



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT AND LAND CASE NO. 41 OF 2015**

**MOSES KIPTANUI.....1ST PLAINTIFF**

**DANIEL TANUI SUTER..... 2ND PLAINTIFF**

**VERSUS**

**EVANS KAMAU MWAURA.....DEFENDANT**

**R U L I N G**

1. The applicants are brothers. The two jointly bought L.R.Nos. Trans Nzoia/Suwerwa/1457 and 1458 but the two properties were registered in the name of the second applicant. The two properties were purchased from the Administrators of the Estate of Evans Kamau Mwaura.
2. The applicants brought a notice of motion dated 25/3/2015 in which they are seeking a temporary injunction against the respondent restraining him, his agents, servants, employees and/or any other persons claiming through him from ploughing, tilling, planting, fencing and/or in any manner interfering with the applicants peaceful possession and quiet occupation of all those two parcels pending the hearing and determination of the suit herein. The applicants contend that the respondent is one of the beneficiaries of the estate of the late Evans Kamau Mwaura; that the beneficiaries of the estate of the deceased sold and transferred the two properties to them after confirmation of the grant of letters of administration; that the respondent never raised any objection to the said sale and that he is now attempting to re-enter the two parcels thus likely to interfere with the applicant's quiet and peaceful occupation of the same.
3. The applicants further contend that the respondent is interfering with their plan to develop the properties which they lawfully acquired at a consideration.
4. The respondent opposed the applicants' application through replying affidavit sworn on 8/4/2015 and filed in court on the same day. The respondent contends that he is the one who is in occupation of both properties and that the second applicant's acquisition of title to the same was fraudulent as he never participated or consented to sale of any portion of land which was originally plot No. 174.

The respondent further contends that he has already ploughed the two properties ready for planting and that if the injunction is granted it will amount to granting a mandatory injunction whose effect is to remove him from the properties.

5. I have carefully considered the applicants application as well as the opposition to the same by the

respondent. There are certain facts which are not contested. This include the fact that the respondent is one of the beneficiaries of the estate of the late Evans Kamau Mwaura and that the beneficiaries of the estate who include the respondent were allocated land which according to the certificate of confirmation of grant the total average of the plot is 003174 is 28 acres.

6. The applicants bought the suit properties on 15/1/2015. The purchase was the whole of Plot No. 003174. This plot was subdivided into two portion namely Trans-Nzoia/Sumerwa/1457 and 1458 measuring 6.52 and 4.666 hectares respectively. This translates to 27.6 acres.
7. The applicants are contending that the purchase of the suit properties was with the consent of all the beneficiaries of the Estate of the late Evans Kamau Mwaura who included the respondent herein. The respondent on the other hand contends that he never consented to the sale. It is not clear whether the Evans Kamau Mwaura who is one of the administrators of the Estate of Evans Kamau is the same Evans Kamau Mwaura who is the respondent herein. What however emerges from a document annexed to the respondent's replying affidavit is that the respondent comes from a polygamous family and it is possible that one of the houses could be having a son having same names with a son from another house.

However be that as it may, the fact remains that the respondent herein had filed objection proceedings in Succession Cause No. 260 of 2006. His objection was dismissed and he has since preferred an appeal which is pending. A keen look at that document shows that the father of the respondent and the petitioners in the succession cause was called Moses Kamau Mwaura. The deceased was the eldest son of Moses Mwaura Kamau who appears to have held Plot No. 003174 in trust for the whole family of Moses Mwaura Kamau. This is why upon Evans Mwaura Kamau's death, the property was distributed amongst all the children of Moses Mwaura Kamau.

8. There are two Evans Mwaura Kamau's who benefited from the Estate of Evans Kamau Mwaura. One of them got 3 acres and another got 2 acres. It is not clear which portion the respondent herein was to get whether it is 3 acres or 2 acres. However be that as it may, it is clear that he was to get at least a portion of the land. It is clear that the respondent has been opposed to the distribution but his objection has already been dismissed. This means that he is entitled to either 3 or 2 acres depending on which Evans Kamau Mwaura he is of the two Evans Kamau Mwauras.
9. The applicants have already bought the entire parcels comprising 27.6 acres. That means that they have even bought the respondent's entitlement in the Estate. There is a letter annexed to the applicants application from the vendors lawyers dated 13/2/2015. This letter shows that one Evans Mwaura Kamau is residing on the portions bought by the applicants but that his portion is now 1456. The applicants did not annex any documents to show that the respondent has any other land elsewhere. Their contention is that they bought the entire parcel known as Plot 174 which was 27.6 acres. The letter of 13/2/2015 is therefore misleading. The consent to subdivide Plot No. 174 was given. The plot was to be subdivided into two portions of 6.52 and 4.666 hectares. There was no consent to have a third portion.
10. The applicants in their application contend that the respondent is attempting to re-enter the properties after he moved out when the same was sold. This is absolutely not the position. The respondent has been on the property and has never left at any moment. The letter of 13/2/2015 from the lawyer of the vendors is clear that the respondent is in possession.

An injunction is an equitable remedy. Whoever wants to have it must approach the court with clean hands. It is clear that the applicants are seeking the injunction with the sole purpose of removing the respondent from the suit land. This is not the purpose of a temporary injunction. If the applicants wanted to remove the respondent from the properties which are now registered in the second applicant's name, they should have moved the court for a mandatory injunction which will then have to be decided based on the facts presented.

11. There is the question of the respondent's entitlement in the Estate of Evans Kamau Mwaura which

seems to have been taken by the applicants without his consent. The administrators cannot give the respondent 3 or 2 acres depending on which Evans he is and then purport to sell his entitlement without his consent. I find that the applicant's application is mischievously brought. It is intended to evict the respondent from the suit land. The applicant's application is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of May, 2015.

**E. OBAGA**

**JUDGE**

In the presence of M/s Arunga for respondent and Mr. Kisa for applicant.

Court clerk Isabella.

**E. OBAGA**

**JUDGE**

**19/5/15**

**MR. KISA**

I pray for certified copies of proceedings and ruling to enable us advise our clients.

**COURT**

Let certified copies of proceedings and ruling be supplied to the applicants upon payment of the requisite fees.

**E. OBAGA**

**JUDGE**

**19/5/15**