



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 135 OF 2016**

**NABISWA ONGWEKO NICKSON.....1ST PLAINTIFF**

**BEATRICE NAWIRE NABISWA.....2ND PLAINTIFF**

**VERSUS**

**JENIPHER NANYAMA MABONGA.....1ST DEFENDANT**

**HENRY K. SEREM.....2ND DEFENDANT**

**PHILEMON BOINET.....3RD DEFENDANT**

**JOSEPH BOIT MAIYO.....4TH DEFENDANT**

**RULING**

By Notice of Motion dated 26.5.2016, the applicant seeks injunction restraining the respondents from taking possession, developing, constructing, cultivating, subdividing, alienating, encumbering, disposing, transferring, charging or in any other manner to deal with the parcel of land known as L.R. No. Soy/Soy Block 10 (Navillus)/534 pending the hearing and determination of the suit. The application is based on grounds that the respondents have proceeded to demolish houses on the suit land without consent or prior knowledge of the applicants and that the property was a family home of matriarch Masakhwe family.

In the supporting affidavit, the 1st applicant states that he is a grandson of the matriarch of Masakhwe family who died on 31.9.2015. That their family immigrated from Mumias in Kakamega County and settled in Soy sub-location within Uasin Gishu County. That after the immigration, the entire extended family came together and contributed money which was used to buy a parcel of land to resettle his grandmother, the matriarch of Masakhwe family, Soy sub-location, Vumilia Village within Uasin Gishu County. That upon purchasing this suit parcel of land, a house was built and his grandmother was settled thereon. That his grandmother settled on the suit land until her demise on 31st September, 2015. That it was at all material times expected that once the suit parcel of land will remain a family property for the entire extended family and all family members had sentimental attachment to the suit parcel of land. That after the purchase of the property, the family allowed his elder uncle, Dismas Wafula Masakhwe now deceased to execute the agreement with the vendor. Though his deceased uncle executed the Sale Agreement, it was never meant to be his personal property at all.

That after the demise of his grandmother, the 1st respondent in conjunction with the 2nd respondent in complete derogation of the interest of the extended family is attempting to alienate the suit parcel of land to the 3rd respondent without consulting the other interested parties and that in any event, he is one of the administrators of the estate of his uncle Dismas Wafula Masakhwe (deceased) who died on 14th February, 2008 yet he has not authorized any transfer or alienation of the suit parcel of land. And in any

event, he has information his co-administrator, Beatrice Nawire Nabiswa has also not authorized any dealing on the suit parcel of land. That as a matter of fact at the time of the demise of his uncle, Dismas Wafula Masakhwe (deceased), the 1st respondent was not cohabiting with the said Dismas and the 1st respondent only showed up in the home on learning of the demise of their grandmother.

In the night of 4th February 2016, the 1st and 2nd respondents without any colour or right trespassed into the suit parcel of land and started demolishing the house which their matriarch grandmother Juliana Masakhwe (deceased) had been residing in. The 1st and 2nd respondents were arrested by police, Soy Police Station on the 5th February, 2016 and the door (blue in colour) of the demolished house were taken to police station plus the iron sheets (24 pieces). That the 1st and 2nd respondents were released on 6th February, 2016 on cash bail. That a lengthy meeting was held at Soy Police Station chaired by the Deputy OCS, Mr. Wambua proved fruitless and was adjourned so that the matter be dealt with customarily but the 1st respondent was not willing to solve. On 11th February, 2016, Mr. Joseph Boit, the biological father of the 3rd respondent herein without any colour or right trespassed into the suit parcel of land and started ploughing the land with a view of planting.

That he is therefore apprehensive that if the respondents are not restrained by orders of this Honourable Court from entering and occupying the suit property, they will continue to infringe on the family's property and that unless restrained by an order of this court, the respondents herein are likely to alienate, transfer, sell or in any manner so deal with the suit parcel of land to the detriment of the interest of the family of Juliana Nekesa Masakhwe (deceased). That for all intents and purposes, this land belongs to their clan and cannot be redeemed by a person who is not a clan member since it will not be in conformity with their customs and practices. That it is not customarily accepted for a person to sell land that belongs to the extended family to strangers when there are other persons capable of redeeming the same.

Jenipher Nanyama Mabonga's response is that she is the only widow of the late Dismas Wafula Masakhwe (deceased) and that they have four children. They bought 0.6 acres a purchasing interest in land parcel No. Soy/Soy/Block 10 (Navillus)/534 measuring 25 acres belong to Kiyomegei Company Limited. She claims that her late husband procured the purchasing interest to her and informed the registered owner.

Mr. Philemon Kibitok though not a party confirms that the property is registered in the name of Kiyomegei Company Ltd. He has discovered that the land was allocated to Jenipher Nanyama Wafula as the new shareholder by herself and Dismas Wafula. The initial share belonged to Beatrice K. Rotich.

Joseph Boit Maiyo on his part states that his son bought land belonging to Kiyomegei Company Limited from the former owner Jenipher Nanyama Mabonga and that the registered owner has transferred the land to the relevant owners.

Henry Serem, the Director of Kiyomegei Company Ltd states that he has not seen any consent of the Land Commission Board granted to anyone to transfer or subdivided any parcel of land. He does not know the plaintiffs and never dealt with them. However, he knows that the late Dismas Wafula Masakhwe had a purchase interest having bought 0.6 acres from Beatrice K. Rotich now deceased. That Dismas and wife used to live on the land. Upon the demise of Dismas, the membership record with Jenipher Nanyama Wafula and that subsequently, Philemon Kibitok bought the interest from Jenipher Nanyama Wafula measures 0.6 acres and part of Soy/Soy Block 10 (Navillus)/534 measuring 10.117 Ha registered in the name of Kiyomegei Company Ltd on the 10.2.2009 and title deed issued on the same date. The 0.6 acres initially belonged to Beatrice Khasoa Rotich of ID. No. 9226539 who sold the same to Dismas Wafula Masakhwe of ID. NO. 4172850 on 28.12.2001 witnessed by Pamela Nangila, Henry Serem and Mzee Wa Mtaa. It is alleged that the purchase price was contributed by the family to settle M/s Juliana Nekesa Masakhwe who is now deceased. Dismas Wafula Masakhwe is also deceased.

The plaintiffs filed a supplementary affidavit which I have considered and which in essence reiterates that the suit land is family land..

Jenipher Nanyama Mabonga filed a further affidavit stating that indeed there is a family dispute and

therefore, she is in the process of revoking the grant of letters of administration intestate granted to the plaintiffs.

I have considered the pleadings, Notice of Motion and supporting and supplementary affidavit, the replying affidavit and the further affidavit and do find that the dispute arose after the death of Dismas Wafula Masakhwe, the 1st defendant now claims that the property and was even sold.

There is evidence that after the death of Dismas Wafula Masakhwe, the plaintiffs took out a grant of letters of administration and therefore, they are the legal representatives of the estate of the deceased Dismas Wafula Masakhwe. It is trite law that an application for an order of temporary injunction ought to be determined on principles set out in the *locus classicus* case of ***Giella Vs Cassman Brown***.

On the issue of *prima facie* case with probability of success, I do find that the plaintiffs have established that they are the legal representatives of the estate of Dismas Wafula Masakhwe and therefore, have the capacity to bring this action in the interest of the deceased.

Moreover, that the property in dispute though registered in the name of Kiyomegei Company Ltd is the property of Dismas Wafula Masakhwe who purchased the same from Beatrice Khasoa Rotich. The defendants appear to be inter-meddling in the estate of the deceased an issue that can only be proved upon hearing of the parties. I do find that the plaintiffs have demonstrated that they have a *prima facie* case with a probability of success.

On whether the plaintiffs will suffer irreparable harm if injunction is not granted, I do find that this being a property of the deceased person, the plaintiffs being the administrators of the Estate of the deceased should be granted an injunction as the property is likely to be wasted and that no amount of damages should compensate the plaintiffs for the wastage if they succeed in the claim.

On the balance of convenience, this court finds that it tilts towards preserving the estate of the deceased person. Ultimately, this court grants an order of injunction restraining the respondents from taking possession, developing, constructing, cultivating, subdividing, alienating, encumbering, disposing, transferring, charging or in any other manner to deal with the parcel of land known as ***L.R. No. Soy/Soy Block 10 (Navillus)/534*** pending the hearing and determination of the suit. Orders accordingly.

**DATED AND DELIVERED AT ELDORET ON 25TH DAY OF NOVEMBER, 2016.**

**ANTONY OMBWAYO**

**JUDGE**