



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 3 OF 2019

ISAAC NYAGARA NYAMWAYA (*suing as the Legal Attorney of*

LEAH BOYANI RATEMO KEBASO.....PLAINTIFF

VERSUS

STEPHEN KWEMOI MATUL.....DEFENDANT

RULING

1. The application dated **15th January, 2019** and filed on the same date seek an order of permanent injunction against the defendants, their relatives, servants, agents and/or any other person claiming through them from using in any manner prejudicial to the plaintiff, interfering, blocking and/or barring the plaintiffs, their relatives, servants or agents from ploughing, tilling, occupying, using the disputed land in any manner beneficial to **Leah Boyani Ratemo Kebaso** pending the hearing and determination of this application and the main suit. He also prays for costs of this application be in the cause.
2. The application is brought under **Section 3 and 3A of Civil Procedure Act and Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules**.
3. The application is supported by the sworn affidavit of the plaintiff dated **15/2/2019**. The grounds upon which the application is sought are that the plaintiff/applicant is the registered absolute owner of land parcel **Kwanza/Namanjalala Block 5/119**; that the defendant/respondent without any colour of right since September, 2018, has been trespassing into the plaintiff's parcel with an intention of ploughing; that the defendant has no proprietary rights and that the plaintiff will suffer prejudice at the acts of the respondents.
4. The plaintiff has sued in his capacity as the legal attorney of **Leah Boyani Ratemo Baso**.
5. The defendant opposed the application through his grounds of opposition filed on **23/1/2019** and a replying affidavit of the same date. The gist of his response is that the plaintiff purchased plot No. **Kwanza/Namanjalala Block 5/1019** while the defendant purchased **Kwanza/Namanjalala Block 5/119**; that however the plaintiff illegally acquired title over plot no. **Kwanza/Namanjalala Block 5/119** and thus threatened the defendant's proprietary rights to the land while the plaintiff has never been in possession of the suit land; that the defendant has been in "continuous uninterrupted and quiet possession" of the suit land and that the application 25/1/2019 is therefore overtaken by event.
6. The supplementary affidavit of the applicant sworn on **28/1/2019** and filed on the same date responds to the plaintiff's allegation in the replying affidavit by stating that parcel No **Kwanza/Namanjalala Block 5/119** is registered in the plaintiff's name and she is the rightful and absolute owner therefore whose rights under **Section 25 and 26** of the Land Registration Act cannot be defeated; that the suit land was purchased for valuation consideration and the entire purchase price was paid and the title deed was acquired without any misrepresentation or illegality. Further the respondent caused **Hassan Service**, the seller to be arrested and charged for obtaining money from the respondent by false presence in **Kitale Criminal case No. 4757/2018** and it is apparent that the said Hassan did not have to sell to the respondent; that the respondent is only entitled to a refund of his money and damages from Hassan Kisongoji; that the agreement between the respondent and Hassan Kisongoji is for sale of land larger plot No. 119 which Hassan did not have. Lastly it is averred the land was already developed by the time the respondent purported to buy it and the respondent has never taken possession of the suit land.
7. The further supplementary affidavit of **Sawenja Ronald Walubengo**, the Secretary to the Board of Directors, Trans-Nzoia Investment Company Limited was sworn and filed on 28/1/2019. In summary that affidavit states that Hassan Kisongoji Service is a member of Trans-Nzoia Investments. Company limited; that his share of the land is 2.023 hectares; that Hassan and the plaintiff visited the company offices with copies of the agreement dated 21/9/2017 witnessed by the chief of Namanjalala and another one dated 22/9/2017 witnessed by an advocate; that he checked the area list and noticed that parcel No. 1019 belongs to one Reuben M. Kisongoji and parcel No. 119 was in Hassan's name; that Hassan identified plot No. 119 as one sold to Lenah Boyani and not No. 1019 and that the plaintiff was purchasing the land on her behalf and so his membership should be transferred to her; that subsequently and relying on those documents produced by the two persons the deponent signed all the necessary documents to issuance of title deed to Lenah Boyani Ratemo.

8. The application herein seeks an order of permanent injunction against the defendant pending the hearing and determination of the main suit. The plaintiff seeks a declaration that parcel No. **Kwanza/Namanjalala Block 5/119** belongs to the plaintiff and a permanent injunction do issue against the defendant restraining him from interfering with the suit land.

9. It is not for this court to assume a mistake was made while drafting the application so as to seek an order of permanent at an interlocutory stage that order is similar to one of the order sought in the prayers at the foot of the plaintiff. In my view if it was granted a greater part of the claim will have been determined. Drawing from the court's opinion in **Stephen Kipkebut T/A Riverside Lodge and Rooms v Naftali Ogola [2009] eKLR (Civil Application No 146 of 2008 [UR 93/08])** I find that that order of permanent injunction cannot issue in favour of any of the parties at this interlocutory stage.

10. In the **Stephen Kipkebut Case (supra)** the Court of Appeal stated as follows:

“Referring to the application of those principles this Court in Kenya Airports Authority v Paul Njogu Muigai & 2 Others Civil Application No. NAI. 29/97 (UR) said:

“An order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage. Again referring to the principle in the Shepherd Homes case (supra) as adopted in the case of Locabail International Finance Ltd. v. Agroexport [1986] 1 ALL E.R. 901 Mustil LJ said at page 906:

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case. I feel bound to say that, to my way of thinking, this was not the approach adopted by the judge because, as I understand the position, a specific argument was not directed at the hearing before him to the level of conviction which required to be conveyed to the court before a mandatory injunction could properly be granted.”

11. For that reason I hereby strike out the application dated 15/1/2019 with costs.

Dated, signed and delivered at Kitale on this 27th day of March, 2019.

MWANGI NJOROGE

JUDGE

27/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Onyancha holding brief for Teti for Defendant

Mr. Katina for plaintiff absent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

27/03/2019