



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 6 OF 2017

JANE TABSUBEI CREIDER.....PLAINTIFF

VERSUS

SAMUEL KIPCHUMBA ARAP KOGO.....1STDEFENDANT

PHILIP KIPLETING.....2NDDEFENDANT

R U L I N G

1. By an application dated **23/1/2017** the plaintiff sought against the defendants an order of temporary injunction to restrain the defendants/respondents from cutting trees, interfering with the plaintiff/applicant's quiet possession of the suit properties, namely Land Parcel Number **Waitaluk/Mabonde Block 7/Koiyo/71, Waitaluk/Mabonde Block 7/Koiyo/72 and Waitaluk/Mabonde Block 7/Koiyo/148**, all situate in Waitaluk, Trans-Nzoia County or dealing in any way whatsoever with the suit properties , pending the hearing and determination of the application *interpartes* and thereafter pending the hearing and determination of the suit.

2. The grounds upon which the application is made are at the foot of the application and in the supporting affidavit sworn by the plaintiff on 23/1/2017. She states that she is the legal owner of the suit properties and attaches as exhibits copies of the title deeds thereof which are in her name; that the respondents have interfered with the said properties by trespassing thereupon, cutting down trees and threatening to burn the applicant's house; that if not restrained the respondents will continue with their offensive conduct and thereby cause the plaintiff/applicant irreparable damage with a likelihood of breach of peace.

3. The plaintiff/applicant's case is that she hired a farm manager in 1981 to take care of Plot No. 71 but the 1st defendant came and drove the manager away. Thereafter the 1st defendant remained on the property and was always paid in cash and in kind. The plaintiff has caused trees to be planted on the premises and in 2006. She and her husband put up a permanent house on the suit parcel which was to be their retirement home. The plaintiff avers that in 2007 she hired another farm manager to care for the suit properties, supervise ploughing, planting, harvesting and looking after cattle.

4. According to the plaintiff on 21/4/2016 the 2nd defendant and other people entered the suitlands and cut down 28 trees. The 1st defendant was part of this activity as he had obtained a permit from the Chief Waitaluk Location for the purpose. It was at this juncture that the plaintiff learnt of the cutting down of the trees and asked the 1st and 2nd defendants to leave the suit property but they refused and instead threatened her with violence while the cut trees were ferried away by the 2nd defendant together with others on a lorry.

5. The plaintiff further states that through a letter written by the area Chief the 1st defendant stated that he would only leave when he is paid an alleged outstanding salary for 36 years. Upon the advice of her lawyers, she states, she being the registered and lawful owner of the suit premises, the respondents have no right to interfere with her quiet enjoyment of the suit premises.

6. The application is opposed. The 1st defendant filed a replying affidavit on 30/1/2017. It was sworn on the same day. He states that the defendants have been staying on the suitland for the last 37 years without interference or disturbance from the plaintiff; that in 1981 the plaintiff handed over her portion of land to the 1st defendant to be her caretaker; that since then he and his family have been staying on **LR. No. Waitaluk/Mabonde Block 7/Koiyo/72** measuring **6.010 Ha**; that he has sired his seven children on the said parcel and buried two on it; that trees were planted on the land in the year 2001 and 2002 while the plaintiff was in Canada; that in 1997 the 1st defendant filed a case in **Kitale Civil Suit No. 328/1997** against a neighbour concerning the said parcel, and has protected the land from other intruders; that the plaintiff has not paid the 1st defendant for the last 37 years; that the defendants have no other place of abode; that the defendants only reside in **LR. No. Waitaluk/Mabonde Block 7/Koiyo/72** and not on the other parcels of land and that the motion should therefore be dismissed with costs.

7. In his counterclaim, the 1st defendant's claim is for a declaration that **LR. No. Waitaluk/Mabonde Block 7/Koiyo/72** belongs to him; this is rather awkwardly pleaded in the body of the counterclaim while the prayers (a) (b) and (c) seem to allude to it.

8. There is no doubt that the plaintiff owns all the parcels of land mentioned in the plaint. There is also no doubt that the 1st defendant has lived on the land belonging to the plaintiff, particularly on Land Parcel No. **Waitaluk/Mabonde Block 7/Koiyo/72**;

9. What comes out clearly from the pleadings and the affidavits is that the 1st defendant does not deny the plaintiff's title over all the three land parcels. From the plaintiff's own affidavit in support of the application and the plaint, it is clear that her position is that she never gave the defendants the land they are occupying. She states that the 1st defendant got to stay on the said land by chasing the manager who she had appointed to care for the land and animals. It is clear from the letter dated 28/4/2016 which is exhibited as "JTC3" in the plaintiff's affidavit that from the beginning of this dispute the 1st defendant did not have any objection to moving out of the land as ordered by the plaintiff; his main concern was that he was being asked to move out of the plot "empty handed while he has been taking care of" the "plot for 36 years". The letter states that the defendant wants the salary for the stated years before he moves out.

10. The Chief's letter did not go unanswered. The plaintiff wrote to the Chief a long letter dated 2/5/2016 in reply. She stated that she had "always paid the 1st defendant in cash and in kind"; that she has paid school fees for the 2nd defendant at high school and university to the tune of approximately Kshs.1,000,000/=; that she has also paid the school fees for his four other children through primary and secondary school education; that the 1st defendant and his family have consumed milk from her cows and sold some of it for many years while she maintained the said cows; that she paid for ploughing and harvesting on the land the 1st defendant planted maize on each year; that the plaintiff paid for all medical expenses for the 1st defendant's family and even sold some cattle for this purpose and that the plaintiff paid part of the bride price to enable the 2nd defendant get a wife. The plaintiff concluded the said letter by requesting the Chief to ensure that the 1st defendant and his family do desist from destroying her property and harassing her and other members of her family currently working on the farm. This evidence has not been controverted in any way by the defendants.

11. Section 24(a) of the Land Registration Act states as follows:

"24 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 the rights and privileges belonging or appurtenant thereto;

Section 25 of the Land Registration Act provides as follows:-

25 (1) the rights of a proprietor whether acquired on first registration or subsequently from 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 claim 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 nothing 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 as a trustee”.

9. At this interlocutory state the defendants have not disputed the plaintiff’s registration or proprietorship of the suit lands. Further, the certificates of title whose copies are exhibited by the plaintiff are prima facie evidence that the plaintiff is the absolute and indefeasible owner of the land.

10. Can the 1st defendant’s claim of non-payment for services rendered operate to defeat any of the rights of the plaintiff? Without needing to go beyond the confines of the orders sought by the plaintiff in her application, this court finds that the defendants have not brought onto the record any material sufficient to dissuade the court from issuing the orders sought. On the contrary, the material placed by the defendants before this court tends to reinforce the plaintiff’s claim. On the other hand, the plaintiff has a prima facie case with a probability of success.

11. The next issue that arises is whether the plaintiff would suffer irreparable damage if the orders sought were not granted. The plaintiff’s apprehension, which to this court seems justifiable, is that more trees would be cut and her house stands the risk of destruction by the acts of the defendants. After the destruction of the trees, their replacements may take many years to grow to the current size and the aesthetics of the subject land, which the plaintiff refers to as her retirement home, may be gravely affected. If her house is destroyed, she may have nowhere else to reside in, and she will have been put to considerable inconvenience by the defendants for no fault of her own.

12. The upshot of the above analysis is that the plaintiff has demonstrated that she would suffer irreparable damage in the event the orders sought are not granted. The first two limbs of the test in the celebrated case of **Giella –vs- Cassman Brown** have been proved. It is not therefore necessary to go into the third limb as to where the balance of convenience lies.

12. In the end, the court finds that the application dated **23/1/2017** has merit. I therefore issue an order of temporary injunction restraining the defendants or their agents from cutting trees, interfering with the plaintiff’s quiet possession of the suit premises namely Land Reference Numbers **Waitaluk/Mabonde Block 7/Koiyo/71; Waitaluk/Mabonde Block 7/Koiyo/72 and Waitaluk/Mabonde Block 7/Koiyo/148** all situate in **Waitaluk, Trans-Nzoia County** or dealing in any way whatsoever with the suit properties pending the hearing and determination of this suit. The Officer Commanding Kitale Police Station shall ensure compliance with these orders. The defendants shall bear the costs of this application.

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

MWANGI NJOROGI

JUDGE

30/05/2017

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah

Mr. Wanyama for Plaintiff/Applicant

N/A for Defendant/Respondent

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/05/2017