



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 39 OF 2018**

**MARY NAKHUMICHA CHEMIATI.....PLAINTIFF/APPLICANT**

**VERSUS**

**JULIUS CHEMKENEYI KORING'URA.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. By an application dated 11/4/2018 the plaintiff/applicant sought the following orders:-

**“(1) That application be certified as urgent and service thereof be dispensed with and be heard ex-parte in the first instance.**

**(2) That a temporary injunction be issued restraining the defendant either by himself or through his agents, servants, employees, assigns, representatives or any person claiming through him from encroaching, trespassing, entering or interfering in any manner whatsoever with the plaintiff’s quiet possession or occupation and use and from digging, ploughing or planting or dealing in any other manner otherwise wasting any part of parcel of land known as Trans-Nzoia/Zea/825 pending the hearing and determination of this application.**

**(3) That a temporary injunction be issued restraining the defendant either by himself or through his agents, servants, employees, assigns, representatives or any person claiming through him from encroaching, trespassing, entering or interfering in any manner whatsoever with the plaintiff’s quiet possession or occupation and use and from digging, ploughing or planting or dealing in any other manner otherwise wasting any part of parcel of land known as Trans-Nzoia/Zea/825 pending the hearing and determination of this suit.**

**(4) Costs of this application be provided for”.**

2. and 63 (e) of the Civil Procedure Act. The grounds on which the said application is made are as follows:-

**“(1) The plaintiff is the bona fide absolute owner of parcel of land title number Trans-Nzoia/Zea/825, the suit property.**

**(2) The defendant/respondent has wrongfully entered and taken possession of the land and has thereafter wrongfully started cultivating it as a consequence whereof, the plaintiff/applicant is suffering loss and damage.**

**(3) That if the defendant/respondent continues with the wrongful entry and occupation of the suit property, it is likely to be misused, damaged, wasted, destroyed and/or degraded.**

**(4) The defendant/respondent threatens and intend, unless restrained by this court, to continue with his actions on the land.**

**(5) The defendant/respondent has no interest or claim whatsoever in the land to warrant his trespassing or utilization or working thereon.**

**(6) The defendant/respondent has no right or justification whatsoever to enter and remain on the parcel of land”.**

3. The application is supported by the affidavit of the applicant which reiterates what is contained in the grounds.

4. In reply to the application the defendant/respondent filed a replying affidavit dated 21/5/2018 which was filed on 28/5/2018. In that affidavit the respondent admits that the plaintiff is the registered owner of parcel no. Trans-Nzoia/Zea/825 but avers that the title to the land was obtained irregularly by the plaintiff. He denies trespassing on the disputed land and avers that the land is sandwiched ‘in’ his own land which he is on possession of. He avers that he has erected structures on the suit land and that he is in possession thereof. He denies ever

wrongfully taking possession of the suit land and avers that it was irregularly carved out of Plot Zea No.1 (formerly ADC Kapsitwet farm). He exhibits the photographs of the developments of the farm which include a health cabbage crop and a corrugated iron sheet house and a fence. There was no reply to his averments contained in the replying affidavit and it is my finding therefore that he is already in possession of the disputed land. Though the applicant has sworn an affidavit stating that she has a prima facie case that she would suffer irreparable loss and that she is ready to compensate the respondent in the event this court finds that the grant of an order of injunction is not merited, this court is reluctant to issue an order which will amount to a mandatory injunction before the hearing of the suit on its merits especially where possession by the defendant is not denied. There is a long line of decided cases which emphasize that a mandatory injunction is given in a limited number of cases especially where the respondent's conduct can be deemed to be an attempt to steal a march on the applicant (see the *Locabail International Finance Ltd -vs- Agro Export & Another [1986] ALL ER 901* and *Beatrice Ngina Mwai & Another -vs- Gichine Mwai & Another [2010] eKLR*).

5. For that reason I am not inclined to issue any order that might amount to a mandatory injunction that might affect the right of possession currently being enjoyed by the defendant. The application dated **11/4/2018** therefore has no merit and I hereby dismiss it with costs. I also order as follows:-

- (1) The plaintiff shall file her trial bundle duly bound, indexed and paginated which shall include all the documents she intend to produce in evidence at the hearing, her list of witnesses and her witness statements within 21 days of this order.**
- (2) The defendant shall likewise respond by filing his trial bundle within 14 days of being served.**
- (3) This suit shall be allocated a hearing in the month of December, 2018 and the parties shall be ready to proceed with the hearing of the suit on a day to day basis when it commences.**
- (4) The costs of the application shall be in the cause.**
- (5) Upon the plaintiff's failure to comply with any of the orders made hereinabove or with the timelines provided this suit shall stand automatically dismissed.**

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of July, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**30/7/2018**

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Collins

Mr. Ingosi for plaintiff

N/A for defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/7/2018**