



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 102 OF 2014**

**MARK SIKALABO OPICHO.....PLAINTIFF**

**VERSUS**

**WILFRED WAFULA OPICHO.....1<sup>ST</sup> DEFENDANT**

**TIM JUMA OPICHO.....2<sup>ND</sup> DEFENDANT**

**MOHAMMED ABDALA ASELI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is with regard to an application by way of Notice of Motion dated 25/6/2019 brought under *Section 13 (7) 19 of Environment and Land Court Act 2011, Section 68 & 80 of the Land Registration Act*. The defendants/applicants are seeking the following orders:-

**(1) That this application be certified as urgent and service be dispensed with in the first instance.**

**(2) That this court be pleased to order the rectification of the register by directing the Land Registrar Trans-Nzoia County to cancel registration of title deed for LR. No. KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343 in the name of GODFREY MANYENYI SIMATWA.**

**(3) That this court be pleased to make an order inhibiting the transfer and or all transactions generally relating to LR. No. KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343 pending the hearing and determination of this application and the entire suit.**

**(4) That this court be pleased to make an order of restitution of land parcel comprised in LR. No. KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343 to the applicants pending the hearing and determination of this suit.**

**(5) That this court be pleased to issue an order of temporary injunction restraining the plaintiff, its agents, servants or any person acting on his behalf from selling, encroaching, entering, ploughing or in any other way interfering with Plot No. 57 Kolongolo Farmers Co-operative Society pending the hearing and determination of this application and the entire suit.**

**(6) That costs of this application be provided for.**

2. The application is premised on the 1<sup>st</sup> applicant's supporting affidavit sworn on the even date.

3. The grounds relied upon are that the applicants' father **Opicho Naminde** was a shareholder of **Kolongolo Farmers Co-operative Society** who was allocated **Plot No. 57** which was subdivided into 2 portions **Plot No. 1** and **2** wherein the applicants are residing and the subject of this suit; that while this suit was pending the respondent colluded with the officials of Kolongolo Farmers Society and fraudulently transferred part of the suit land to one **Godfrey Manyenyi Simatwa**; that it is an act of bad faith malice, fraud and disrespect to the court to transfer the suit land while this suit is pending before court for determination and that this court has jurisdiction to cancel the said title No. **LR. No. KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343** and the respondent should be restrained by way of injunction from selling the suit land.

4. The respondent filed a replying affidavit sworn on 22/7/2019. In his response he stated that the application is wrongly brought within the suit as the prayers amounts to a substantive suit; that granting the application would amount to condemning some parties unheard; that it is not supported by any evidence; plot **No. 57** never existed and that the plaintiff has not sold land as alleged and there has not been collusion; that the 1<sup>st</sup> applicant is not a party in the suit that the application has been overtaken by events. The plaintiff also avers that there was no

order of stay in respect of the suit land pending the hearing and final disposal of this suit and that the applicants reside not on plot **No. 353** but on another plot.

5. The 1<sup>st</sup> applicant further filed supporting affidavit on 31/7/2019. He deponed that he has resided on the land for over 30 years and exhibited a copy of official search showing that Godfrey Manyenyi Simatwa is the registered owner of the suit land having been so registered and issued with title on **19/3/2018**. He avers that the respondent should have come to equity with clean hands and waited for the judgment of this court before disposing of a part of the suit land. He maintained that Plot No. **KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343** emanates from **Plot No. 57 Kolongolo Farmers Co-operative Society**.

6. I have noted that the purported transfer of the Plot No. (**KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343**) has been effected. It is in the name of **Godfrey Manyenyi Simatwa** who is not a party to this suit and there is no evidence that the said suit land has emanated a subdivision of Plot **No. 57**; there is no green card attached to show that **KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343** emanated from the subdivision of plot **No. 57 - Kolongolo Farmers Co-operative Society**. The applicant should have enjoined the said Godfrey Manyenyi Simatwa in this suit before or contemporaneously with the making of the instant application. I am not inclined to grant the orders sought in the instant application. With regard to prayer No. (5) of the application it is noteworthy that the joint defence dated 23/7/2014 indicates at paragraph 6 that parcel **No. 57 Kolongolo Co-operative Society Ltd** was subdivided into Plots **No. 1** and **2**. All the prayers numbered **(2)** to **(5)** are declined not only for non-joinder of the registered owner of Plot No. **KOLONGOLO/KOLONGOLO BLOCK 4 'C'/343** but also for the reason that they seek a mandatory injunction which can only be granted in very special circumstances. Regarding prayer **No. (5)** it is noteworthy that the defence indicates that plot **No. 57** does not exist anymore, having been subdivided into two and therefore no prayers can issue in respect thereto except when the same are directed to its specific subdivisions or any of them. The application dated **12/6/2019** is hereby dismissed with costs.

**Dated, signed and delivered at Kitale on this 17<sup>th</sup> day of September, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**17/9/2019**

Coram:

Before; Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Chebii for plaintiff/respondent

Mr. Nyakundi for defendant/applicant

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**17/9/2019**