



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 163 OF 2017**

**ERICK LIGEVE LAGOSWA (*suing as the Administrator*)**

***of the Estate of JAPHETH AYEKA LAGOSWA*.....PLAINTIFF**

**VERSUS**

**EVERLYNE JEPTOO AGUI.....1<sup>ST</sup> DEFENDANT**

**ELIAS KOSKEI MOSOP.....2<sup>ND</sup> DEFENDANT**

**JAMES TALAM.....3<sup>RD</sup> DEFENDANT**

**SAMWEL BACHARI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated 11/10/2017 seeks an order of temporary injunction to restrain the defendants from in any manner interfering with the plaintiff's quiet possession of **5 acres** occupied by and belonging to the plaintiff out of **LR No. 614/5 Sinendet Farm** pending the hearing and determination of this suit.

2. The application is supported by the sworn affidavit of the plaintiff dated 11/10/2017. The grounds upon which the application is sought are that the plaintiff purchased the 5 acres, lives thereon, has developed that portion and, besides, has been in peaceful, quiet, uninterrupted possession thereof since the year 2005. Now the defendants are said to be trespassers on the land, ploughing, planting and putting up structures thereon and threatening to evict the plaintiff. The plaintiff avers that his residence in his home and his family's livelihood are now threatened by the defendant's actions.

3. The plaintiff has sued in his capacity as the Administrator of the Estate of his late father who bought the 5 acres from one John Kipkoech Mutai. The latter sold the plaintiff's father land that was said to be apportion of his share as a beneficiary of the Estate of his father one Isaiah Busienei, also deceased and the 1<sup>st</sup> defendant witnessed the sale agreement by signing. However despite undertakings by the vendor to have the land transferred to the plaintiff's father, that never happened. The plaintiff avers he was placed on the land by his father in the year 2005 after the purchase. Now the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants claim that they have been sold the same land by the 1<sup>st</sup> defendant.

4. The supplementary affidavit of John Kipkoech Mutai the seller, sworn on 7/11/2017 confirms that he sold the land to the applicant's father. However he avers that there was opposition to the sale from his siblings on the basis that he was not an administrator and that he is considering buying the plaintiff's family land elsewhere or a refund of the purchase price. He avers that the plaintiff has invaded the 1<sup>st</sup> defendant's land and he should desist from that action.

5. The 1<sup>st</sup> defendant filed her sworn affidavit dated 7/11/2017 in opposition to the motion. Her main grounds are that the Estate is yet to be distributed fully; that she has temporarily been granted 60 acres out of LR No. 6614/5, part of which she had leased to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. She accuses the plaintiff of invading her land and concealing material facts from this court. It is also her position that the plaintiff does not have legal authority to institute these proceedings and that the sale to the plaintiff's father was by a person who has no authority.

6. In a further response to the 1<sup>st</sup> defendant's affidavit the plaintiff vide an affidavit dated 20/11/2017 points out his house in one of the photographs exhibited in the 1<sup>st</sup> defendant's replying affidavit. It looks fairly old. The 1<sup>st</sup> defendant has not stated when the plaintiff invaded the land as alleged. Neither has John Mutai the admitted seller. The plaintiff exhibits a Certificate of Confirmation of Grant in respect of his late father's estate in which his share is said to be Title No. 614/5 which he states refers to the 5 acre portion his father purchased from John Mutai. He also disputes the signature on the supplementary affidavit said to have been sworn by John Mutai on 7/11/2017 which I have addressed above.

7. I have considered the application, the supporting affidavits, the replying affidavits and the filed submissions of the parties. Counsel for the plaintiff cites the case of *Jan Bolden Nielsen -vs- Herman Phillipus Steyn & 2 Others [2012] eKLR* for the proposition that the court should take whichever course appears to carry the lower risk of injustice if it should turn out that it was wrong.

8. On their part the defendants aver that the agreement between the plaintiff's father and John Koech was illegal from the beginning. They rely on the case of *Evans Obino Nyamoss -vs- Ndege Okangi, Kisumu Civil Appeal No. 32 of 1998* from this proposition, they also state that the agreement is null and void for want of consent. However, in my view the issue here is whether the applicant/plaintiff has established a prima facie case. The agreement between his father and John Koech having been admitted, the next question for this court to address is when the plaintiff took possession. From the defendants evasive responsive that event did not occur recently. The structure on the defendant's photographs that the plaintiff claims to be his, which has not been controverted, does not look new to me. He has therefore been on the land for some time and this court requires to investigate further the circumstances surrounding his presence there including consents and authority which should be only done through a hearing. In this case where the sale agreement is admitted, the Certificates of Confirmation of Grant demonstrates that both John Mutai and the 1<sup>st</sup> defendant have entitlements under the Grant of Letters in respect of their deceased father and father-in-law's estate respectively. In effect the plaintiff has established that he has a prima facie case with a probability of success.

9. The next issue is whether the plaintiff may suffer irreparable damage if the orders sought do not issue. In my view, one does not have to have a skyscraper on the land for them to establish that they would suffer irreparable damage. Other circumstances matter too. The premises in dispute are said to be the home the plaintiff and his family have resided on since 2005 when he alleges to have taken possession. For that reason, the court finds that first, great inconvenience may be occasioned by any eviction as that is said, and incontroverted that allegation is, to be the plaintiff and his family's source of livelihood. In my view there would be loss that cannot be compensated by way of damages if the orders do not issue.

10. In the event that I am wrong, the third principle in the case of *Giella -vs- Cassman Brown 1973, EA 358* permits this court to rule on the balance of convenience. In this case the sale agreement is admitted. The Certificates of Confirmation of Grant demonstrates that both John Mutai and the 1<sup>st</sup> defendant have entitlements under the Grant of Letters in respect of their deceased father and father-in-law's estate respectively. I find that the balance of convenience lies in preserving the suit premises as they are.

11. The application dated 11/10/2017 is therefore merited. I grant **prayers Nos. 3, 4 and 5** thereof.

**Dated, signed and delivered at Kitale on this 23<sup>rd</sup> day of April, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**23/4/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for Applicant

N/A for Respondent

**COURT**

Ruling read in open court in the absence of parties who had notice of this date.

**MWANGI NJOROGE**

**JUDGE**

**23/4/2018**