



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**MISC. APPLICATION NO.344 OF 2016**

**NANCY WANJIRA WAHOME.....PLAINTIFF**

**VERSUS**

**ISSAC ONGERI.....1<sup>ST</sup> DEFENDANT**

**DEFINIDA RAGID ONGERI.....2<sup>ND</sup> DEFENDANT**

**SAMUEL MAIRURA .....3<sup>RD</sup> DEFENDANT**

**RULING**

**(Application to sue as a pauper; need for the court to be persuaded that the applicant has a cause of action; applicant seeking to file suit claiming ownership of certain land in a settlement scheme that she alleges was allotted to her; no allotment letter or any document showing that the said land was allotted to her; doubtful whether in the absence of any documentation it can be said that the applicant has a reasonable cause of action; applicant also guilty of material non-disclosure of facts; application denied).**

1. This application was filed on 7 October 2016 and the applicant seeks orders that she be allowed to sue as a pauper. Although the application is said to be brought pursuant to the provisions of Order L Rule 1 and XXXII Rules, 1, 2 and 8, what is applicable is Order 33 of the Civil Procedure Rules, 2010.

2. Before I go to the applicable law, it is the contention of the applicant that she is the rightful owner of the Plot No. 1099 OI Jorai Settlement Scheme (Olesiria Nursery) having been a beneficiary after the Government started allocating land in the area in the year 1992. She has averred that on 7 April 2010, the intended 1st defendant and his son trespassed into the claimed property, assaulted and raped her, and demolished her home, which led her to move out of the land. In the month of December 2010, she tried to re-enter the land but failed as the intended 2<sup>nd</sup> defendant claimed that she had stolen farm stock and produce, which led the applicant to be charged with theft, but was later acquitted. The applicant has averred that the suit property has now been sold to the intended 3<sup>rd</sup> defendant. In her proposed suit, she wants an order of eviction against the intended defendants and an order that she be registered as proprietor of the property.

3. When the application first came before me, I directed the applicant to file an affidavit elaborating her claim and annexing all requisite documents in support of her proposed suit following the provisions of Order 33 Rule 5 which provides as follows :-

The court shall reject an application for permission to sue as a pauper—

(a) where it is not framed and presented in the manner prescribed in rules 2 and 3;

(b) where the applicant is not a pauper;

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper;

(d) where his allegations do not show a cause of action; or

4. Looking at the application, it is difficult for me to determine with certainty that the applicant is impecunious or that she has disposed of any property fraudulently in order to apply for permission to sue as a pauper. However, I am able to determine from the documents that she has provided, whether she has a reasonable cause of action.

5. In as much as the applicant claims that she was allotted land in Ol Jorai Settlement Scheme, I have not seen any document annexed to the application which would suggest that she was the beneficiary of any allocation. I take judicial notice of the fact that when one is allocated land in a Settlement Scheme, such person is ordinarily issued with an allotment letter. I have not seen any allotment letter. Neither has the applicant annexed any form of a register or letter from the Ministry of Lands and Settlement that prima facie shows that she was truly allocated the land that she now claims.

6. In her supporting affidavit, she has averred that she has tried to seek legal assistance from Kituo Cha Sheria and FIDA. I have not seen any document from FIDA which would suggest that she has been to this institution. I have however seen two letters dated 23 February 2016 and 15 March 2016 written by Kituo Cha Sheria to the Land Registrar, asking for a search of the land that the applicant claims. Clearly, the institution wanted to also assess the veracity of the claims of the applicant. I do not know whether she forwarded a search of the property to this institution or not but it is apparent that the interest of Kituo Cha Sheria waned and I think that it is because she had no document evidencing her ownership of the land.

7. Having assessed the application, I am afraid that I have to reject it for the reason that without documentation, I am not persuaded that the allegations of the applicant demonstrate a cause of action against the proposed defendants.

8. I am also of the view that the applicant does not deserve the orders for being guilty of material non-disclosure. What the applicant wishes for is an order that is in the discretion of the court, and when one approaches the court seeking the court's discretion, such person must approach the court with clean hands and must reveal all material facts. In this instance, the applicant has annexed the proceedings through which the son of the intended 1<sup>st</sup> defendant was charged and found guilty of raping her. What the applicant has not said is that the said son of the 1<sup>st</sup> defendant, one Isaac Onger, preferred an appeal, being Nakuru Criminal Appeal No.329 of 2010, and that appeal was allowed. Ouko J, who dealt with the appeal, was of the view that the applicant fabricated the rape claim so as to settle scores with the persons that she had a land dispute with and he proceeded to set aside the conviction. The applicant has opted not to reveal the fact of this appeal and the acquittal of the said Mr. Onger, and I only came to be aware of this when I was conducting research on other matters. If the applicant thought that it was a material fact to state that the son of the intended 1<sup>st</sup> defendant was charged and found guilty of rape by the trial court, then there is no question that his acquittal on appeal was equally a material fact, and this needed to be disclosed as well. The applicant cannot therefore be said to be honest and candid and I am unable to trust all that she claims in this application.

9. For the foregoing reasons I dismiss this application but without any orders as to costs.

10. For the avoidance of doubt, the applicant is still at liberty to file suit, if she feels that she has a cause of action, but this she will have to do as any other ordinary litigant and not as a pauper.

11. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 7<sup>th</sup> day of February 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Applicant acting in person.

Court Assistant :Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**