



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 111 OF 2018**

JANE CHEPTOO KIGEN.....1<sup>ST</sup> PLAINTIFF

DUNCAN KIGEN KORIR).....2<sup>ND</sup> PLAINTIFF

(Suing as the Legal Administrators of the Estate of the late SAMUEL K.M. KIGEN)

VERSUS

NANCY GAKENYA NYOIKE.....1<sup>ST</sup> DEFENDANT

THE COUNTY LAND REGISTRAR

TRANS-NZOIA COUNTY.....2<sup>ND</sup> DEFENDANT

THE CHIEF LANDS REGISTRAR.....3<sup>RD</sup> DEFENDANT

COMMISSIONER FOR LANDS.....4<sup>TH</sup> DEFENDANT

**RULING**

1. The application dated **13/12/2018** and filed in court on the same date has been brought by the plaintiffs. It seeks the following orders:-

(1) .....spent

(2) .....spent

(3) That the court be pleased to issue an inhibition order inhibiting the respondents from further entries and/or any dealings and/or transfer of the suit plot pending hearing and determination of the application herein inter partes.

(4) That the honourable court do issue an order of temporary injunction restraining the defendants jointly and severally whether by themselves, their agents, servants, employees and or any other persons claiming through them from trespassing, passing on, occupying, cultivating, alienating and/or doing anything to interfere with the plaintiffs quiet possession of the suit plot pending the hearing and determination of the main suit.

(5) That the court be pleased to issue an inhibition order inhibiting the making of further entries and/or any dealings and/or transfer of the suit plot pending hearing and determination of the main suit.

(6) Costs be provided for.

2. The applicant has brought the application pursuant to *Order 51 Rule (1), (4) Order 40 Rule (1) (4) as read with Section 1A, 1B, 3 and 3A of the Civil Procedure Rules.*

3. The grounds upon which the application is made are contained at the foot of the application, the supporting affidavit of the 1<sup>st</sup> applicant dated **13/12/2018** and a supplementary affidavit dated **12/2/2019** also sworn by the 1<sup>st</sup> plaintiff.

4. The grounds are that the applicants are the legal administrators of the estate of the late Samwel K. Kigen who was and still is the lawful owner and/or allottee of **Plot No. Kitale Municipality Block 11/171** situated at Milimani area in Kitale town within Trans-Nzoia County;

that on the **3<sup>rd</sup> December, 1985** the **3<sup>rd</sup>** and **4<sup>th</sup>** defendants did allocate the deceased plot No. **Kitale Municipality Block 11/171** vide a letter of allotment dated **3<sup>rd</sup> December, 1985**; that the deceased paid the requisite charges and took possession of the suit plot and stayed thereon with his family including the applicants until his demise in September, **2017** and his family continued to occupy the same without interruption from any person or persons and more particularly the defendants; that the deceased followed up on the issuance of a certificate of lease in respect thereof but he passed on before he could obtain it; that the **1<sup>st</sup>** defendant without any colour of right has fraudulently acquired a certificate of lease of the suit plot **Kitale Municipality Block 11/171**, which was issued by the **2<sup>nd</sup>**, **3<sup>rd</sup>** and **4<sup>th</sup>** defendants and that the applicants stand to suffer irreparably if the orders being sought are not granted; that attempts by the applicants to have a caution registered over the suit land were unsuccessful as the **3<sup>rd</sup>** respondent is said to have rejected the caution; that the suit premises host the only home that the applicants have ever known since the date of allotment and any eviction as is threatened by the **1<sup>st</sup>** respondent may occasion them irreparable loss and damage.

5. In reply to the application the **1<sup>st</sup>** respondent filed a replying affidavit sworn on **31/1/2019**. In that affidavit the deponent denies the allegations of fraud levelled against her and avers that she was legally and procedurally issued with the title documents in respect of the suit property. It is further deponed that the letter of allotment issued to the plaintiffs is for an unrelated unsurveyed plot only identified as plot No 3, and that the plaintiffs have fraudulently inserted number "171" in the letter of allotment to make it appear as if it is in respect of the plaintiff's plot. Further it is denied that the plaintiffs' husband was ever allocated any land, and that any developments carried out on the parcel of land identified as Kitale Municipality Block 11/171 were conducted illegally. The deponent states that her letter of allotment in respect of the suit land was issued in 1997 and upon accepting the offer and paying the requisite fees the registry index map was formally amended to include the **1<sup>st</sup>** defendant's parcel and the Chief Land Registrar forwarded the lease to the Land Registrar at Kitale for registration which was duly effected. She has exhibited the copy of the lease in respect of the land, the copy of the letter of allotment, a copy of the payment receipt, a copy of the acceptance letter, a copy of a letter from the director of surveys to the Chief Land Registrar forwarding the amended registry index map a copy of a land rent payments request and a rent clearance certificate.

6. In the supplementary affidavit of the **1<sup>st</sup>** applicant it is deponed that acceptance and payment for the suit plot were made by the applicant's husband in **1985** and a surveyor conducted a survey on the plot and a beacon certificate was issued. However she does not state whether the land was issued with number **171** by dint of that survey or the survey commissioned on behalf of the **1<sup>st</sup>** defendant.

7. The plaintiff filed submissions on **14/3/2019** while the **1<sup>st</sup>** defendant filed submissions on **8/3/2019**. I have considered the application and the response and the submissions of the parties.

8. I must consider if the conditions for the grant of a temporary injunction have been established by the applicants. These, as set out in the case of **Giella vs Cassman Brown 1973 EA 358**, are that the applicant must establish a prima facie case and probability of loss that can not be compensated for by way of damages.

9. This is a case in which one party holds the certificate of title to the suit land and the other holds a letter of allotment. I must remind myself the provisions of **Sections 25 and 26** of the **Land Registration Act** which state as follows:

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

**26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

10. The rights of a registered owner are protected by the law as set out above.

11. However it is not lost to the court that this case concerns allegations of fraud and that there appears to have been persons in occupation of the land before the **1<sup>st</sup>** respondent was issued with her title documents.

12. The suit land was government land. There is need to inquire into how the persons in occupation came into possession of the suit land and

to try the issue whether they have any right that may successfully compete with that of a person who has already been issued with title to the suit land. Both letters of allotment are equally old. The applicants claim theirs was issued in 1985 while the 1<sup>st</sup> respondent claims that hers was issued in 1997.

13. In the circumstances given above I am of the view that the applicants have failed to demonstrate that they have a prima facie case against the 1<sup>st</sup> defendant who is a title holder. However as they have erected structures on the said land which even the 1<sup>st</sup> defendant appears to concede, and they claim to have been living on the suit land since the year it was allegedly allocated to the deceased, I find that they would sustain some loss and damage but that it would not amount to loss and damage that can not be compensated for by way of damages.

14. In the circumstances set out above this court finds that the two principal conditions set out in the case of **Giella vs Cassman Brown 1973 EA 358** have not been demonstrated to exist.

15. Nevertheless in a situation where the applicants have constructed on the land and claim to have lived there for decades, I must consider the balance of convenience and in my view the balance of convenience tilts in favour of granting the orders sought pending the hearing and determination of this suit.

16. I therefore dispose of the application dated **13/12/18** by issuing the following orders:

**(1) An order of temporary injunction restraining the defendants jointly and severally whether by themselves, their agents, servants, employees and or any other persons claiming through them from trespassing, passing on, occupying, cultivating, alienating and/or doing anything to interfere with the plaintiffs quiet possession of the suit plot pending the hearing and determination of the main suit.**

**(2) An order of inhibition, inhibiting the making of further entries and/or any dealings and/or transfer of the suit plot pending hearing and determination of the main suit.**

17. The costs of the application shall be in the cause.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of April, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**30/4/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiplagat holding brief for Kipseii for plaintiff/applicant

Mr. Bisonga holding brief for Arunga for 1<sup>st</sup> defendant

Mr. Wabwire for 2<sup>nd</sup> - 4<sup>th</sup> defendants.

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/4/2019**