



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 31 OF 2020

MARY JACKSON MASAI.....PLAINTIFF

VERSUS

JACKSON SIRKEN MASAI AKA JACKSON MASAL.....1ST DEFENDANT

JACKSON MNANGAT YARALIMA.....2ND DEFENDANT

THE COUNTY LAND REGISTRAR, WEST POKOT.....3RD DEFENDANT

RULING

1. The application dated **9/6/2020** and filed in court on **17/7/2020** has been brought by the plaintiff who is seeking the following orders:

a. ...spent

b. That there be a temporary injunction restraining the defendants by themselves, their employees, agents or through any other persons acting on their behalf or authority from trespassing onto, entering, evicting the plaintiff therefrom, cultivating, fencing of, disposing, transferring, harassing the plaintiff in respect of the suit land or any other manner interfering with title number West Pokot Keringet 'A'/370 pending the hearing *inter partes* of this application.

c. That there be a temporary injunction restraining the defendants by themselves, their employees, agents or through any other persons acting on their behalf or authority from trespassing onto, entering, evicting the plaintiff therefrom, cultivating, fencing of, disposing, transferring, harassing the plaintiff in respect of the suit land or any other manner interfering with title number West Pokot Keringet 'A'/370 pending the hearing and determination of the suit herein.

d. The OCS Kapenguria be directed to enforce the orders of injunction.

e. Any other orders the court shall deem fit to grant.

2. The application is brought under **Sections 1A, 1B and 63(e)** of the **Civil Procedure Act, Order 40 Rule 1, 2, 4 and 4** of the **Civil Procedure Rules (2010)**.

3. The application is supported by the affidavit of the plaintiff sworn on **9/7/2020**. The grounds on the face of the application and in the supporting affidavit are that the plaintiff is a spouse to the **1st** defendant and the plaintiff and her children reside and have from time immemorial resided on the suit property; that the **1st** defendant unlawfully withdrew a caution lodged by the plaintiff to stop any disposal of the title; that the **1st** defendant disposed of the said title to the **2nd** defendant irregularly and suspiciously processed the documents of title; that the **3rd** defendant removed the caution and proceeded to issue documents of title to the **2nd** defendant; that the **2nd** defendant has time and again restrained the plaintiff from working on her land and that if evicted or denied access to the suit land the plaintiff and her children will suffer irreparably as they have no other place of abode and source of livelihood.

4. The **1st** defendant filed a replying affidavit dated **3rd June 2020** in opposition to the application. He avers that the plaintiff deserted their matrimonial home in **1995** for Kitalale in Trans Nzoia; that while following necessary procedures, he sold the land to the **2nd** defendant for *personal reasons*; that the **2nd** defendant took possession of the land immediately after he bought it; that spousal consent from the plaintiff was not needed as the **1st** defendant had been living alone and that his son named *Boniface Kiptoo* has no right to interfere with the **2nd** defendant's possession of the suit land.

5. On **10/7/2020**, the 2nd defendant filed a replying affidavit sworn on **3/7/2020**. In that affidavit he denies the averments in the supporting affidavit and depones that he purchased the suit land in **2012** from the 1st defendant which was registered in his name on **29th May 2013** and he is the absolute owner of the suit land and that the plaintiff has no right to interfere with it. He then gives a narrative of his long struggle with the seller's son and another person who allegedly had interest in buying the land.

6. The plaintiff filed her submissions on **14/7/2010**. The 1st and 2nd defendants filed their submissions on **20/7/2020**.

7. I have considered the application the response and the submissions.

Determination

8. The main issues that arise for determination in the instant application are as follows:

a. Whether a temporary injunction should issue restraining the defendants from interfering with the suit land pending the hearing and determination of the suit.

b. What orders should issue?

9. The issues are discussed as herein below.

a. Whether a temporary injunction should issue restraining the defendants from interfering with the suit land pending the hearing and determination of the suit.

10. The 1st defendant does not deny that he did not purchase the suit land for valuable consideration and that the suit land was handed down to him by his father. He does not live on the suit land. He has been residing in Endeless in Trans Nzoia County.

11. The plaintiff does not live on the suit land as well. She alleges that following threats on her life by the 1st defendant she moved away but continued working the land and planted some trees.

12. The 1st defendant admits there was a marriage between him and the plaintiff but avers that the plaintiff deserted him in **1995** and that he sold the suit land to the 2nd defendant in **2012**. The plaintiff alleges that a major incident of interference by the 1st and 2nd defendants occurred in **2019** when her trees growing on the land were destroyed by the 1st and 2nd defendants.

13. The main grievance of the plaintiff is that the caution she had lodged against the title to the suit land was illegally removed when her thumbprint was allegedly forged and subsequently the suit land was sold to the 2nd defendant. The 2nd defendant admits that soon after the land was sold to him the plaintiff's son began resisting the sale in the year **2013** and this caused the local administration and the police to be involved in the matter.

14. Citing the case of **Suleiman Vs Amboseli Resort Ltd 2004 eKLR**, Counsel for the plaintiff urges that the test therein, that is the test of the court opting for the lower risk of injustice while considering an injunction application should be adopted herein. He criticizes the alleged fraud and forgery employed in removing the caution and in transfer of the land to the 2nd defendant without spousal consent. He alleges that the 2nd defendant did not pay the whole purchase price. Citing section **28** of the **Registered Land Act** (now repealed) he submits that though the **RLA** did not provide for spousal consent by the time of the sale, **Section 28** thereof still addressed the issue of existence of trusts with regard to registered land. He also submits that the documents exhibited by the 2nd defendant show that the transaction was carried out in **2013** after new legislation came into place and therefore spousal consent was required for the disposal of the land.

15. It is clear that the plaintiff had some interest in the land which interest can only be connected to her marriage to the 1st defendant which is not denied. If it turns out at the hearing of this suit that spousal consent was a necessity for the legality of the sale to the 2nd defendant, then absence of such spousal consent would vitiate the entire transaction.

16. In the case of **Tolelinyang Lomongoni v Chemoru Tolelinyang [2018] eKLR** the court observed as follows:

“16. In the instant case the defendant lodged the caution against the suit land as a licensee for she is a wife to the plaintiff who, being the registered owner, allowed her to occupy the land in such capacity.

17. A licensee cannot bar the registered proprietor from enjoying the full rights he is otherwise entitled to under title that he holds. However where the licensee is a spouse to the land owner, other additional statutory rights do exist under the Constitution and the law. Article 68 (c) (vi) of the Constitution of Kenya 2010 provides that Parliament shall enact legislation to protect the dependants of deceased persons holding interests in any land including the interests of spouses in actual occupation of land. Article 45 of the Constitution of Kenya 2010 recognizes the family as the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State. This court must have the provisions of the latter clause in mind when dealing with the question of whether lodging of a caution by the spouse is proper and if that caution should be removed.”

17. It must be added that following the enactment of the Constitution of Kenya **2010** there came several other legislations that addressed the issue of matrimonial property such as the **Matrimonial Property Act** and the **Land Act**. The requirement of spousal consent was introduced

by the **Land Act 2012** and the **Land Registration 2012**. The proof of the allegation that the land was transferred to the 2nd defendant in 2013 is therefore a vital issue to be ventilated at the hearing of this case.

18. In the case of the court observed as follows also:

“21. In the case of Simon Kimemia Muthondu -vs- Moses Mugo Maringa [2017] eKLR the court stated as follows:-

“In considering an application for the removal of a caution placed on land which is the subject of a dispute the court will no doubt take into account the circumstances and justification for which the caution was lodged; what interests the person lodging the caution has on the land and what prejudice will be caused to the other party if the caution is removed”.

19. In the light of the above cited passages this court is of the view that the allegation of forgery of the caution withdrawal form does not leave the defendants, especially the 1st and 3rd defendants in a very flattering position. Illegal or irregular removal of a caution is not an issue to be glossed over but which must be fully ventilated at the hearing for it may vitiate the transfer of the suit land to the 2nd defendant. There would be need for the defendants to show at the hearing that the caution was procedurally removed in accordance with the **Land Registration Act 2012**.

20. Besides, other collateral issues such as the alleged irregular procurement of the land control board consent may also affect the propriety of the procedure employed in the sale.

21. In view of the above matters it is the opinion of this court that the plaintiff has established that she has a *prima facie* case.

22. As to whether she may suffer loss that can not be compensated for by way of damages I find that the plaintiff has not established that she may suffer any such loss.

b. What orders should issue?

23. It is necessary to note that at this interlocutory stage of the suit many facts may not have appropriately crystallised to enable the court make fully final conclusions and indeed the court may not make any such conclusions at this juncture. What the decision in **Giella Vs Cassman Brown 1973 EA 358** gives this court is the discretion to rule on an interim injunction application depending on the balance of convenience.

24. Therefore though the plaintiff has not proved the second limb of the test laid down in that case this court finds it necessary to preserve the *status quo* regarding the suit land pending the hearing of this suit.

25. Although the plaintiff has shown some evidence of past possession of the same land, I have found no concrete evidence from the 2nd defendant to the effect that save for fencing, he has taken possession of the land and effected new developments thereon. Consequently the balance of convenience would lie in allowing the application and ordering as follows:

a. Prayer no (c) of the application is granted as prayed.

b. The plaintiff shall have possession of the land but shall in no way substantially alter the nature of the land or commit waste thereon but shall restrict her activities to the growing of annual crops.

c. The parties shall file and serve on each other their clear and legible copies of lists, witness statements, and documents duly bound into booklet form and paginated within 60 days of this order. The plaintiff shall have the first 30 days to do so and the defendant shall respond within 30 days from the last day on which the plaintiff's documents are due.

d. The parties shall attend a mention by teleconference on 12th October 2020 to fix a hearing date for the main suit.

It is so ordered.

Dated, Signed and Delivered via electronic mail at Kitale via electronic mail on this 28th day of July, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE