



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 40 OF 2017

MAGDALENA J. CHESANG.....PLAINTIFF/APPLICANT

VERSUS

LUKA RUTTO.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff filed an application dated 3rd March, 2017 together with her plaint dated the same date. In her application she seeks orders as follows:

a. An order declaring that the plaintiff is the legal owner of plot No. TRANS-NZOIA/SUWERWA/1316 and that the defendant and those claiming under him do move out of the suit land and failing which he be evicted forth with at his own costs.

b. An order of permanent injunction restraining the defendant, his agents, servants, employees and or all those claiming under him from interfering with the plaintiff's quiet enjoyment and use of the suit land.

c. Costs

d. Any other relief this Honourable court may deem just and fit to grant.

2. The plaintiff describes herself as the legal owner of the land known as Trans Nzoia/Suwerwa/1316. The grounds on which she seeks the interim orders as above are stated at the bottom of the application.

3. The defendant also filed his own application. It is dated 27/3/2017. He has also filed a Replying Affidavit sworn on the same date. It is different from the affidavit in support of his application in terms of structure but the contents are substantially the same.

4. In the affidavit in support of the plaintiff's application it is averred that the land comprised in **Trans Nzoia/Suwerwa/1316** measures **16 acres** and that it was formerly part of original plot No. **Trans Nzoia/Suwerwa/156**. The plaintiff avers that the same was awarded to her during the lifetime of her husband whom she and her co-wives had sued. **Exhibit "M.J.C.1"** exhibited in that Affidavit is a decree in the Senior Principal Magistrates Court dated **3/1/2005**.

5. It allocates the plaintiff some 16 acres out of "plot No. 156 Suwerwa" which this court has a good reason to believe that it is the same as Plot No. **Trans Nzoia/Suwerwa/156**. This allocation was made pursuant to the confirmation by that court of the award of the Cherangany Division Land Disputes

Tribunal filed in said court on **30th November 2004**. Exhibit “**M.J.C 2**” is the Affidavit of the plaintiff is an order in **Judicial Review No.31/2005** at Kitale. The Judicial Review proceedings were filed by the plaintiff’s husband. It was an attempt to quash the decision of the Cherangany District Land Disputes Tribunal mentioned above. The plaintiff’s husband failed in that attempt. The court observed that the award was within the jurisdiction of the Tribunal, very fair and equitable and it cannot be faulted and that the only recourse that the *Ex-parte* applicant had was an appeal to the Appeals Committee as provided for under **Section 8(i)** of the Land Disputes Tribunal Act. The decree is dated **17/10/2006**.

6. The plaintiff avers that the defendant's mother was awarded a share equal to the plaintiff's; however in the year 2014 the defendant invaded the land allocated to the plaintiff; he ploughed the same and threatened to harm the plaintiff if she set foot on the land; in the year 2017 the defendant again entered the land; This court is not told what happened between 2014 and 2017.

7. The plaintiff states that the respondent has threatened to plough and plant. This court issued an order of temporary injunction on **7/3/2017** pending the hearing *inter partes* of the plaintiff's application dated **3/3/2017**.

8. The defendant has filed a defence. In response to the plaintiff’s application he has filed a Replying Affidavit and an application supported by another affidavit. In the application he seeks these orders:

1. **THAT** this application be certified as urgent and the same be directed to proceed to hearing immediately in view of its urgency.
2. **THAT** the status quo obtaining before the **7th** day of **March 2017** be maintained pending the hearing and final determination of this application and thereafter the suit.
3. **THAT** this Honorable Court be pleased to discharge, vary or set aside the Orders of Interim Injunction given by the Honorable Court *ex parte* on **7th March, 2017**.
4. **THAT** the costs of this application be provided for.

9. What comes out of the responses by the defendant is as follows; That he is not a trespasser on the land, that he has been using the portion of land he is in since **1995**, that the plaintiff is guilty of non-disclosure, that the defendant is son to the plaintiff's husband by a different wife, that the defendant's father is deceased; that long before he died, the father had shown him and his siblings where to plough and plant, that his father in **1995** allocated the defendant **10 acres** for his use, that this is the parcel he has been utilizing to date, that as at the demise of his father, no subdivision of plot No. **Trans-Nzoia/Suwerwa/156** had been done; that even now no subdivision has been done on the ground; that he did not participate in any way in the subdivision of the land Title No. **Trans-Nzoia/Suwerwa/156** and that the land comprised in Title No. **Trans-Nzoia/Suwerwa/1316** is registered in the name of one Chesang Sutter, (deceased); That the plaintiff being not the Administrator of the Estate of Chesang Suter lacks the legal capacity to initiate or maintain the current proceedings and that the plaintiff is guilty of delay in that since the defendant’s occupation of the land in the 1990's the plaintiff did not object till she filed this suit.

10. Whereas it is true that the land is registered in the name of Chesang Suter, the plaintiff exhibits an order issued in **Land Case No. 38** of **2004**. The order authorizes the Court Executive Officers to execute Land Control Board and Transfer forms in favour of the plaintiff. The plaintiff in that case was Lydia Chesang Suter and the plaintiff herein. The order was issued on the **30th March 2016**.

11. A copy of a Letter to the County Land Registrar is exhibited in the plaintiff’s further Affidavit. It is dated **3/7/2015**. It is from the Chief, Suwerwa. It introduces the plaintiff herein to the County Land Registrar, Trans-Nzoia County. It identified the plaintiff. It states that she wished to process her “**Land Title Deed Number 1316**”.

12. Even though the plaintiff states that she is the owner of that plot, the documents filed by the parties show that that she is in the process of getting herself registered as owner. She has not fully achieved the

same though she appears to have made some progress by following upon **Land Case No. 38 of 2004**.

13. I do note that the order dated **3rd January 2005** in **Land case No.38** in the Senior Principal Magistrate's Court directs the Government Surveyor to survey **plot No.156** so that each person should get his or her portion.

14. The mutation that has been exhibited by the plaintiff in the Supporting Affidavit refers to the Land subject matter of **SPMCC 38/04 – Kitale**. It appears to have caused the land to be subdivided into four portions. A part of it was to serve as a road. The mutation has the hallmarks of a document that was presented to the District Surveyor's office. It also appears that some preliminaries such as the Registry Index Map amendment fee has been paid. This was done on **31/5/2013**.

15. The District Surveyor received the mutation on **27/11/2013**. Plots resulting from the subdivision have been allocated numbers; **1316** in one of them, it measures **6.475 Ha**. The mutation is signed by J.R.R. Aganyo Associates, Licenced Surveyors. It certifies that a survey has been carried out on the land. It recommends the registration of mutation form. It appears that the District Surveyor acceded to this request. He signed the mutation on **27/11/2013**.

16. He also allocated the resultant parcels numbers **1313 – 1316**. However, the mutation is yet to be registered by the Land Registrar. This accounts for why the plaintiff has not exhibited a title deed in her name; she does not have it. The defendant has filled in some crucial gaps in the plaintiff's application. He has exhibited a copy of the green card for **LR No. Trans-Nzoia/Suwerwa/156**. It was certified by the Land Registrar on **17/3/2017**. It shows that the land was owned by Chesang Suter, but that it has now been subdivided and title closed on subdivision into new parcels **Nos.1313 – 1316**.

17. The title was closed on **27/11/2013**. This is the same date as that on which the mutation was apparently received by the District Land Surveyor. The Official Search the defendant has conducted also usefully shows that plot No. **Trans-Nzoia/Suwerwa/1316** is registered in the name of Chesang Sutter (deceased).It is dated **28/3/2017**. It is signed by the Land Registrar. I therefore find that there has occurred a subdivision of the original land parcel, giving rise to plot **No.1316** among others, which plot No.1316 is claimed by the plaintiff.

18. The plaintiff seeks an interim order of injunction. She has pleaded that she is the lawful owner of plot No.1316. She has not pleaded that she is registered yet; there is no doubt that the plaintiff is entitled to one of the four subdivision as per the order of the court. Though the mutation has been attached there is nothing else produced by the plaintiff to demonstrate to this court that her specific claim to entitlement to plot No.1316 is well founded.

19. The question is, which subdivision is the plaintiff entitled to? The answer to this question would have helped this court considerably in determining this application. As things stand now, neither the plaintiff's nor the defendant's documents show which part of the original land each is claiming. The defendant has carefully avoided giving a clear indication of where he is residing or the portion of land he is working on. He has not even taken advantage of the sketches in the mutation to do so. It is his case. It is at times perfectly in order, though not good for administration of justice, in an adversarial situation, to keep silent on the facts and allow the other party to prove their case. However, in this case, the unfortunate bit is that his silence is construed against the defendant in this case. He is not ignorant of the goings on in respect of the land. He is aware of the subdivision. He was not allocated land in the final order in SPMCC No.38/2004 – Kitale. He bases his claim on occupation only.

20. He avers at paragraph 8 of the Replying Affidavit that the plaintiff has never been in occupation or use of any part of Land Title No.Trans-Nzoia/Suwerwa/156. He has missed the issue. Title No.156 does not exist. The arrangement of the several plots on the ground has brought in a new order. This arrangement is what will give the parties the new direction as to where their proper place of residence will be.

21. This is a matter in which the plaintiff has owing to some slip along the way, failed to map out the

exact location which has been invaded (as she so claims) by the defendant vis-a-vis the boundaries shown on the mutation. The slip is small, but nevertheless a slip. And her application fails for reason of the slip. It would not be proper for this court to do sheer guess work as to whether the defendant is residing on plot No.1316 or any other. The full picture has to be made clear for the court to see. It is the plaintiff's application and so is the burden of proof.

22. By now it is clear that the plaintiff, having omitted such a crucial detail in her documents has not demonstrated that she has a *prima facie* case with probability of success against the defendant for now.

23. Along with that, is the concomitant failure to prove the probability of irreparable loss and damage. This court need not even consider the balance of convenience.

24. The plaintiff's application dated 3rd March 2017 is hereby dismissed. The defendant's application dated 27th March 2017 is allowed in terms of prayers No.2 and 3 thereof. The orders of 7th March 2017 are hereby discharged. There shall be no orders as to costs in respect of both applications.

25. The suit herein should be fixed for hearing on a priority basis in the registry.

It is so ordered.

Dated, Signed and Delivered at Kitale this 27th day of **June, 2017.**

MWANGI NJOROGE

JUDGE

27/06/2017

Before – Hon. Mwangi Njoroge Judge

Court Assistant – Isabellah

Mr. Ingosi for Respondent present

Mr. Chebii for the Applicant present

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

27/06/2017