



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 47 OF 2017

R T S.....PLAINTIFF

VERSUS

I M S.....DEFENDANT

R U L I N G

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R U L I N G

1. The plaintiff in this suit brought an application dated 15/3/2017 seeking the following orders:-

- a. That this matter (sic) be certified urgent and same (sic) be heard *ex parte* in the first instance.
- b. That a temporary injunction be issued restraining the defendant/respondent, his servants, assignees, representatives, and/or agents from trespassing upon, utilizing, ploughing, planting and/or in any other way whatsoever from interfering with Land Parcel Plot [Particulars Withheld], and [Particulars Withheld], Settlement Scheme, within Trans-Nzoia County pending hearing and determination of this suit.
- c. That pending hearing and determination of this application *inter partes*, prayer No. 2 be granted in the interim.
- d. Costs be provided for.

2. On 3/4/2017 this court ordered that status quo be maintained on the suit properties. The respondent, despite service as evidenced by the affidavit of service of one George Mumali sworn on 13/4/2017, never attended court nor filed any reply to the application.

3. The plaintiff's case as stated in the plaint is that the defendant, her husband, deserted their matrimonial home standing on the suitland and has now come back. In his absence, the plaintiff was utilizing the suitland for the benefit of the children of their marriage. She moved from the suit properties to another plot at a place called Grassland and left a caretaker on the suitland, but when she went back to the suitland on 11th March, 2017 she found that the defendant had reploughed and prepared the land for planting.

4. There is a case between the two parties to wit **Kitale Children's Case No. 24 of 2008** in which maintenance orders have been sought against the defendant. However the plaintiff is said to have land with rental houses elsewhere which he solely controls. He is an employee at the Kenya Power & Lighting Company Limited. On the other hand the plaintiff has been a farmer for many years.

5. The supporting affidavit annexed to the application substantially reiterates what is contained in the plaint. It appears that the defendant has serially defaulted on maintenance orders made in the children's case mentioned above while the plaintiff, desirous for more, has applied for enhancement of the monthly maintenance. The plaintiff is convinced that the defendant is trying to take control of the suit properties in retaliation for the application for enhancement of the maintenance sum. The plaintiff candidly admits that on 14th March, 2017 she went to the suitland and found the defendant and others planting. She had already secured subsidized fertilizer from the National Cereals and Produce Board and had ploughed the land in readiness for planting. According to the plaintiff the defendant has threatened her with dire consequences and turned her away from the suit properties. She therefore prays to this court for help.

6. The defendant has not filed any response that would have enlightened the court some more on this apparently unhappy marriage that cries out for help, whose life appears to be oozing out as the parties get entangled in legal combat for control of assets and maintenance of its issues. While the defendant, at least from the plaintiff's narrative, appears to have broken out into a tempest of fury at being asked to stop planting on the suit properties, the plaintiff has sought succour in this court.

7. This application depicts a perplexing state of affairs. If it is true that more maintenance has been sought in the Kitale Children's Case No. 24 of 2008, it may be well that the defendant is by his action in search of more ways of meeting an expected outcome of that application. However this court is no seer, and cannot prognosticate the outcome of the quality of land husbandry the defendant may carry out on the land while the plaintiff is excluded from participation, yet this outcome may affect the decision at hand.

8. The plaintiff is, according to the records the one who has been working on the land during the defendant's period of desertion of the matrimonial home. Scantiness of detail regarding the maintenance cause may have been cured by a response by the defendant, much to the advantage of this court in handling this case where possibly a former arcadia of absolute bliss gradually degenerated into implacable bitterness and strife. But that response is not forthcoming and this court has to peg its decision on the material on the record.

9. Therefore, out goes any possible speculation as to the intent of the defendant and into sharper focus now comes the attempts of the plaintiff to supplement, by working the land, any other income that may help her children during the period of desertion by the defendant.

10. It is these attempts by the plaintiff that would be thwarted were the defendant allowed to take control of the land after a long hiatus. Whatever benefit she has been reaping from the land for own support and that of her four children since the year 2004 stands to be discontinued by the act of the defendant with no indication that other help is on the way. In the secret recesses of his personal resolve which for his default of response to the current application lie beyond this court's scrutiny the defendant's action may in fact be well intended. However, the adage remains that old loves are weaker than new loves, and where he is at variance with the mother of his children, and he has to be taken to law for their provisions, though no dissolution of marital union has been declared by a competent court, reasonable doubt is cast as to his true friendship with his estranged household.

11. Taking this reasonable doubt into consideration is necessary in concluding whether there is probability of change of fortunes for the worse on the part of the plaintiff's and her children's life if the

defendant continues to meddle with the suit properties they have relied on for the thirteen years of the defendant's desertion.

12. The local peoples' all round-the-year reliance on perennial herbaceous plants for food is renowned. It cannot therefore be ruled out that besides the annual or other crops that the plaintiff may be denied the chance of planting and harvesting there too are other benefits that she and her children may lose if the defendant is not restrained by the court as urged.

13. However, this court is, by reason of paucity of information placed in its hands, unable to assess the full merits of the plaintiff's case. No copies of the titles to the suitlands are attached. Income from the land is not disclosed. Whereas four is the number given in plaint, only two children are named in the copies of documents in Kitale Children's Case No. 24 of 2008. A prima facie case is therefore not made out.

14. There is lack of certitude as to the future of the land and yields thereof while in the hands of the defendant. However as I have said before this dispute concerns a family. The possibility of the very commonly recognized ebb and flow, rise and wane, constant change of familial relationships in a dynamic African extended family relations setting, which galvanizes itself into action at times to resolve sometimes seemingly unresolvable domestic conflicts, sometimes even taking over these disputes from the court's hands in the course of improvised or established alternative dispute mechanisms, largely contributes to this court's finding that the plaintiff has not proved that she would suffer any irreparable loss or damage if the orders are not granted. The plaintiff's application therefore fails the first two tests laid down in the case of *Giella versus Cassman Brown* {1973} EA 368.

15. The only recourse at the present moment is to inquire into the question whether, in the light of the facts outlined in this case so far, the balance of convenience lies in issuance or denial of the orders sought by the plaintiff.

16. This issue may therefore be determined largely on the basis of two factors: one, the plaintiff's previous reliance on the land over a long period without interruption by the defendant, and two, the uncertainty of the consequences of the defendant's control over the suit premises.

17. It is vital that, whether the final outcome of the plaintiff's claim is in her favour or not, the plaintiff and her children's comfort, convenience and necessities should not be adversely affected by any precipitate action by a person who last lived in their midst thirteen years ago.

18. Secondly, in this court's considered opinion the defendant is far less likely to prove and has not indeed proved, any loss or damage that would arise from the granting of the orders sought.

19. A keen eye may with hindsight comment: "But the defendant has already sowed on the land, as acknowledged by the plaintiff, and so does he not stand to sustain damage?" To this, there may not be any proper answer save the observation that this suit is not combat between perfect strangers, but it pits against each other parties possibly previously possessed of passionate and priceless, partnership and spousal bonds which any of them, with heaven's increased dose of divine wisdom which may infuse regret for any past errors, may stretch out a conciliatory hand to effect emotional repairs of. In brief, these happenings between the parties, are not a mythical Greek tragedy in which the author directs actions of the *dramatis personae* at will, but a real life story whose future no person can prognosticate. Perchance a rosy future of joyous reunion and resumed bliss arises, the defendant will be part of the harvesting team enjoying the fruits of his sowing on the land; perchance dissension persists after the orders sought herein are granted, the defendant's offspring will remain partially cared for by the proceeds of his sowing work. It pleases this court therefore to find that the balance of convenience in this case lies in issuing the orders sought by the application.

20. There shall therefore issue a temporary injunction restraining the defendant/respondent or his agents, from entering upon, utilizing, ploughing, planting or replanting or in any other way whatsoever interfering with **Land Parcels Nos. [Particulars Withheld], and [Particulars Withheld], Settlement**

Scheme, within Trans-Nzoia County pending the hearing and determination of this suit. The costs of the application shall be in the cause.

Signed, dated and delivered at Kitale on this 30th day of May, 2017.

MWANGI NJOROGE

JUDGE

30/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Ingosi holding brief for Ms. Arunga

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/05/2017