



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 192 OF 2017

1. CAROLYNE CHEPNGETICH

2. BEATRICE JEPKOECH LANGAT

(Suing as Administrators of the Estate of the late

JOHN KIPKORIR ARAP LANGAT).....PLAINTIFFS

VERSUS

ELIJAH MOSS KIPSOI.....DEFENDANT

R U L I N G

1. The application dated 22/12/2017 seeks an order of temporary injunction to restrain the defendant from wasting, selling, leasing, developing or in any manner interfering with the plaintiffs' interest over all that land known as **Saboti/Saboti Block 3/Tiotluget/50** belonging to the Estate of the late **John Kipkorir Arap Langat** pending hearing and determination of the suit.

2. It also seeks a mandatory injunction ordering the defendant to demolish all the structures he has constructed on the suit land within 14 days of the granting of an order by this court to that effect in default of which the plaintiff may demolish the same at the defendant's cost.

3. The applicant has brought the application under **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act and Order 40 Rule 2 and 4(1)** of the **Civil Procedure Rules**. The application is supported by the sworn affidavit of the 1st plaintiff.

4. The grounds upon which the application is brought are that the land belongs to the estate of the deceased; that the plaintiffs are administrators of the estate; that a Confirmation of Grant has been obtained which includes the suit land, and that the defendant trespassed onto the suit land on or about 18/12/2017 and without any consent of the administrators, began constructing a house thereon and ploughing the land. The plaintiff therefore avers that the defendant has no right to be in occupation of the land, and that his actions amount to intermeddling with the deceased's estate, and that he ought to be restrained by an order of this court.

5. The application is opposed. The defendant filed his sworn replying affidavit dated 9/1/2018 on 10/1/2018 stating as follows: That by a sale agreement dated 11/7/2017 the plaintiffs sold him 6 acres of the land for Kshs.3,360,000/= as part of the plaintiffs' entitlement under the grant; that the consideration was paid; that possession was to be taken by the defendant after the 2017 harvest of cereals; that by 18/12/2017 the defendant was legitimately on the suit land; that the plaintiff have concealed material facts from this court in that they knew of the defendant's entry onto the suit land.

6. The replying affidavit was followed by the 2nd plaintiff's further affidavit dated 25/1/2018 which acknowledged that she and a sister not named as party to the suit sold part of their unascertained share in the suit land to the defendant, and that their share was to be ascertained upon full distribution of their deceased father's estate to the respective beneficiaries; that their share, though acknowledged in the Grant, had not been ascertained on the ground; that the defendant acted through an agent in the execution of the agreement and it was understood that the defendant would be shown the portion he was entitled to by the plaintiff and others upon completion of the placement of the beneficiaries in their respective portions on the suit land. Since the defendant was absent at the time, he could not be shown the portion he was purchasing and in any event the sellers' portions had not been identified. The defendant therefore ought to have waited to be shown the portion of land he was purchasing instead of entering an "unknown portion of land", to quote the 2nd defendant. It is averred that the portion that the defendant has invaded is not the one the 2nd plaintiff and her sister Loice, the co-sellers, are set to get from the estate of the deceased. The court observes that the portion they are set to get has not been revealed by the deponent in that affidavit. The defendant's invasion is said to have caused a commotion between the plaintiff, the defendant and other beneficiaries of the estate of John Kipkorir Langat whose portions the defendant has encroached on.

7. It is further the position of the 2nd plaintiff that the defendant's right over an unknown portion has not yet crystallized and the defendant's

remedy lies in the refund of the purchase price and the sellers are ready to refund the buyer.

8. It is alleged that the agreement the defendant relies upon is not legally enforceable and should be cancelled, and in any event, it was breached by the defendant by virtue of the said invasion among other reasons. Subsequent to the filing of this further affidavit the plaintiffs filed an amended plaint in which the matters in the further affidavit were included and in which a prayer cancelling the agreement dated 11/7/2017 was sought. This is an implied concession that material facts had been earlier kept away from the court by the plaintiffs.

9. The defendant filed his submissions on the application on 27/2/2018 and the plaintiff on 6/3/2018. I have considered those submissions. As at the time of the writing of this ruling no defence had been filed to the main suit. Nevertheless the contents of the replying affidavit are indicative of the position the defendant has so far taken on the application and probably the main suit. His action is premised on an agreement. The agreement is admitted by both parties as genuine. The whole consideration under that agreement was paid to the 2nd plaintiff and her sister who were the sellers. One of the conditions in the sale was that vacant possession would be after harvest of standing maize. The agreement is express that the joint vendors are selling a portion of their entitlement as beneficiaries in the deceased's estate.

10. Condition No. 3 states that after succession proceedings are over the vendor together with the administrators shall effect the process of transfer and do all that appertains to the agreement to ensure ownership vests in the purchaser. A curious provision is found in Condition No. 4 which states as follows: - "the land is sold as it is". I do not wish to read any meaning into it at the moment but Condition No. 4 renders it a question for determination which has been raised by the plaintiff, as to whether any portion of land was pointed out to the defendant's agent upon or before the execution of the agreement.

11. Nevertheless, the absence of any specific assertion by the defendant that any land was pointed out or identified to him, and the role of administrators not all who were involved in the sale having been required there may probably be a good reason to challenge the defendant's occupation. I find that there is a prima facie case for determination on the plaintiff's part. The commotion between all the parties is a disadvantageous aspect of the outcome of the transaction between the vendors and the defendant and forms part of the damage that in my view may be irreparably caused in social and familial relations by the defendant's action.

12. I have taken note of the plaintiff's willingness to refund the purchase price to the defendant and in my view, this situation is different from where a plaintiff in the current claimant's shoes objects to an action such as the defendant's and declines to comment on whether they are willing to refund the purchase price. In the circumstances I find it only necessary to issue the following orders:-

(1) Prayer No. 3 of the application dated 22/12/2017 is granted only to the extent that the defendant shall not commit any acts that further change the status quo as at the date of this ruling, pending the hearing and determination of the suit. This order does not affect the normal cultivation of the land for a livelihood by the defendant.

(2) Prayer No. 4 in the application dated 22/12/2017 is hereby denied.

(3) The grant of prayer No. 3 as per paragraph (1) above is conditional upon the payment of the entire sum of Kshs.3,360,000/= being the consideration received by the 2nd plaintiff and her co-vendor, into an interest bearing joint account opened in the names of the Advocates for both the plaintiffs and the defendant in this suit.

(4) The sum mentioned in paragraph (3) above shall be paid into the said joint account of the parties' counsel within 14 days of this order in default of which the order shall lapse automatically on the expiry of the 14 days period.

Dated, signed and delivered at Kitale on this 23rd day of April, 2018.

MWANGI NJOROGE

JUDGE

23/4/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Plaintiffs/Applicants

N/A for the Defendant/Respondents

COURT

Ruling read in open court in the absence of parties who had been notified.

MWANGI NJOROGE

JUDGE

23/4/2018