



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 150 OF 2016

MARY C. KITUR (suing as the administrator of the Estate of

SILAS KIMUGEI KITUR.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF

TRANS-NZOIA.....DEFENFANT

JUDGMENT

1. In the plaint dated **30/9/2016** which was filed on **19/10/2016** the plaintiff seeks the following orders against the defendant:-

(a) declaration that the defendant has no proprietary rights over the suit land Plot No. 293 being a portion of that larger parcel of land known as LR. No. 5777/3 Chepkorok Farm and has no right whatsoever to continue remaining on and/or occupying the same and/or constructing any structures of any nature whatsoever, and/or to interfere with the plaintiff quiet user and possession of the suit land.

(b) An order compelling the defendant to demolish and remove any structures constructed on the suit land being Chepkorok Farm Plot No. 293 being a portion of that larger parcel of land known as LR. No. 5777/3 Chepkorok Farm within 14 days after the judgment of this court in default of which the same be removed by the plaintiff at the defendant's costs.

(c) A permanent injunction restraining the defendant, its agents, servants or any other person claiming through it from encroaching and/or in any manner interfering with the plaintiff's interest over the suit land being Chepkorok Farm Plot No 293 being a portion of that larger parcel of land known as LR. No. 5777/3 Chepkorok Farm.

(d) Costs of this suit and interest.

THE PARTIES PLEADINGS

The Plaintiff's Case

2. According to the plaint the plaintiff is the legitimate owner of **Plot No 293** being a portion of that larger parcel of land known as LR. No. 5777/3 **Chepkorok Farm** measuring **2.0** acres and situate in Sikhendu shopping centre in Trans Nzoia County (the suit land.) In or around March 2016 the defendant without wrongfully invaded the suit land fenced it off and started constructing a market therein without the plaintiff's consent and thus denied the plaintiff the user of the suit land. According to the plaint the plaintiff has never leased or sold the suit land to the defendant and the defendant has never approached the plaintiff with any offer to purchase the land, or advertised its intention to do so. No notice of compulsory acquisition or compensation as required by law has ever been served upon the plaintiff. According to the plaintiff the actions of the defendant amount to unlawful interference with the plaintiff's quiet user and possession of the suit land.

The Defendant's Case

3. The defendant filed its defence dated **6/12/2016** on the **8/12/2016**. It denies the plaintiff's claim. It claims to be a bona fide purchaser of the suit land for value without notice. According to the defendant's defence, the suit land was originally allocated to Sila Kitur, now deceased, who by himself or through his family members parted with the ownership thereof to third parties for valuable consideration, and the plaintiff should therefore direct her claim to those third parties. Thus it was not necessary for it to seek the plaintiff's consent to develop the suit property. It avers that it took possession of the premises in **2014**, erected and completed a permanent market to enhance trade create employment and empower the residents of Sikhendu and the neighbouring wards financially and economically.

4. The plaintiff filed a reply to defence on **17/1/2017** joining issues with the defendant on its defence. She maintains that the defendant forcefully invaded the suit land in **March 2016** and constructed a market without her consent.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

5. The plaintiff testified on **19/7/2017** and adopted her statement filed in the record. She produced the grant of letters of administration over her late husband's estate as **PEXh 1** and its certificate of confirmation as **PEXh 2**. According to her evidence her husband owned plots numbers **51** and **293** in Chepkorok farm. She does not live on either of the two plots. She produced a copy of the area list (**PEXh 3**) which showed her husband's name listed against plot no **51**. She produced a copy of a clearance certificate (**PEXh 4**) showing that she had paid for plots **51 and 293**. She produced two receipts, one dated **29/10/10** for survey fees for plots numbers **51, 293(I)** and **57** and another for clearance certificate fees. It bears plots numbers **51 and 293(I)**.

6. She testified that she and her husband vacated the land after attacks by their neighbours about **10** years ago; that one neighbour sued them and his case was dismissed and a decree (**PEXh 6**) was issued by the court awarding the plaintiff's husband the land which was implemented and a report on implementation was made (**PEXh 7**). David, the neighbour appealed the decision of the court vide **Misc Application No 117 of 2006** and the appeal was dismissed (a look at **PEXh 7** shows that it was not an appeal but a Judicial review Notice of Motion that was struck out in **Misc Appl No 117 Of 2006** on **20/5/2011**.)

7. Even after that court decision and implementation the plaintiff did not utilize the land since the defendant invaded it and built a market and failed to pay her for the land. Copies of receipts dated **4/6/2008**, show that in that year land rates were paid for the Plot 293 by Josiah K Kurgat. Rates invoices addressed to Mary Kituru (which this court assumes is a variant of Mary Kitur, the name of the plaintiff) for the years **2010** and **2011** respectively show that the defendant was still demanding rates payments from the plaintiff for plot no **293** during those years. Photographs show the completed and fenced market built on the suit land by the defendant. The plaintiff averred that she wants the defendant to pay her for use of the land and that the market structures be demolished. In cross examination she denied that the defendant purchased the land from her or from other people. She also called two other witnesses.

The Defendant's Evidence

8. The defendant did not call evidence in this case. After the close of the plaintiff's case the defendant closed its case and the court ordered the parties to file submissions.

Submissions

9. The plaintiff filed submissions on **15/11/2018**. On failure to call evidence, the defendant filed its submissions on **27/11/2018**.
DETERMINATION

Issues for Determination

10. It is not disputed that Silas Kitur the plaintiff's husband was allocated land and the plaintiff is an administrator of her deceased husband's estate.

11. It is also common ground that the defendant is in occupation of the suit land, having built a market and a livestock auctioning facility thereon. It is also the case that the land is not yet registered, and title has not issued.

12. The issues that arise in this suit are as follows:

(a) *Is the suit competent?*

(b) *Whether the defendant rightfully acquired the land by way of purchase and if so, whether the sale to the defendant was capable of transferring interest in the land to the defendant.*

(c) *What orders should issue.*

(a) **Whether the suit is competent**

13. A preliminary issue has to be addressed by this court. When this court sat to write the judgment in this matter it was noticed for the first time that the grant of letters of administration dated **29/11/2004** shows that there are four administrators to the estate of the deceased Silas Kimugei Kitur yet only one of them, Mary C. Kitur the widow of the deceased, has brought this suit as the administrator of the estate of the deceased. All the other 3 administrators were not enjoined as parties. None of the counsel in the matter ever raised this issue.

14. Normally, all administrators should be enjoined in proceedings by or against them unless certain exemptions obtain as provided for in **Order 31 Rule 2 of the Civil Procedure Rules**.

15. In **Joram Kaberia -vs- District Land Adjudication and Settlement Officer Igembe South District & 2 others [2018] eKLR** this court dealt with a similar scenario and stated as follows:

“24. Order 31 Rule 2 of the Civil Procedure Rules provides as follows:

“Joinder of trustees, executors and administrators [Order 31, rule 2.]

“2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator’s will, and trustees, executors, and administrators outside Kenya, need not be made parties.”

“25. It would appear that though the rule provided for joinder of all trustees, executors or administrators to a suit commenced against them, where a suit is commenced by trustees, executors or administrators they must all be enjoined as parties. Several decided cases illustrate this point.

26. In the case of Raffaella Adiyakhiso Ntotoi V Robert Obrian Lenguro [2012] eKLR an objection was raised to an application for an injunction on the basis that the application is fatally defective and both cannot stand as the suit and the application was not filed by both administratrix and the administrator. Makau J, after citing the decision of Ojwang J (as he then was) in the case of The Attorney General-Vs-Kenya School of Flying Ltd Civil Suit 215 of 1999, observed as follows:

“The application cannot stand and as such I find that no prima facie case has been established with probability of success. As the plaintiff’s application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.

The upshot of this application is that the same is found to be incompetent and is struck out with costs to the respondent.”

16. There is no evidence in this case that the other three administrators were either not alive or out of the country. I find that this case has not been properly presented. This is irregular.

17. This suit is incompetent and should be struck out. For this very reason, there is no need to examine the other issues listed hereinabove. I therefore strike out the suit with no orders as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 14th day of **February, 2019.**

MWANGI NJOROGE

JUDGE

14/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

14/2/2019