on 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> May, 2021 commencing at 9.00 a.m. each day and all parties shall bring all their witnesses without fail.**

**e) No other evidentiary documents shall be filed and/or relied on by the parties without prior leave of court.**

**f) There will be a pre-trial conference on 20/5/2021 and the parties are hereby ordered to indicate by notice in writing the documents from their adversaries which they object to before that date with copy to court.**

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 4<sup>th</sup> day of May, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE.**