



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 155 OF 2017

ANNE WAMBUI WANJIRU (*suing as the legal*

representative of the estate of PATRICK

MAINA KIMANI).....PLAINTIFF

VERSUS

SELINA NABANGALA MALABA.....DEFENDANT

R U L I N G

1. The application dated 26/9/2017 seeks orders that the defendant and her agents be restrained by a temporary injunction from occupying, constructing, developing, wasting and or further developing or in any other way dealing with the **1 acre** of land on **Kobos Farm Group A1** belonging to the plaintiff pending the hearing and determination of this suit.

2. The plaintiff's ground in that application are that she inherited the land from her husband, and in 2016, she entered into a sale agreement with the defendant for sale of one acre and the defendant has failed to honour the agreement despite having been granted possession of the land. The defendant is said to be erecting structures on the suit property and she has prevented the plaintiff from utilizing her land.

3. According to the plaintiff's supporting affidavit the purchase price was **Kshs.950,000/=** and the defendant only made a part payment of **Kshs.300,000/=** and another one of **Kshs.40,000/=** on separate occasions, leaving a balance of **Kshs.610,000/=** outstanding.

4. The plaintiff avers that it was a term of the agreement that any party in default of any terms of the agreement would compensate the aggrieved party by paying double the amount. She refers to clause 8 of the agreement exhibited in the supporting affidavit. The plaintiff avers that she has demanded the outstanding amount or vacant possession from the defendant in vain hence the suit. She avers that it is unfair for the defendant to continue occupying the land while withholding payment of the balance of purchase price. She now seeks to recover her land and have the defendant evicted.

5. In reply the defendant swore and filed an affidavit dated 13/12/2017. Her defence to the application is principally that after having agreed in a purchase price of **Kshs.800,000/=** for the suit land the price was changed to **Kshs.950,000/=** without her knowledge and that she signed the agreement based on a misrepresentation concerning the purchase price. She also states that she expected succession formalities regarding the deceased former owner's estate to be completed before formal transfer of the land to her, and the plaintiff breached the undertaking to facilitate the transfer. She therefore acknowledges to having withheld the balance of the purchase price out of fear of losing her hard earned money and the land. Her breach, she says, was in response to the plaintiff's breach. She avers that the plaintiff has unclean hands and there is no risk of the suit land being wasted or any irreparable injury which cannot be remedied by an award of damages. She states she would be rendered homeless if the orders sought by the plaintiff are granted.

6. On her part the plaintiff counters the "an eye for an eye" statement by the defendant by stating that it is "common law practice that the transfer documents can only be effected upon payment of full purchase price and not as alleged by the respondent".

7. In my view possession was taken by the defendant after the execution of the agreement by the defendant. There are also mechanisms inbuilt into agreement which address the issue of damages for breach. I do not see any requirement for repossession, though that could well be a remedy, in that agreement. The defendant is said to have her residence on the suit land and in my view she may be disadvantaged by an eviction order at this stage. I am of the view that the plaintiff would not suffer any such damage as would not be compensated for by way of damages if the orders sought do not issue.

Further the orders sought in the application, though couched in another form may constructively lead to eviction of the defendant at an

interlocutory stage while that eviction is also a final order sought in the plaint amongst others. I do not find it proper to grant the prayers as prayed in the application. However, I order that the defendant shall not conduct any further development on the suit land or perform such acts as may cause waste until the hearing and determination of the suit herein. Costs in the cause.

Dated, signed and delivered at Kitale on this 27th day of February, 2018.

MWANGI NJOROGE

JUDGE

27/2/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty/Collins

Mr. Teti for Ngugi for Plaintiff/Applicant

Ms. Mengich (absent) for Defendant

COURT

Ruling read in open Court in the presence of Counsel for the Plaintiff.

MWANGI NJOROGE

JUDGE

27/2/2018