



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 109 OF 2015

RICHARD KIPROTICH KENDUIYWO (*suing as the legal representative
of the estate of Sawe Bargero Barchok (DECEASED)*).....**PLAINTIFF**

VERSUS

MEMBER OF THE COUNTY ASSEMBLY-

TUWAN WARD.....1ST DEFENDANT

CHIEF OFFICER TRANS-NZOIA COUNTY.....2ND DEFENDANT

ASSISTANT CHIEF – TUWAN SUB-LOCATION.....3RD DEFENDANT

RULING

1. The applicant Richard Kiprotich Kenduiywo is the administrator of the estate of his late father Sawe Bargero Barchok (deceased) who died on 21.9.2004. The deceased was a shareholder of Tuwan Farm Limited 1966. The applicant contends that the deceased was owner of plot No. 4546 at Tuwan Farm measuring half an acre (suit land). That on or about 24.8.2015, the respondents trespassed on the suit land and started digging up holes in preparation for erection of high masts for lighting. That the respondents are also intending to put up an office for the assistant chief of Tuwan sub-location on the grounds that the suit land is a public utility plot. It is on this basis that the applicant applied for injunction orders restraining the respondents from interfering with his possession of the suit land.

2. The applicant's application is opposed by Francis Obingo were member of County Assembly Tuwan Ward, Lineka Nafula, Chief Officer in charge of Lands, Housing and Physical Planning Department of the County government of Trans-Nzoia and Jacqueline Nekesa Sitoya, assistant chief Tuwan sub-location. The three respondents contend that the suit land has never belonged to the deceased and that the same is a public utility plot which was set aside by Tuwan Farm Limited for that purpose. They all contend that the applicant has not produced any document to show that he or the deceased is the owner of the suit land.

3. The assistant chief of Tuwan sub-location depones that the suit land has been idle for decades and is used as a playground for Primary School pupils in a nearby Primary School. At night the suit land is used as a hideout for criminals who operate from there to commit criminal activities. It was decided that since it was a public utility plot, lights should be put in place to enhance security of the area.

4. I have considered the applicant's application, the documents in support of his application as well and submissions filed by his counsel. I have also considered the replying affidavits of the three respondents as well as submissions filed by their respective counsel. This is an application for injunction. The

principles for grant of temporary injunction are now well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be given unless otherwise the applicant might suffer loss which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

5. In the instant case, the applicant is arguing that the suit land belongs to the deceased. There is absolutely no document annexed to the supporting affidavit to show that the suit land belonged to the deceased. The applicant has annexed a list of 101 members of Tuwan farm Limited 1966. This is a list of members who are said to have been settled from 1966. The deceased is number 42 on the list. This list does not show any plot allocated to any member. The applicant also annexed a copy of a map which again does not show which plot belongs to which member. A third document annexed to the supporting affidavit is a copy of minutes of 2.7.2001 from Tuwan Farm Limited. According to these minutes, the name of the deceased is shown as one of those members who had raised complaints that they got less land than what they were entitled to. It was resolved that the deceased was to get seven plots to compensate him. Other than these documents, there is nothing to show that the suit land belonged to the deceased.

6. Contrary to the applicant's claims, the respondents have exhibited documents to show that the suit land was a public utility plot. The map attached to the respondents affidavits show that the suit land is distinct from the other plots in that it is bigger than all the rest of the plots. There is also a letter from the directors of Tuwan Farm Limited confirming that the suit land is a public utility plot held under the company name for that purpose. This is contained in the further affidavit of the assistant chief of Tuwan sub-location. I therefore find that the applicant has failed to demonstrate that he has a prima facie case with probability of success.

7. The other consideration is whether the applicant will suffer loss which will not be compensated in damages. It is clear that the applicant or his deceased father have never occupied the suit land since 1966 when the plots are said to have been distributed by Tuwan Farm Limited. His father had never occupied the land until he died in 2004. Which loss will the applicant suffer which will not be compensated in damages? The answer is that should it turn out that the suit land belonged to the deceased, the applicant can be compensated.

8. Even the balance of convenience does not favour the applicant. The applicant is not in possession and has never been. I therefore find that the applicant's application is misconceived. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 16th day of February,2016

E. OBAGA

JUDGE

In the presence of Mr. Komen for 2nd respondent

Plaintiff/Applicant and Mr. Karani for 2nd respondent.

Court Assistant - Isabellah.

E. OBAGA

JUDGE