



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 102 OF 2018**

**CHRISTINA BARABARA MALAKWEN**

**(Suing as legal representative of the Estate of the late**

**RAPHAEL KIPTOO BIEBEL.....PLAINTIFF**

**VERSUS**

**BENJAMIN MWALE ENGAIRO.....1<sup>ST</sup> DEFENDANT**

**TITUS KIPYAB.....2<sup>ND</sup> DEFENDANT**

**LAND ADJUDICATION & SETTLEMENT OFFICER**

**TRANS-NZOIA.....3<sup>RD</sup> DEFENDANT**

**IBRAHIM WAFULA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated **19/3/2019** and filed in court on **20/3/2019** has been brought by the plaintiff. It seeks the following orders:

**(1) ...spent**

**(2) ...spent**

**(3) ...spent**

**(4) That this court be pleased to allow substituted service of the summons to enter appearance, the plaint and its accompanying documents, as well as this application upon the 4<sup>th</sup> respondent/defendant by way of an advertisement in the standards newspaper.**

**(5) That while pending the hearing and determination of this suit herein, this court be pleased to preserve the suit property i.e. Trans-Nzoia/Kipsoen.269 by issuing a temporary injunction to restrain the 1<sup>st</sup> defendant from selling, alienating, charging or in any other manner interfering with the title of the suit property.**

**(6) That the costs be in the cause.**

2. The applicant has brought the application under provisions of **Order 1 Rule 10, Orders 5 Rule 17 Order 8 Rules 3 and 5, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 13 (7) of the Environment and Land Court Act, 2011.**

3. The grounds upon which the application is made are contained at the foot of the application. Those grounds are that it is necessary to enjoin the 4<sup>th</sup> defendant for it is to him that the suit land got transferred to for the first time; that the whereabouts of the 4<sup>th</sup> defendant are completely unknown to the plaintiff and in order to expedite the process there is need to allow substituted service; that there is need for amendment of the plaint, for the purpose of determining the real question in controversy between the parties and that there is need to preserve the suit property while pending the hearing and determination of the suit.

4. When the application was first placed before this court on 21/3/2019 this court certified the application as urgent and allowed the prayer

for joinder of the 4<sup>th</sup> defendant and the amendment of the plaint.

5. Prayer No. 4 was deferred pending the filing of a competent process server's affidavit of service or attempted service and status quo was ordered to be maintained. An affidavit verify the unavailability of the 4<sup>th</sup> defendant was filed 29/4/2019 and upon perusing that sworn affidavit by Peter Kiarie Ndarwa I am content that this is a matter fit for issuance of orders of substituted service as prayed.

6. The last issue to be addressed by this court is whether a temporary injunction should issue to preserve the suit property from any interference by the defendants pending the hearing and determination of this suit.

7. I have considered the basis of the plaintiff's claim which is that the suit property is alleged to have been transferred to the 1<sup>st</sup> defendant while her husband who was the owner thereof was already dead. The affidavit in support of the application annexes no death certificate but there is an express statement at paragraph of the plaint that states the date of death of the plaintiff's husband as 15/1/1972, yet the 1<sup>st</sup> defendant is said to have become the registered owner of the suit land on 28/5/1991, it having been sold to him by the 2<sup>nd</sup> defendant. It is also stated that the alleged sale in 1991 occurred before the issuance of title for the land. The suit land is also said to be the plaintiff's matrimonial home and she denies that the deceased at any time sold the suit land. The particulars of fraud are pleaded at paragraph 17 of the plaint.

8. There is a replying affidavit of the 1<sup>st</sup> defendant filed on 2<sup>nd</sup> defendant filed on 29/4/2019 in which he admits being the absolute proprietor in occupation of the suit land without any interruption since 1991, having acquired it from the 2<sup>nd</sup> defendant and after having followed due process. He states that this suit has been filed after inordinate delay and the equitable relief sought is not merited.

9. The plaintiff filed written submissions on 29/5/2019 while the 1<sup>st</sup> defendant filed on 30/5/2019. I have considered the application and the response including the submissions.

10. The conditions for grant of an order of temporary injunction were laid down in **Giella -vs- Cassman Brown [1973] EA 358** as follows: the applicant must establish a prima facie case with probability of success; he must also demonstrate that he would suffer an injury that would not be capable of being compensated for by way of an award of damages if the order is not granted; lastly, if the court is in doubt it will rule on the application on a balance of probabilities.

11. If the allegation is that the plaintiff's husband died in 1972 and the land was sold in 1991 there appears to be probability of a case to answer on the part of the 1<sup>st</sup> defendant as to how he acquired the land. Similarly in the circumstances the 2<sup>nd</sup> defendant would have to account for his capacity to sell the land the 1<sup>st</sup> defendant.

12. The land is said to have been sold to the 1<sup>st</sup> defendant before title issued. The joinder of the 3<sup>rd</sup> defendant is clear evidence that the Land's office requires to account for the transfer to the 1<sup>st</sup> defendant. In the circumstances I find that the plaintiff has a prima facie with probability of success.

13. As to whether the plaintiff will suffer irreparable loss, I note that for a long duration she has not been in occupation of the suit land. Nevertheless in the face of the fact that she has a prima facie case as observed above her right to the land would be further jeopardized and this litigation protracted and made more complex by any further transfers of the land. Those potential transfers may make the land, in the event that this court finds that her claim is merited, difficult to reach. For that reason this court find it necessary to decide the application on a balance of convenience.

14. I therefore grant **prayer No. 5** of the application dated 19/3/2019. The costs of the application shall be in the cause.

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

**MWANGI NJOROGE**

**JUDGE**

**30/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Ms. Ifedha for Defendants

Ms. Wanyala for Applicant

**COURT**

Ruling read in open court.

**MWANGI NJORGE**

**JUDGE**

**30/7/2019**