



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 364 OF 2014**

**CONSTANTINE J. KANGOGO (Legal Representative of the Estate of  
WILFRED KIMAIYO MONDY).....PLAINTIFF**

**VERSUS**

**FESTUS RUTTO TAILEM.....DEFENDANT**

**RULING**

*Constantine J. Kangogo*, the Legal representative of the Estate of Wilfred Kimaiyo Mondy and hereinafter referred to as the plaintiff has sued *Festus Rutto Tailem* claiming that she is the owner and in possession and occupation on the parcel of land known as Megun/Kesses Block 3/544 measuring 1 acre which was purchased by her late husband Wilfred Kimaiyo Mondy in 2006 from one Edinah Chepkoech and paid over Kshs.80,000/=.

The plaintiff states that she has been planting the said farm until 2008 and the parcel of land is fenced all round with posts and barbed wire and since 2010 to date the land is full of wattle trees in the whole 1 acre and that between the month of September, 2014, the defendant started telling people that the land belongs to him and on 19th, 20th, 21st and 24th November, 2014 while the plaintiff was away, the defendant forcefully trespassed to the aforesaid parcel of land and cut down the wattle trees indiscriminately and when members of the public including the neighbors tried to restrain him, the defendant turned violent and warned everybody never to interfere with the defendant. She further states the matter was reported to the administration and the police and the defendant warned but the defendant is so stubborn and wants to remove the trees from the parcel of land and cut a few trees still standing and that unless the defendant is perpetually restrained by an order of this court stopping the defendant from further cutting the remaining standing trees and also stopped from removing the cut trees, then the plaintiff will suffer great loss and the environment destroyed. The defendant has threatened the life of the defendant and needs to be stopped from further threats. Elders have tried to intervene but the defendant remained adamant and wants to enter the parcel of land by force.

The plaintiff prays for a declaratory order of perpetual injunction to issue stopping the defendant from trespassing entering, cutting trees from the plaintiff's parcel of land at Kesses known as Megun/Ngeria Block 3/544 measuring one (1) acre and costs of this suit.

The plaint is accompanied with a Notice of Motion seeking orders that pending the hearing and determination of the suit, the honourable court to be pleased to restrain the defendant, his agents, servants or employees from threatening, entering, cutting or removing trees from the plaintiff's parcel of land known as Megun/Kesses Block 3/544, a portion measuring approximately 1 acre. Moreover, the orders be served upon the OCS, Kesses Police Station for re-enforcement.

The application is based on grounds that the defendant has threatened the life of the plaintiff who is in occupation and owns parcel of land known as Megun/Kesses Block 3/544. The defendant is indiscriminately cutting trees on the parcel of land and chases everybody away.

The application is supported by the affidavit of Constantine Jepkoech Kangogo who states that the late Wilfred Kimaiyo Mondy who was her husband passed on 22nd May, 2009 and that before her late husband passed on, he had purchased a piece of land within Kesses area of approximately one (1) acre from one Edinah Jepkoech and paid over Kshs.80,000/= in 2006. That the purchase was between her late husband and one Edinah Jepkoech who acknowledged the transactions. That she has been cultivating the parcel of land until 2009 when she resorted to leave cultivation and resorted to the wattle trees. That the whole 1 acre is full of wattle trees and she has been taking care of the trees since 2009. Between the month of September and November, 2014, the defendant started to claim that he also purchased the land and wanted to forcefully enter her land but he was restrained by the elders, the chief and the District Officer, Kesses area. On 19th, 20th, 21st and 24th November, 2014, the defendant forcefully entered the said parcel of land and therein cut the trees indiscriminately.

On 8th December, 2014, the defendant entered the land with several persons to cut the remaining trees an act that has traumatized her. That the administration intervened and tried to restrain the defendant but he turned violent and threatened her life. She reported the matter to the police but they have refused to arrest the defendant saying it is a land matter and they are unable to handle hence the matter is pending in the police. The defendant has threatened to remove the cut trees whose value is more than Kshs.300,000/= hence she will suffer greatly. That unless the defendant is restrained by an order of this court, she will continue to suffer great loss. That she is a single mother taking care of her family and share no other source of income to sustain her family.

The respondent filed a replying affidavit sworn by himself stating that on 25.1.2010, he purchased the said parcel of land known as Megun/Ngeria Block 3/544 measuring 1 acre from one Edinah Jepkoech. That the said Edinah Jepkoech surrendered to him all the documents in respect of the said parcel including the sale agreement by which she bought the said land from M/s Maktaba Sacco Ltd. He took possession of the said parcel of land Megun/Ngeria Block 3/544 from Edinah Jepkoech and started utilizing it in 2010 by planting trees which he is now harvesting. The late husband of the plaintiff had a relationship with Edinah Jepkoech and that the plaintiff is a liar since she knew that Edinah Jepkoech had a relationship with her late husband, which she has exploited and went on and claimed his land.

That the plaintiff's suit and application have no merit in law and he prays that the same be dismissed with costs. According to the defendant no grounds of an injunction have been demonstrated by the plaintiff. He followed all the processes in the purchase of this land by way of shares as he has an original Sale Agreement and the Share Certificate transferred to him whilst the plaintiff has no Sale Agreement. That he is in occupation of the land and has fenced and planted trees which he is now harvesting.

The plaintiff submits that the facts herein demonstrate a *prima facie* case with probability of success and that if an injunction is not granted, he will suffer irreparable loss and that if the court is in doubt, it should decide the application on balance of convenience. The plaintiff argues that the defendant has not shown that he will suffer any loss if the application is granted and that no prejudice will be suffered.

The defendant submits that the defendant has an agreement dated 25.1.2010, which is not disputed but the plaintiff has no agreement and therefore, this being a sale of land transaction, section 3(3) of the Law of Contract Act, Cap. 23, Laws of Kenya applies and provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and signed by all the parties thereto. The respondent also relies on ***Giella Vs Cassman Brown***.

This court finds that the plaintiff relies on bundles of receipts, letters and acknowledgements while the defendant relies on an agreement of sale and certificate of ownership in the name of Edinah Jepkoech who allegedly sold the property to both parties. The property is registered in the names of Edinah

Jepkoech and neither the plaintiff nor the defendant. Therefore, the plaintiff and the defendant have competing interest which need to be determined after substantially hearing the parties. At one time, the said Edinah Jepkoech should be joined as a party as she is the person registered by the company as the proprietor.

The circumstances of this case leave me in doubt as to between the two, who is entitled to the parcel of land hence I constrain to determine the dispute on a balance of convenience which tilts towards restraining both parties from accessing the parcel of land and utilizing it in any manner whatsoever until the suit is heard and determined. Those will be the orders of the court. Costs in the case. Edinah Jepkoech is hereby enjoined in the matter as a defendant to be served within 10 days.

**DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.**

**ANTONY OMBWAYO**

**JUDGE**