



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 12 OF 2018

DOREEN WANYAMA.....PLAINTIFF/APPLICANT

VERSUS

TITUS WEKESA LWIKI.....1ST DEFENDANT/RESPONDENT

PETER WEKESA LWIKI.....2ND DEFENDANT/RESPONDENT

GEORGE K. LWIKI.....3RD DEFENDANT/RESPONDENT

REUBEN KHISA LWIKI.....4TH DEFENDANT/RESPONDENT

RULING

1. The applicant brought an application dated **6/6/2018** seeking the following orders:-

(a) That this application be certified as urgent and service be dispensed with in the first instance;

(b) That there be stay of execution of the ruling and subsequent order of this honourable court made on 31st May, 2018 pending the hearing and determination of this application *inter partes*.

(c) That this honourable court be pleased to review and/or set aside its ruling delivered on 31st May, 2018 and all and subsequent order (s) thereto and/or substitute the said same with an order maintaining the status quo or as this court may deem fit.

(d) That costs of this application be in cause.

2. The application is based on the grounds set out at the foot of the notice of motion as follows:-

(1) A ruling was delivered herein 31st May, 2018 and an injunction issued restraining the defendants/respondents jointly and severally from trespassing, ploughing, accessing, transforming or in any other way dealing and/or interfering with the plaintiff's possession use and/or occupation of suit land of 1.2 Ha Saboti/Saboti Block 8/Saboti/267 pending the hearing and determination of this suit.

(2) In making the said order the court made an error on the face of the record as it erroneously overlooked the evidence of defences' houses on the suit land. The defendants are in actual possession and use of the suit land having resided thereon since the year 1962 hence the said order amount to evicting the defendants from the suit land at an interim stage without affording them a hearing contrary to rules of natural justice and Article 50 of the Constitution.

(3) perusal of the ruling of this court delivered on 31/5/2018 clearly reveals that there is an error apparent on the face of the record as the court overlooked the evidence on record which shows that the defendants are in actual possession of the suit land and they live thereon and that the plaintiff has never been in possession of the suit land.

(4) Further the court made an error when it overlooked the fact that the title deed upon which the plaintiff claims ownership of the suit land is under attack through a Succession Cause No. 61 of 2003. Hence there is a pending application in the High Court for revocation of the grant and certificate of confirmation of grant.

(5) The plaintiff is not in possession of the suit land and she has never been in possession since the year 1996 when she got re-married elsewhere.

(6) Court orders are never issued in vain and court orders are never meant to place undue hardship on and/or to punish parties.

(7) That there is danger of the applicant being in contempt of the said order of this court for non-compliance as the said order cannot be complied with.

3. The applicant has brought the application under *Sections 1A, 1B, 3, 3A and 63(e)* and *80* of the *Civil Procedure Act, Order 45 Rule 1* and *Order 51 Rule 1 of the Civil Procedure Rules, Article 50* and *259 of the Constitution of Kenya 2010*. The application is supported by the sworn affidavit of the plaintiff.

4. I have examined the allegations and the counter- allegations of the parties and I have found it necessary to make the following tentative orders before the final ruling on the application mentioned above in this matter is finally made:

(a) The County Surveyor shall visit the suit land in the company of the plaintiff and the defendants who shall be served with due notice of such visit to enable them attend.

(b) The county surveyor shall establish the boundaries of the suit land and also prepare and submit a report stating his findings as to which parcel the defendants have built their dwellings on in which currently reside.

(c) The defendants shall bear the costs of the county surveyor for the exercise in any event.

Dated, signed and delivered at Kitale on this 11th day of October, 2018.

MWANGI NJOROGE

JUDGE

11/10/2018

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Plaintiff in person present

N/A for the defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

11/10/2018