



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 22 OF 2020

**EUNICE NASIPWONDI MWASI(Suing as Personal Representative of
the Estate of PAUL MONGARE MWASI (DECEASED).....PLAINTIFF**

VERSUS

MARY MORAA MWASI.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

RULING

The Application

1. By a notice of motion dated 25/3/2020 and filed on 26/3/2020 the plaintiff seeks the following orders against the defendants:

1. ...spent

2. ...spent

3. That pending the hearing and determination of this suit this court be pleased to issue a permanent injunction restraining the defendants either by themselves, their servants and/or agents otherwise whosoever claiming under them from entering, taking, up or trespassing, alienating, cultivating, occupying and/or interfering in any way whatsoever with all that parcel of land known as Plot No. 54 and/or 36 now known and described as plot No. Sinyerere/Sitatunga Block 7 Chepkoiyo/230 until further orders of this court.

4. That the orders of this Honourable Court be served upon the Sub County Police Commander Trans Nzoia East Kachibora and OCS Sibanga Police Station directing them to assist the plaintiff and ensure that the defendants/respondents comply with the said orders.

5. That costs of this application be borne by the defendants.

2. The application is brought under **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Section 1(a) and (b) Section 3 and 3A of the Civil Procedure Act**. The application is supported by an affidavit of plaintiff sworn on 25/3/2020.

3. The application is based on the grounds that the 1st defendant has secretly registered herself as the proprietor of all that parcel of land known as **Sinyerere/Sitatunga Block 7 Chepkoiyo/230** and commenced cultivation by force despite the warning from the police and provincial administration; that the 1st defendant has threatened to kill the applicant together with her children if they do not vacate the disputed land; that the 1st defendant has stationed goons around the disputed land; that the situation on the ground is very volatile as given in the certificate filed herein and that the plaintiff stands to suffer irreparable loss and damages.

The Response

4. The 1st defendant filed a replying affidavit dated 29/6/2020 on 2/7/2020. In that affidavit she claims that she is the registered owner of the suit land having purchased it on **13/10/1994** and took possession of the land and she paid for it in two instalments; that she identified the suit property and the plaintiff's late husband helped her to purchase the same by paying **Kshs. 180,000/=**; that she paid **Kshs. 45000** thereafter;

that the deceased instructed her to effect the transfer of the suit property into her name which she did; that she repeatedly charged the said property to the 2nd defendant thereafter; that she had been cultivating the land until the deceased died after which event the plaintiff began claiming the property. She takes issue with the general power of attorney that is said, according to the plaintiff's version, to have granted to one *Paul Kipkorir*, saying that it was not properly executed. She appears to concede that the parties appeared before the local administration but adds that the conflict regarding the suit was never resolved there.

Submissions

5. The plaintiff filed her submissions on **7/7/2020**. The defendant filed her submissions on **9/7/2020**. I have considered the application and the response and the filed submissions.

Determination

6. The issue that arises in the instant application is whether an interim injunction pending the hearing and determination of the suit should issue against the defendants.

7. The conditions for the grant of an interim injunction were set out in the **Case of Giella -vs- Cassman Brown 1973 EA 358** where it was stated that the applicant must first establish that he or she has a *prima facie* case with a probability of success, that he would suffer loss that can not be compensated for by way of damages, and lastly, that in the event of doubt, the court should rule on the application on a balance of convenience.

8. The plaintiff has been acknowledged to be the widow of the deceased Paul Mwasi who is the 1st defendant's son and that the couple had built a home on the suit land. The plaintiff's claim that she and her husband were relying on the services of the 1st defendant to manage the farm on their behalf is in sharp contrast with the 1st defendant's claim that she purchased the land and had been utilizing the same on her own behalf since **1994**. However it is not denied by the 1st defendant that her homestead is located several kilometres from the land. The plaintiff avers that her husband was mostly abroad on duties in his military career and that he had little time to follow up other matters.

9. It is apparent from the record of the proceedings that took place before the County Commissioner that the 1st defendant admitted that the deceased had a claim over the land; however that record is only a part of the documents subject to proof at the trial of the suit.

10. The claim that the plaintiff's husband erected a bungalow on the said land in **2019** has not been controverted by the defendant, who avers that she is the person who authorized the deceased to build a house on the land since the couple did not have a home in the rural area.

11. The allegation that the deceased was buried on the suit land was also not denied.

12. The 1st defendant does not deny that there was damage to various items belonging to the plaintiff which were on the suit land; she only points out in her sworn affidavit that there is no evidence to incriminate her for the deeds of destruction complained of by the plaintiff.

13. The 1st defendant has title and has charged it to the 2nd defendant. The plaintiff has none. The explanation given by the plaintiff for lack thereof is that due to unavailability on the part of the couple caused by their busy careers and distance between their regular residence in Nakuru and Kitale, the deceased had entrusted the process of acquisition of title on his behalf to the 1st defendant and her other children.

14. Both sides claim to have entered into an agreement with the seller of the land. The plaintiff points out that the 1st defendant's copy is undated and alleged it is a forgery; the 1st defendant is silent regarding the plaintiff's agreement.

15. In this court's view both sides in this matter have raised equally strong points and it will take the evidence of both sides at the main hearing of the suit to determine who has legal right to the suit land.

16. The deceased was a career soldier of high rank. Now that the 1st defendant alleges that she purchased the suit land and owns it absolutely, and that she merely granted the deceased a licence to build a rural residence, it appears strange that she, seeing that his son was in need of an upcountry residence, did not deem it fit to accommodate him on her homestead where no such ownership dispute as the current suit could have arisen.

17. Again, if the 1st defendant was comfortably settled on another parcel of land it would require a good explanation at the hearing for the deceased to buy land and have it registered in her name, and then proceed to erect a dwelling thereon for his family.

18. The purported letter to an advocate allegedly authorizing the transfer of the land to the 1st defendant is a double edged sword which, though purportedly used to effect transfer to the 1st defendant, implies that the deceased had power and control over the suit land as well as its disposition and without his consent the suit land could not be disposed of to any person. It has to be proved at the hearing.

19. This court is aware of the provisions of **sections 24 and 26** of the **Land Registration Act**, but where a title is under a challenge it has been held in past decisions that it is not sufficient for the holder thereof to wave it about while stressing its indefeasibility. (See the decision in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**). The court in that case stated as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the

instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

20. That holder is required to prove that it was obtained by legal and rightful means. Proof can only be provided at the hearing.

21. In the circumstances of this case I am satisfied that the plaintiff has established that she has a *prima facie* case with a probability of success.

22. Regarding loss, I find that if an injunction is not issued and the suit land turns out to have been the deceased's his widow may suffer irreparable loss if what she deems as her rural home, to which she may have an attachment, is disposed of in the pendency of the suit. On the other hand the 1st defendant has a home some distance away and she may not suffer any loss that may not be compensated for by way of damages in the event that this court finds that she, after all, has proper title to the suit land. I find this to be a case in which the interests of justice would be served by granting an injunction as sought in order to preserve the subject matter of the suit.

23. Consequently I find that the plaintiff's application dated **25th March 2020** has merit and I grant the same in terms of **Prayer Nos. 3 and 4** thereof. The costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 15th day of July, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.