



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 87 OF 2016**

**JULIA WAKESU MOGAYI.....PLAINTIFF/APPLICANT**

**VERSUS**

**JANEFFER CHEPKEMOI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SARAH WANJIRU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MIRRIAM NYAMBURA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MONICAH CHEPKOSGEL.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**CHARLES CHEBII.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**DANIEL KIPSIGOR.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**MUSA MASAFU.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**EUNICE CHEPKAT.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**KIBET SIGOR.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The application dated 28/2/2017 has been filed by the plaintiff who seeks that the respondents be found guilty and punished by this court for interfering with the plaintiff's suitland and subjecting it to waste in disobedience of this court's orders issued by consent of the parties on 7/11/2016.
2. The applicant also seeks interim orders to the effect that pending the hearing and determination of the application and of the suit, the respondents and their agents and servants be restrained from interfering with the plaintiffs use and possession of the suit land **Title No. Cherangany/ Kacherop/605**.
3. The plaintiff has stated that in or about the month of January, 2015 the defendants invaded the said land, and cultivated it for the 2015 and 2016 seasons; that by the consent of the parties an order of status quo issued on 7/11/2016; that the defendants have disobeyed the said order in that they have prevented the plaintiff from accessing the said land to prepare the same for the 2017 planting season.
4. In her supporting affidavit sworn on 28/2/2017 in support of the application the plaintiff avers that the original application for interim orders which was filed together with the plaint was compromised by

consent of the parties and that on 7/11/2016 when this court issued an order that the status quo be maintained, the plaintiff was cultivating the said land. She states that on 6/2/2017 when her agents went to prepare the land for planting, they were prevented by the defendants from accessing the land.

5. A little background is given in the plaint. The plaintiff states that the 1<sup>st</sup>- 3<sup>rd</sup> defendants are daughters to the 4<sup>th</sup> defendant who was married to the plaintiff's husband while the rest are people claiming to have leased the land from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She avers that sometime in the year 2007 she left the land for a safer place due to the post election violence, but she continued leasing it out to other people. However, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants invaded the suit land and leased out a portion measuring 10 acres to the other parties without the plaintiff's authority. She avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have built a house on the land, purporting to own the suit land, have destroyed trees on the land, and that their actions are unlawful and amount to trespass. She seeks a declaration that the defendants have no proprietary right over the suitland and have no right to remain on or cultivate the land comprised in Title Number Cherangany/Kacherop/605 as well as a permanent injunction against them and damages for trespass.

6. It is the plaintiff's case is that the father to the 1<sup>st</sup> - 3<sup>rd</sup> defendants died landless and had no interest in the plaintiff's land. However, the 1<sup>st</sup> - 4<sup>th</sup> defendants, in a defence filed for all the defendants, aver that they are entitled to 12 ½ acres out of the suitland being their father's share which came about by way of their father's involvement alongside his brother and his mother in the purchase of the suitland in the 1970s.

7. The 1<sup>st</sup> - 4<sup>th</sup> defendant accuse the plaintiff of trying to grab their fathers' share on the basis that the 4<sup>th</sup> defendant gave birth only to girls. They argue that they are lawfully on the land. The 1<sup>st</sup> - 4<sup>th</sup> defendants aver that the plaintiff's husband had only held the land in trust for their family and that the plaintiff had obtained registration in her name through fraudulent means and with a lot of secrecy.

8. In their replying affidavit to the current application sworn by the 2<sup>nd</sup> defendant, it is averred that the defendants are currently confined to 8 acres "agreed on" which is the portion they have been ploughing over the years with the knowledge of the applicant and her children. It is urged that the defendants have the right to cultivate their said portion "as ordered by consent on 7/11/2016". There is no reply to these allegations.

9. When the application dated 22/6/2016 came up first on 27/6/2016, this court observed that the defendants are already in possession and that the application should be served for *interpartes* hearing on a date to be given at the Registry. By a letter to the defendants' counsel dated 7/11/2016, the plaintiff's advocates commenced efforts to fix the said application for *interpartes* hearing. When the application dated 28/2/2017 first came up on 2/3/2017, this court ordered that the *status quo* obtained as at 7/11/2016 be maintained by the parties pending the hearing of the application *interpartes* on 9/3/2017. Both applications seek the same interim orders of injunction against the defendants, save that the application currently under consideration also seeks a punitive order.

10. The *status quo* orders of 7/11/2016 recognized the presence of the defendants on part of the suitland and restrained them from any further construction on the said land. It appeared that the court envisaged that from that date, the application dated 22/6/2016 having been disposed of by way of that consent order, the parties would focus on preparing the main suit for hearing. The court ordered the parties to comply with Order 11 of the Civil Procedure Rules before a hearing date was taken.

11. It is therefore quite a surprising turn of events that rather than list the main suit for hearing, the plaintiff has filed an application for punitive and injunctive orders more or less similar to the application that was disposed of by way of a consent entered into by the parties while appearing before the court on 7/11/2016.

12. It is the view of this court that unless there is any new material demonstrating aggression, which deviates from the pacific path adopted by the consent order agreed to by the defendants, the plaintiff

would really have no basis to lodge a fresh application couched in the terms of the current application so, the question is in fact whether any such new material is presented in court by way of the supporting affidavit sworn on 28/2/2017 by the plaintiff in support of the current application. Such material needs to be any other material not included in the plaintiff's affidavit sworn on 22/6/2016 in support of the first application. A scrutiny of both affidavits shows that the presence of the defendants on the land, the allegations of cut down trees, the construction of a house by the defendants and the claim of denial of user of the land through action of the defendants are common features of both supporting affidavits. It would not be an overstatement to say that the plaintiff is quite evasive in her statements in the second affidavit supporting the current application. She does not accuse the defendants of pushing any boundaries or occupying more land than they were occupying as at 7/11/2016; she does not accuse them of completing the house or doing any other construction on the suit land. Neither does she assert that she has been evicted from the portion she was in possession of. Besides, she does not respond by way of a further affidavit to the allegations that the defendants occupy only 8 acres. The leases that she mentions in her second affidavit were still a feature in the plaint and first supporting affidavit annexed to the application dated 22/6/2016. If there is anything new, it is only the hope that the court would issue orders on the second application, but that hope should fade into disappointment and quite expectedly so because legally, this court cannot sit in review of previous orders entered into by parties before it by consent at the instance of one party in this same suit in which the consent orders were recorded.

13. The upshot of the above is that the application dated 28/2/2017 has no merit and it is hereby dismissed with costs.

The parties are at liberty to set down the main suit for hearing after compliance with Order 11 of the Civil Procedure Rules.

Signed, dated and delivered at Kitale on this 29<sup>th</sup> day of **May, 2017.**

**MWANGI NJOROGE**

**JUDGE**

**29/05/2017**

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Koech for the Respondents

N/A for the Plaintiff

Ruling read in open court. Application dismissed.

**MWANGI NJOROGE**

**JUDGE**

**29/05/2017**