



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 49 OF 2016

EVERLINE NANGILA WEKESA..... PLAINTIFF/APPLICANT

VERSUS

MARTIN BUKAMU.....1ST DEFENDANT/RESPONDENT

EDWARD BARASA.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant is the registered owner of **LR No. Kwanza/Kwanza Block 7/Tonyoto/190** which measures **0.1214 Hectares** (suitland). The applicant seeks an injunction restraining the respondents from trespassing on the suitland until hearing and determination of this suit. The applicant contends that she bought the Suitland on **3/2/1994** from one **Reuben K. Longoromoi**.
2. The first respondent is proprietor of **LR. No. Kwanza/Kwanza Block 7/Tonyoto/186** whereas the second respondent is proprietor of **LR. No. Kwanza/Kwanza Block 7/Tonyoto/193**. Both respondents are neighbours of the applicant. The applicant took possession of the suitland where she stayed until 1997 when robbers attacked her and brutally killed her daughter. She was forced to move out of the suitland.
3. While the applicant was away, the respondents encroached onto the suitland and constructed houses and are living on the suitland. She has tried to sort out the issue with the area administration in vain forcing her to file this application.
4. The applicant's application is opposed by the respondents through replying affidavits filed on 13/4/2016. The first respondent contends that he bought **half an acre** on **10/2/1987** from **Musa Ludenyo Mulusa**. The second respondent bought **one acre** on **22/1/1989** from **Musa Ludenyo Mulusa**. The two respondents took possession of their respective portions where they constructed and are living on their portions.
5. The two respondents contend that the applicant has her own land but that the only problem is that when she processed her title, she obtained title which covers their plots. They contend that this was because the surveyor who carried out the survey did it wrongly. That the applicant is still cultivating the land which she bought and that she only wants to evict them from their respective portions. They further contend that this is a matter which can only be resolved by appropriate amendment to the map to reflect the proper positioning of the suitland.
6. I have gone through the applicant's application as well as the annexures thereto. The applicant's contention is that the respondents have encroached onto the suitland and constructed houses on it. She has

annexed photographs showing houses belonging to both respondents.

7. The first respondent has annexed a photograph showing the applicant's house and ploughed section of land which he says belong to the applicant. That boundaries of the land are intact. This is an application for injunction. Firstly the applicant is expected to demonstrate that she 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- Cessman Brown Co. Ltd [1973] EA 358***.

8. It is clear that it is the respondents who bought their plots early than the applicant. The respondents settled on their respective portions. The applicant bought her portion later. She took possession and settled on the land until 1997 when she says she moved out after an attack by robbers who killed her daughter. The applicant does not say when the respondents encroached on the suitland. She had purchased half an acre. The first respondent purchased half an acre and the second respondent bought one acre.

9. The applicant is not coming out clearly on what her claim is. The two respondents are her neighbours. She is not saying whether hers is a case of boundary dispute or claim for land. Though she has title, it is not possible for now to state where her half acre plot is located. This can only be determined with involvement of a surveyor. The two respondents have built their houses. The applicant's claim is that the houses are on the suitland. The plaintiff/applicant has not demonstrated that she has a prima facie case with probability of success.

10. The purpose of a temporary injunction is to preserve a property until the dispute is resolved. It is never intended to help an applicant to gain access or remove a respondent who is in possession. It is clear that the applicant's intention is to use the injunction to evict the respondents before the case is determined. This is why one of her prayers is that the OCS Endebess police station do supervise compliance with the order.

11. There is no injury which the applicant will suffer which will not be compensated in damages. If her claims are anything to go by, the respondents are the ones in possession of what she claims to be her land. If it turns out to be true, then she can always be compensated. There is no threat that any of the respondents intend to sell the disputed portions.

12. The balance of convenience tilts in favour of the respondents who are in possession. One of the prayers in the plaint is an order of eviction. If an injunction were to be given in terms of the prayers in the application it will amount to determining the case at interlocutory stage. 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 13th day of September, 2016.

E. OBAGA

JUDGE

In the presence of Mr. Bororio for applicant and Mr. Pukah for respondent. Court Assistant - Isabellah.

E. OBAGA

JUDGE

13/9/2016