



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 202 OF 2015**

**BENJAMIN KARANGATHI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF  
JAMES WAIHORO KIONGO (DECEASED))..... PLAINTIFF**

**VERSUS**

**ESTHER NJERI CHEGE.....1<sup>ST</sup> DEFENDANT**

**BENARD KIONGO CHEGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff, *Benjamin Karangathi* is suing on behalf of the Estate of James Waihoru Kiongo against *Esther Njeri Chege* and *Benard Kiongo Chege* for a declaration that their act of planting crops bringing down the fence on the deceased parcel of land constitute not only trespass but also amount to intermeddling in the estate of the deceased and pray for an order of permanent injunction restraining the defendants from trespassing in the land known as *TRANSZOIA/CHERANGANYI/1197* measuring 4.04 Ha. The plaintiff has brought an application for a temporary injunction pending the hearing and determination of the case. The application is based on grounds that the applicant is the administrator of the Estate of the deceased, James Waihoru Kiongo who died on the 3.2.2015. The deceased was the owner of parcel No. Transzoia/Cheranganyi/1197. He occupied the land for his benefit and his dependants till his death. The defendants invaded the parcel of land upon his death and ploughed and planted on the land. The plaintiff and the beneficiaries are unable to utilize the land. The plaintiffs have reported to the police but police have offered no help.

Esther Njeri Chege filed a replying affidavit whose gist is that title No. Transzoia/Cheranganyi/1197 does not belong to the Estate of the deceased and believes that the same was obtained by fraud. Moreover, that it does not exist. According to Esther Njeri Chege, her husband was ordered to transfer 10 acres of land to Lucia Njoki Kiongo in relating to L.R. No. Transzoia/Cheranganyi/22 on the 18.11.2002. The land was carried out within 45 days but Lucia Njoki did not obtain title and died in the year 2010 and succession has not been done.

I have considered the submissions of both parties and evidence on record and do find that the judgment by Lady Justice Nambuye on 18.11.2001 declared that Julius Chege Kiongo held 10 acres out of land parcel No. Transzoia/Cheranganyi/11 comprising 14.8 Ha in trust for Lucia Njoki Kiongo. The trust was to be brought to an end and the said 10 acres were to be transferred to the plaintiff and the same was to be registered in her name. The defendant, Julius Chege Kiongo was to execute the transfer forms in favour of plaintiff, Lucia Njoki Kiongo within 45 days. There is no evidence that the judgment of the court has been executed by Julius Chege Kiongo in favour of Lucia Njoki Kiongo.

The first issue the court considers in such matters is the existence of a prima facie case in favor of the plaintiff. *Prima Facie* case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a *Prima Facie* case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. This court finds that though the plaintiffs have established that they are the proprietors of the suit property through transmission, it is arguable by the defendant that she has unregistered rights in the property being

the widow to the deceased.

The plaintiff in this matter has not established how L. R. Transzoia/Cheranganyi/1197 was created from L. R./Transzoia/Cheranganyi/11. It is being claimed by the defendant that Transzoia/Cheranganyi/1197 was procured by fraud and that it does not exist. The plaintiff did not respond to this allegation by either producing the map or the extract from the register in respect of the suit land. It was imperative for the court to look at the transaction in respect of parcel No. 11 to ascertain how 1197 was created to determine whether the plaintiff has established a prima facie case with a probability of success. This court finds that if Tanszoia/Cheranganyi/1197 measuring 4.04 ha is the 10 acres referred to in the judgment of Lady Justice Nambuye, then it was to be registered in the name of Lucia Njoki Kiongo.

The second issue the court considers is whether the plaintiff is likely to suffer irreparable harm that cannot be compensated with damages. **Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. No evidence has been given by affidavit to demonstrate that the plaintiff is likely to suffer irreparable harm.

The third and last issue is where the balance of convenience tilts. The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. Since I am in doubt, I do determine the matter on a balance of convenience and do find that since the defendants have been utilizing the land they should continue doing so until determination of the case. The application is otherwise dismissed. Costs in the cause.

**DATED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**A. OMBWAYO**

**JUDGE**