



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 27 OF 2020**

**ANN WAMBUI MUNA.....PLAINTIFF**

**VERSUS**

**ELIZABETH WACHEKE.....1<sup>ST</sup> DEFENDANT**

**ANNE NJOKI MUNA.....2<sup>ND</sup> DEFENDANT**

**LOICE WANGOI.....3<sup>RD</sup> DEFENDANT**

**PRISCILLA WANGARI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated **29/4/2020** has been brought by the plaintiff who seeks an order of temporary injunction restraining the defendants and their agents from interfering with the suit land pending the hearing and determination of the suit.
2. The plaintiff claims to be the registered owner of the suit land comprised in parcels **Nos. Waitaluk /Kapkoi 11/Gutongorio "B"/70, Waitaluk /Kapkoi 11/Gutongorio 71, Waitaluk /Kapkoi 11/Gutongorio 54 and Waitaluk /Kapkoi 11/Gutongorio "B"/ 58** and has attached copies of title deeds for the subject land parcels to support her claim.
3. The suit lands were transferred to her by her husband **Clement Solomon Munga** who had obtained ownership by transmission from the estate of his late father **Clement Munga Muna** after succession proceedings. A certificate of confirmation of grant is exhibited in the sworn affidavit of the plaintiff in support of the application.
4. Copies of various rulings and orders in various court proceedings have also been exhibited. The deponent states that she has been in quiet use and occupation of the suit lands since **1994** and that on **15/4/2020** the respondents interfered with her said occupation and use, threatened a breach of the peace and destroyed one of the houses thereon without any justifiable cause thus interfering with her maize planting for the year.
5. In her response in the sworn affidavit dated **8/6/2020** filed on behalf of all the defendants the 1<sup>st</sup> defendant states that her parents had **12** children; that her father passed on in **1992** leaving behind a vast estate; that her elder brother grabbed the entire estate thus disinheriting all the defendants on the basis that they are women; that the matter has been through various court cases culminating in the court of **Appeal Nairobi Civil Appeal No. 283 of 2019** which is still pending and which last came up for directions in **May 2020**; that that for the last **28** years the plaintiff has known that the dispute regarding the alleged disinheritance of the females in the family was pending before court and could not have acquired the suit land for valuable consideration; that the transfer of the suit lands to the plaintiff in **2019** was meant to defeat the Appeal; that since the order of **27/5/2020** in this matter the plaintiff has destroyed property on the suit land; that failure to disclose material facts disentitles the plaintiff to the injunction sought; that the defendants are old and unemployed women who have nowhere else to call home and who would be rendered destitute if the orders sought were issued.
6. In a supplementary affidavit filed on **15<sup>th</sup> June 2020**, **Clement Solomon Munga**, the husband to the plaintiff stated that the grant in respect of his late father's estate was obtained legally with no objection from the applicant; that the property of the estate was distributed in accordance with the deceased's written memorandum which was adopted by the court and confirmation was done and a certificate to that effect issued and distribution effected accordingly whereby he inherited the suit properties; that his mother is now deceased; that the defendants have failed in other court proceedings to have the grant annulled; that these proceedings include **Eldoret Misc. Application 193 of 1994** and **Kitale High Court Petition 5 of 2012**, an application in **Nairobi Succession Cause No 857 of 1992** and **Saboti Land Tribunal Dispute 23/94/B**; that though there is an appeal pending there are no injunctive orders issued against the deponent either in the succession cause or in the appeal and that nothing forbade his transfer to the plaintiff; that the properties were purchased by him and are not available for

distribution; that the defendant never contributed in the medical expenses of her father, having relocated to Europe and that attempts at an amicable settlement has been rejected by the 1<sup>st</sup> defendant; that the defendants have land elsewhere which they either inherited from the deceased or obtained from their husbands.

7. The main issue for determination herein is whether the plaintiff deserves the orders of interim injunction sought.

8. The conditions for the grant of an interim injunction were set out in the case of **Giella -vs- Cassman Brown 1973 EA 358**. They are as follows: the applicant must establish that he or she has a prima facie case with a probability of success, that he or she may suffer irreparable damage if the orders sought do not issue and finally, if the court is in doubt it will issue orders on a balance of convenience.

9. Has the plaintiff shown that she has a prima facie case with probability of success?

10. She is the registered proprietor of the land. The defendants have no title to the land. The land was obtained by her husband through transmission and by way of a court process. There are no orders issued restraining the plaintiff from use of the land in the previous litigation. Till they are successfully challenged by way of the legal process, the rights of a registered proprietor of land are protected by the provisions of **Sections 25** of the **Land Registration Act** which provide as follows:

**“25. Rights of a proprietor**

**(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”**

11. The defendants claim that they are dependent on the land for their residential purposes and would be rendered destitute if the orders sought are granted.

12. The plaintiff in the instant suit seeks only one major prayer: an order of **“Permanent injunction against the defendants restraining them from entering, remaining, wasting, carrying out any construction, ploughing, carrying out activities of any nature or in whatever way interfering with the plaintiff’s possession and use of the suit parcels.”**

13. It is clear that the real battle regarding the propriety of the distribution of the estate of the deceased and the substantive rights of the beneficiaries to that estate lies elsewhere and this court has already been informed that an appeal is pending before the court of appeal. In my view the applicant has a prima facie case with probability of success.

14. As to whether the applicant would suffer loss that could not be capable of compensation by way of damages, it is doubtful that this would be the case since the plaintiff has not exhibited sufficient material to demonstrate the nature of the loss to be suffered. Besides she has portrayed the respondents as persons of means.

15. However, the more intricate part of the instant application is that the plaintiff’s claim is that the defendants invaded the land on **15/4/2020** while their response is that they have no other place to live on and they would be rendered destitute if the orders sought issued. In the light of a protracted dispute that has engulfed the suit land, it was upon the plaintiff to prove to the satisfaction of the court that the defendants invaded the land on **14/4/2020** to warrant the grant of the prayers sought. There is nothing to show that the plaintiff’s claim regarding the date of the defendant’s entry on the land is correct. This implies that they may have been on the suit land for quite some time, a fact that is not specifically denied in the supplementary affidavit of the plaintiff’s husband.

16. The issues addressed above must be taken into consideration in conjunction with the nature of the prayers sought in the main suit. A **“permanent injunction against the defendants restraining them from entering, remaining, wasting, carrying out any construction, ploughing, carrying out activities of any nature or in whatever way interfering with the plaintiff’s possession and use of the suit parcels”** is sought in the plaintiff while a temporary injunction seeking to restrain the same activities of the defendants is sought in the application.

17. In this court’s view an order of temporary injunction may have the effect of evicting the defendants from the land before the full hearing of the suit, in which case there may be no need of a hearing. That would amount to a mandatory injunction.

18. In my view orders of interim injunction that would have such a far reaching effect should be granted only in a very limited number of cases.

19. I have earlier stated in this case that the plaintiff has not established on a balance of probabilities that the defendants entered the suit land on **15/4/2020** or that they tried to steal a march on the plaintiff. Any order that may be deemed to be a mandatory injunction against the possessory interest of the defendants at an interlocutory stage would be contrary to the principle laid down in **Locabail International**

**Finance Ltd -vs- Agro Export & Another [1986] ALL ER 901.**

**20.** For the foregoing reasons I find that this court needs decide the instant application on a balance of convenience. Convenience must take into stock the situation on the ground as well as the pendency of an appeal in the Court of Appeal in respect of a ruling issued by the Hon. Justice Muchelule in **Succession Cause No 857 of 1992** regarding the suit land. The balance of convenience lies in favour of ordering that the *status quo* be maintained.

**21.** Consequently, I hereby order that *status quo* obtaining as at the date of the filing of the instant application shall be maintained by all the parties herein till the hearing and determination of this suit.

It is so ordered.

**Dated signed and delivered at Kitale by way of electronic mail on this 30<sup>th</sup> day of June 2020.**

**MWANGI NJOROGI**

**JUDGE, ELC KITALE.**