



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 12 OF 2018

DOREEN WANYAMA PLAINTIFF

VERSUS

TITUS WEKESA LWIKI 1ST DEFENDANT

PETER WEKESA LWIKI 2ND DEFENDANT

GEORGE LWIKI 3RD DEFENDANT

REUBEN KHISA LWIKI 4TH DEFENDANT

RULING

1. The application dated 7/2/2018 seeks that the defendants and their agents be restrained by an order of temporary injunction from trespassing, ploughing, accessing, transforming or in any other way dealing with the plaintiff's possession use and/or occupation of suit land namely, **Saboti/Saboti/Block 8/Siboti/267** pending the hearing and determination of this suit.

2. The grounds on which the said application is based are on the face of the application and also on the supporting affidavit sworn by the plaintiff on 7/2/2018 and her further affidavit dated 13th March 2018. The plaintiff's case is that she is the legal owner of that parcel of land known as **Saboti/Saboti Block 8/Siboti /267**; that the land is part of the estate of the plaintiff's deceased husband; that the defendants have without any colour of right unlawfully trespassed onto the said land; that the plaintiff stands to suffer irreparable harm if the orders sought are not issued.

3. The defendants responded to the application vide grounds of opposition dated **12th March 2018** and the replying affidavit of **Titus Wekesa Lwiki** dated **21st March 2018**. He deposes that the plaintiff's husband was brother to all the defendants; that the defendants are in occupation of in the suit property by right having contributed to the purchase of the same; that the land was however registered in the name of the plaintiff's husband; that it is family land; that the plaintiff got married into the family after the land had been purchased; that the land is therefore held in trust for the family by the plaintiff' that they have stayed thereon since 1962 and utilized it as their only land; that the plaintiff got herself registered over the suit land clandestinely and by way of fraud; that an application for revocation of grant of letters of administration issued to the plaintiff has been made and that the plaintiff holds the title subject to other encumbrances that need not be noted on the title; and that the plaintiff has never been in possession of the suit land having remarried twice to different men after her husband died; and thus cannot be prejudiced if the orders sought are not granted.

4. In her further affidavit dated 11th April 2018, the plaintiff deposes that the defendant's father bought plot No. **387** while her late husband bought plot No. **386** without any help from the family and that the defendants demolished the house that the deceased left behind; that she has been utilizing the suit land by carrying out farming activities including in the years 2016 and 2017 and that the defendants are only bent on disinheriting her. She avers that the houses whose photographs the defendants have exhibited are constructed on land that was purchased by their father and not on the suit land. She avers that the receipts exhibited are also in respect of the land that was purchased by the defendant's father. She urges that the children of the deceased are entitled to their deceased father's estate.

5. The issues for determination are as follows:-

- (i) **Whether the plaintiff has established a prima facie case with probability of success;**
- (ii) **Whether the plaintiff would suffer irreparable harm if the orders sought are not granted.**
- (iii) **What is the balance of convenience?**

6. To begin with the plaintiff has demonstrated that she is the administrator of the estate of her deceased husband and that she has already been registered as the proprietor of the suit land by way of transmission. Though allegations of fraud have been raised it is not proper and indeed possible to determine the veracity of the fraud claims at this interlocutory stage because proof thereof can only be given by way of evidence at the hearing of the main suit.

7. An examination of the documents exhibited in the defendant's replying affidavit shows that the receipts seen a number of them especially those that are in the name "Wekesa Lwiki," bear the number 387 which this court assumes to refer to the plot that the plaintiff insists that the defendant's father bought while the rates payments receipts refer to an entirely different Land Reference Number. The other receipts do not refer to any number at all.

8. At the moment I find that the documents the plaintiff has shown have demonstrated that she has a *prima facie* case with a probability of success.

9. The second question is if she would suffer irreparable loss and damage if the orders sought were not granted.

10. In this regard this court notes that it cannot ascertain from the documents on the record if the defendants are resident on the land though the plaintiff insists that they are not. The plaintiff also insists that she has been farming on the suit land including in the years 2016 and 2017.

11. Since the rights of a registered proprietor are protected by law the rights of the plaintiff must be upheld. **Section 24** of the Land Registration Act states as follows:

"Subject to this Act-

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

12. **Section 25** of the Land Registration Act states as follows:-

"(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

13. For now, the defendants have not demonstrated that any of the matters mentioned in **Section 25** which would inhibit the absolute enjoyment of the proprietary rights of the plaintiff in respect of the suit land exist. It is only proper then for this court to abide by the position that the plaintiff is the absolute registered owner of the land subject of course to the rights of the issues of her marriage with the deceased.

14. Therefore I find that the plaintiff should enjoy all the rights to the land as stipulated in **Section 24** of the Act. Besides, the defendants are not bereft of any family land to utilize as it has been demonstrated by way of ample evidence that their father had purchased some land. In the end I find that the plaintiff has established that she deserves the orders sought in her application.

15. For this reason I find that the defendants should be enjoined from interfering with the plaintiff's full enjoyment of the suit land.

16. I therefore grant prayer No. 2 of the plaintiff's application dated 7/2/2018 to the extent that the defendants jointly and severally shall not trespass, plough, access, transform or in any other way deal with the plaintiff's possession use and/or occupation of suit land of **1.256 Ha** comprised in **Saboti/Saboti/Block 8/Siboti/267** pending the hearing and determination of this suit.

The costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of May, 2018.

MWANGI NJOROGE

JUDGE

31/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Plaintiffs

N/A for the Defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

31/5/2018