



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 92 OF 2016

RAEL KEMUNTO.....PLAINTIFF

VERSUS

WYCLIFFE ADEGO..... DEFENDANT

AGRICULTURAL FINANCE CORPORATION LTD.....INTERESTED PARTY

RULING

1. The applicant filed a Notice of Motion dated 7/6/2016 against the defendant/respondent in which she seeks the following reliefs:-

(a). An injunction restraining the defendant/respondent his servants, agents or any other person from entering into, cultivating, leasing, selling, destroying or harvesting the applicant's maize crop on a portion of land known as Plot No. 29 comprised in LR. No. 8994/11.

(b). An order directing the exhumation of the body of the defendant's mother which was interred on 3/6/2016.

(c). An injunction restraining the defendant from burying more bodies on the suitland.

2. The applicant contends that **Plot No. 29** is one plot which is comprised in **Title No. 8994/11** whose title is held by the interested party the Agricultural Finance Corporation (AFC). That AFC subdivided the land into small portions which were then sold to members of Ndelema Self Help Group. That she bought **Plot No. 29** from AFC and has been living on it since 2007.

3. On 2/6/2016 the applicant heard that the respondent's mother who had died two months earlier on was about to be buried on her plot. She came to court and filed an application for injunction but as the court was not sitting, on a Friday, the respondent sneaked his mother's body and had it buried on the night of 3/6/2016. Now that the body has already been interred on her plot she wants the same exhumed and taken to a mortuary for preservation pending the hearing and determination of this suit.

4. The applicant's application is opposed by the respondent through a replying affidavit sworn on 11/7/2016 as well as a replying affidavit by the legal officer of the AFC which is the interested party. The respondent contends that the applicant has no proprietary interest in the suitland. That he is one of the members of Ndelema Self Help group who have been negotiating with the AFC on the purchase of the land of which the suit land is a part of it. That the applicant is wife of their lawyer and is not a squatter and that her application is therefore misconceived.

5. The respondent further contends that it is Ndelema Self Help Group which has a right to the land in contention and that the group obtained conservatory orders in **Petition No 3 of 2012**. He therefore argues that the applicant has no better title than he has and hence the application should fail.

6. The AFC on its part contends that the land in issue was lawfully charged to it as security for a loan taken by one **Isaac Chebii Ngochoch** in **1990**. When the chargor defaulted in the loan payment, the charged property was advertised for sale but the sale did not take place as the property was invaded by squatters calling themselves Ndelema Self Help Group. The squatters later entered into negotiations with a view to purchasing the charged property. The negotiations have however not been completed and that the AFC has never subdivided or sold part of the charged property to the applicant. The AFC contends that it is a stranger to the alleged receipts annexed to the applicant's application. The AFC further contends that both the applicant and the respondent have invaded the charged property.

7. I have gone through the applicant's application as well as the opposition thereto by the respondent and the interested party. The applicant is seeking injunctive orders and orders of exhumation of the body of the respondent's mother. The principles for grant of temporary injunction orders were well spelt out in the case of **Giella -vs- Cessman Brown & CO. Ltd 1973 [EA] 358**. Firstly 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 will 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.

8. In the instant case the applicant is contending that she is a member of Ndelema Self Help Group to whom the land was sold by the interested party upon subdivision into smaller portions. The applicant has annexed some copies of four receipts which are all totally illegible. The receipts are purportedly issued by the AFC who are said to have sold the land to the members of Ndelema Self Help Group. The applicant has also annexed an area list for members of Ndelema Self Help Group. This list shows that the applicant was allocated **Plot No. 29** besides one or so other plots. The question which then arises for determination is whether the applicant has demonstrated that she has a prima facie case with probability of success.

9. There is evidence in form of correspondence from the respondent that Ndelema Self Help Group have been negotiating with the interested party with a view to purchasing the charged property. These negotiations are not complete. The property is still charged to the interested party. Members of Ndelema Self Help Group are confessed squatters on the charged property. The applicant claims to be one of the members. There is no way the applicant would have purchased Plot No. 29 from the interested party. The property is still charged and the realization of the security has been frustrated by the squatters on the land.

10. The applicant has filed a further affidavit in which she has annexed an affidavit sworn by the Chairman of Ndelema Self Help Group. In that affidavit, the applicant has referred to **Kitale CMCC No. 50 of 2016** between the interested party and the respondent. The interested party had sued the respondent seeking to restrain the respondent from interring the remains of his mother on **Plot LR. No. 8994/11**. The lower court issued restraining orders but it would appear the respondent ignored the order. It is therefore clear that neither the applicant nor the respondent have any recognizable interest in as far as LR.No. 8994/11 is concerned. I therefore find that the plaintiff has not demonstrated that she has a prima facie case with probability of success.

11. Will the applicant suffer loss which will not be compensated in damages? I have already said hereinabove that the property known as LR. No. 8994/11 has never been subdivided and put up for sale by the interested party. The closest the interested party has come to selling the land is by negotiating with the Ndelema Self Help Group with a view to selling the land to them. This is after the chargor failed to redeem the same by repaying what he owed the interested party. I do not see what loss the applicant will suffer. She has no proprietary interest on the land as yet. The issue of compensation between her and the respondent does not arise in the circumstances. The two are all strangers in the land which is legally charged to the interested party.

12. I do not have to consider the balance of convenience as I am not in any doubt regarding this case.

There have been numerous cases filed touching on this property. Some are pitying one group of the squatters against another. I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondents.

It is so ordered

Dated, signed and delivered at Kitale on this **28th** day of **July, 2016**.

E. OBAGA

JUDGE

In the presence of Ms. Oketch for Mr. Kaosa for Plaintiff/Applicant. Court Assistant – Isabellah.

E. OBAGA

JUDGE

28/7/2016