



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 65 OF 2019**

**JANE CHEPKORIR MARITIM.....PLAINTIFF**

**VERSUS**

**MARY CHEMINDIL MBERIA.....1<sup>ST</sup> DEFENDANT**

**GRAHAM WALIAULA B. SOITA.....2<sup>ND</sup> DEFENDANT**

**CATHERINE WALIAULA KHAINZA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of the application dated 17/1/2019 brought by the plaintiff. It seeks the principal orders which I set out verbatim as hereinbelow:-

(1)...spent

(2) ...spent

(3) That while pending the hearing and determination of this suit, this court be pleased to extend the interlocutory injunction restraining the defendants, their agents or servants or anybody claiming under them from entering, cultivating, planting, undertaking any construction or in any other way whatsoever interfering with the plaintiffs/applicant's user of the land comprised in Title Nos. Trans-Nzoia/Kapkoi/826 and 827.

(4) That in the alternative the court be pleased to order that the *status quo* which prevailed before the institution of the suit, and whereby the plaintiff/applicant has been in sole possession of the land comprised in Title Nos. Trans-Nzoia/Kapkoi/826 and 827, be maintained while pending hearing and determination of the application herein and while pending the hearing and determination of the pending suit.

(5) That the Officer Commanding Kwanza Station, be directed to ensure that the orders made by this court are obeyed.

(6) That costs be provided.

2. The application is brought under Sections 3, 3A and 63 (c) and (e) of the Civil Procedure Act and Order 40 Rule 1, 3 and 4 of the Civil Procedure Rules 2010 and Section 19(3) (i) of the Environment and land Court Act 2011

3. The application is supported by the affidavit of the plaintiff sworn on 17/1/2020. The said affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The grounds upon which the application is premised are as follows: that from 2006 to date, the plaintiff has been in sole possession of the land now comprised in Title Nos. Trans-Nzoia/Kapkoi/826 and 827 and both parcels whereof were subdivided from parcel No. Title No. Trans-Nzoia/Kapkoi/660; that the 1<sup>st</sup> defendant's father namely *Nicholas Mberia* and who was by 2006 a District Commissioner, sold Plot No. 660 to the applicant at Kshs.750,000/= and which was fully paid; that the late *Nicholas Mberia* had obtained the allotment for Plot No. 660 in Kapkoi Settlement Scheme in his daughter's (the 1<sup>st</sup> respondent's) name and he sold the plot on her behalf; that after 2006, the 1<sup>st</sup> respondent has never taken possession of the land that was sold to the applicant and which was comprised in Plot No. 660 in Kapkoi Settlement Scheme; that the 1<sup>st</sup> respondent had at all times promised to process the title for Plot No. 660 in favour of the applicant and even during 2018 she paid to her through the brother *Patrick Kimtai arap Chumba* the sum of Kshs.22,450/=; that instead of processing the title in favour of the applicant, the 1<sup>st</sup> defendant processed the same in her own name and the title for Title Nos. Trans-Nzoia/Kapkoi/660 was issued to her on 20/11/2018; that the 1<sup>st</sup> respondent subdivided parcel No. Trans-Nzoia/Kapkoi/825 and 827 behind the applicant's back

and then transferred parcel **No. 826** to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and title was issued to them on the **15/5/2019**; that the title for parcel **No. 827** was registered in the 1<sup>st</sup> respondent's name; that the applicant has a *prima facie* case with probability of success based on trust; that the applicant would be subjected to irreparable damage if the orders sought are not granted; that the respondents forcefully entered into the land with a surveyor and beacons were put in place on or about **13/01/2020**; that on the **16/1/2020** the 2<sup>nd</sup> and 3<sup>rd</sup> defendants came to parcel **No. 826** with fencing and building materials and unless restrained, they will cultivate and construct houses on the land which she has used since **2006** and thereby evict the applicant during the pendency of this case; that service of the application in the 1<sup>st</sup> instance will defeat the very purpose that the application is meant to protect and that the balance of convenience would also tilt in the applicant's favour since she has always been in possession.

5. In response to the application dated **17/1/2020**, the 2<sup>nd</sup> defendant filed a replying affidavit dated **3/2/2020**. His response is that there is no *prima facie* case; that there is no evidence of ownership on the part of the plaintiff; that the applicant should have sued the estate of Nicholas Mberia if the agreement was made between them; that the property did not belong to Mberia; that there is no risk of irreparable injury; that that the 1<sup>st</sup> respondent and not the plaintiff has been in possession of the land and in any event the plaintiff has not demonstrated evidence of possession; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are only exercising their rights by fencing the property which process can be undone; that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants only own plot no **826**.

**6. Stephen Kamau Iburu** filed supplementary supporting affidavit dated **18/2/2020** in support of the plaintiff's application dated **17/1/2020**. He deponed that he is the owner of the neighbouring parcel no **661** and that sometime in **2006** the plaintiff informed him that the plot comprised in **660** had been sold to her by one Nicholas Mberia and that the plaintiff has been in uninterrupted possession of that parcel from **2006** to **2019**.

7. The applicant filed her submissions on **6/3/2020**. I have gone through the record and found no submissions filed on behalf of the defendants. I have considered the application the response and the submissions filed.

8. The issues that arise from the application are as follows:

*(a) Should the interlocutory injunction restraining the defendants, their agents or servants or anybody claiming under them from entering, cultivating, planting, undertaking any construction or in any other way whatsoever interfering with the plaintiffs/applicant's user of the land comprised in Title Nos. Trans-Nzoia/Kapkoi/826 and 827 or should a status quo order issue?*

*(b) Who should bear the costs of the application?*

9. The issues are addressed as herein under:

*(a) Should the interlocutory injunction restraining the defendants, their agents or servants or anybody claiming under them from entering, cultivating, planting, undertaking any construction or in any other way whatsoever interfering with the plaintiffs/applicant's user of the land comprised in Title Nos. Trans-Nzoia/Kapkoi/826 and 827 or should a status quo order issue?*

10. I have perused the evidence on the record and it is my finding that the plaintiff has a *prima facie* case with a probability of success and that she also demonstrated that she was in possession of the suit land. Though it may be that case that she may not suffer any irreparable damage there is no need to allow the *status quo* to be disturbed while this suit is pending.

11. In my view the order of interim injunction ought to be firmed till the hearing and determination of this suit.

*(b) Who should bear the costs of the application?*

12. The costs of the application shall be in the cause.

## **CONCLUSION**

13. Consequently this court finds that the application dated **7/1/2020** has merit. I grant the same in terms of prayers no **3** and **5** thereof. The costs of the application shall be in the cause.

It is so ordered.

**Dated, signed and delivered at Nairobi via electronic mail on this 29<sup>th</sup> day of May 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**