



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 63 OF 2016

EUNICE LUGATSIBA AMBUTSI.....PLAINTIFF

VERSUS

NICHOLAS KIBOWEN KIGEN.....1ST DEFENDANT

GABRIEL KANDA.....2ND DEFENDANT

PAULINE JEBWAMBOK.....3RD DEFENDANT

R U L I N G

[1] The applicant is one of the administrators of the Estate of the late **Barnabas Ambutsi Masinjila** (deceased) who was the registered owner of **LR. No. No. 6614/10 (Original No. 6614/2/9)** (suitland). The applicant brought a notice of motion dated 30/5/2016 in which she seeks orders of injunction against the respondents restraining them from interfering with the suitland.

[2] The applicant contends that the respondents have trespassed on to the suitland and started re-ploughing land which she had ploughed. She contends that if they are not restrained by an injunction, they will proceed with their illegal acts which will degrade the land.

[3] The first and third respondents did not enter appearance and file defence. They did not even file either grounds of opposition or replying affidavits. It is only the second respondent who filed a replying affidavit. The second respondent contends that he bought part of the suitland from one of the beneficiaries of the estate of the deceased. That he has put up a house and has been ploughing his portion since 2013 when he bought it.

[4] The second respondent contends that the applicant went and obtained orders in Bungoma High Court which orders he and other purchasers are seeking to set aside. The second respondent further contends that the applicant's application is an abuse of the process of the court and that the same should be dismissed.

[5] I have carefully gone through the applicant's application as well as the opposition thereto by the second respondent. The only issue for determination in this application is whether the applicant has demonstrated that she has a prima facie case with probability of success to warrant issuance of an injunction.

[6] The principles for grant of a temporary injunction are now well settled. First, an applicant has to demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the applicant will suffer injury which will not be compensated in

damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience. See ***Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358.***

[7] In the instant case, the applicant did not come out clearly on how the respondents got into the suitland. She did not also come out to say whether the grant which was issued to her and three others has been confirmed or not.

[8] A look at the replying affidavit of the second respondent shows that he bought **5 acres** out of the suitland from **Joseph Makarios Masinjila** on the **10/12/2013** at a consideration of **1,425,000/=**. This Joseph Makarios Masinjila is one of the administrators of the estate of the deceased. There are other purchasers of various parcels from the suitland. These other purchasers bought their parcels from Joseph Makarios Masinjila.

[9] The applicant did not want to disclose the fact that the second respondent purchased the 5 acres from one of the administrators of the estate of the deceased. The applicant did not disclose if the grant issued to her and others was confirmed. The applicant is seeking a declaration that the suitland exclusively belongs to the estate of the deceased and that the respondents have no right to remain on the same. She is also seeking a permanent injunction restraining the respondents from interfering with the suitland. She is also seeking general damages for trespass.

[10] The applicant is guilty of material non disclosure. She has not made out a case against the respondents. The second respondent has demonstrated through the annexures in his replying affidavit that there are other three individuals who also bought land from the same person who sold the five acres to him. These three persons are not sued. It is therefore clear that she is pursuing the three respondents for ulterior motives. Why pick on the three and leave others.

[11] The second respondent is already in possession of the five acres which he purchased from one of the administrators of the estate of the deceased. If the administrators are not acting in unison, that should not be a problem of the second respondent or any other respondent. There is no loss which the applicant will suffer which will not be compensated in damages should it turn out that one of the administrators illegally sold off part of the deceased's estate.

[12] The second respondent has been on the land since 2013 when he bought it. The applicant is coming to court almost three years after he took possession. Even on a balance of convenience, the applicant cannot be granted the injunction. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the second respondent. Injunctive orders which had been given are hereby discharged.

It is so ordered.

Dated, signed and delivered at Kitale on this 15th day of September, 2016.

E. OBAGA

JUDGE

COURT

At 2.45 pm. No appearance. Ruling signed in court in the absence of parties who were aware of time and date of ruling.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

