



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 14 OF 2017**

**MOSES THUKU MWANGI.....1<sup>ST</sup> PLAINTIFF**

**TABARNO BUSIENEI *alias***

**JEPKIMO BUSIENEI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WILLIAM KIPKOSKEI SEREM.....DEFENDANT**

**R U L I N G**

The applicant brought an application dated 2<sup>nd</sup> February, 2017 seeking the following orders:-

- 1. That this application be certified urgent and that service be dispensed with the 1<sup>st</sup> instance (sic).**
- 2. That while pending the *interpartes* hearing and determination of this application a temporary injunction be issued to restrain the defendant from taking possession, selling, charging or in any other way interfere with the land comprised in Title No. Trans-Nzoia/Sinyerere/36.**
- 3. That upon *interpartes* hearing the injunction order be confirmed, while pending the hearing and determination of the suit herein.**
- 4. That the costs of this application be provided.**

When this matter first came before court on 2/2/2017 the court issued an interim injunction pending the hearing of the application *interpartes* on 14/2/2017. On 14/2/2017 Mr. Kiarie for the applicant sought two weeks to enable him serve the respondent. On 2/3/2017 when the application came up for hearing *interpartes* Mr. Chebii sought an adjournment on behalf of Mr. Chemwok which was granted. At the next hearing date the plaintiff was present but his advocate was absent. The matter was placed aside. The court waited for the plaintiff's advocate till 11.20 a.m. but he never appeared and the hearing proceeded.

Mr. Kiarie for the applicant submitted that there was a judgement of this court issued on 6/10/2014 in **HCCC. No. 119/2012**, in which the present plaintiffs were the plaintiffs and one Susan Kiprono was the defendant; that there was a Power of Attorney donated to the present defendant by the said Susan Kiprono; that the current defendant gave evidence in that suit on behalf of the defendant therein; that he was present when the judgement in the case was delivered; that the judgement of the court had the effect of cancelling the registration of Susan Kiprono as proprietor of land comprised in **Title No. Trans-Nzoia/Sinyerere/36**; that the judgement the court ordered that **10 acres and 11 acres** be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff respectively; that this court has earlier on refused an application for stay of execution of the judgement .

Mr. Kiarie submitted that after the said judgement, the defendant herein, without revealing that the title registered in Susan Kiprono's name in respect of **Title No. Trans-Nzoia/Sinyerere/36** had been cancelled, obtained a grant of Letters of Administration to the Estate of Susan Kiprono after her demise. He subsequently had the Grant confirmed and the land transferred to him. All along, the plaintiffs herein had been in possession of the land and Susan Kiprono had never been on the land. Therefore, it was submitted, the interference of the defendant with the land may defeat the judgement of this court in **HCCC. No. 119/2012** and the applicants herein may suffer irreparable damage.

The judgement of the court in **HCCC. No. 119/2012 - Kitale** Tabarno Busienei and Moses Thuku Mwangi -vs- Susan Kiprono is exhibited as exhibit "MTM1" in the supporting affidavit of Moses Thuku Mwangi. It is the correct position that the registration of the land in the name of

Susan Kiprono was cancelled and that it was ordered that 11 acres thereof be registered in the name of the 1<sup>st</sup> plaintiff and 10 acres be registered in the name of the 2<sup>nd</sup> plaintiff. The defendant was enjoined permanently from interfering with the plaintiffs' parcels. The defendants' counterclaim in that suit was dismissed.

Even in the absence of any submission by counsel for the defendant, this court has perused the replying affidavit filed by the defendant on 14/3/2017. The defendant avers that due process of the law was followed in his registration as owner by way of transmission upon his mother's demise. He seems to place great emphasis on the fact that the **High Court in Kitale Succession Cause No. 237/2009** rejected the objection proceedings of the plaintiffs herein. He does not annex the proceedings or final decision of the **High Court in Kitale Succession Cause No. 237 of 2009**. He also speaks of another case, **Succession Cause No. 26 of 2016 - Eldoret** in which he obtained a Grant of Letters of Administration over the Estate of Susan Kiprono. He avers that he obtained the grant on 18/8/2016 and the court confirmed the same on 18/10/2016 and that he obtained title to the land subject matter herein on 24/10/2016 by way of transmission using the said Grant.

Rather than cast doubts on the plaintiffs' case the defendant confirms it by way of his averments in the replying affidavit. The plaintiffs' case is that despite their rights being clarified in the judgement in **Kitale HCC. No. 119/2012**, the defendant has fraudulently conducted himself in that he obtained registration of the land in his name in order to defeat the import and purposes of that judgement.

It is true that the judgement has not been set aside or stayed by any court; The nature of orders sought in the plaint in this case shows that this court risks re-hearing the matters that were raised in **Kitale HCCC. No. 119/2012**, and it is proper to state that judicial time should be applied to better use.

It must be clear from the foregoing that the plaintiffs have established a prima facie case against the defendant. The first limb of the test in the celebrated case of **Giella -vs- Cassman Brown** is now satisfied. However, am also of the view that the disposal of the land subject matter of the suit by the defendant may occasion the plaintiffs irreparable damage.

In the circumstances the prayer for injunction is merited. I hereby grant **prayer number 3** in the application dated 2<sup>nd</sup> February, 2017.

The costs of the application shall in any even be borne by the defendant.

Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of **April, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**In the presence of:**

**Mr. Kiarie for the Applicant**

**Mr. Chemwok for Respondent absent**

**Respondent present in person**

**Court Assistant - Isabellah.**

**MWANGI NJOROGE**

**JUDGE**

**3/4/2017**