



**No. 3**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 206 OF 2011**

**KERESENSIA ASETA.....APPLICANT**

**-VERSUS-**

**1. WILLIAM KIRIAGO**

**2. JULIUS ARERI**

**3. SABINA RABERA.....RESPONDENTS**

**RULING**

The plaintiff/applicant brought a Notice of Motion application dated 26<sup>th</sup> September 2011 seeking the following orders:-

1. ***THAT the application be certified urgent and be heard on priority basis.***

2. ***THAT PENDING the hearing of the application inter partes an order of temporary injunction do issue restraining the Defendants/Respondents, their servants, agents or employees from further trespassing into or interfering with the Plaintiff/Applicant or her servants, agents or employees' peaceful use and enjoyment of the property Wanjare/Bogitaa/1123.***

3. ***THAT PENDING the hearing and determination of the suit an order of temporary injunction do issue restraining the Defendants/Respondents their, servants, agents or employees from further trespassing into or interfering with the Plaintiff's/Applicant's or her servants, agents or employees' peaceful use and enjoyment of the property Wanjare/Bogitaa/1123.***

4. ***THAT the costs of the application be provided for.***

The application was certified urgent as per prayer 1 on 30<sup>th</sup> September, 2011 and an order given for inter partes hearing on priority basis. The application is premised on **Order 40 Rules 1 and 2** of the **Civil Procedure Rules** and **Section 3, 3A and 63(c) and (e)** of the **Civil Procedure Act** (Cap 21 Laws of Kenya).

The Applicant has set out various acts of trespass perpetrated by the Defendants/Respondents including harvesting crops and trees from the suit land on diverse dates. She has stated that a Criminal Case (Kisii CM Criminal Case No.337 of 2011) in respect of the acts of trespass by the Respondents is pending before court. **Mr. Minda**, Counsel for the applicant argued the application before me on 11<sup>th</sup> October 2011.

A perusal of the affidavit of service shows that the Respondents were served on 4<sup>th</sup> October 2011. None of them have filed any papers in response and none of them appeared for the inter partes hearing. This means that the present application is unopposed and ought to be allowed. However from my perusal of the affidavit of service, there appears to be close familial relationships between the Plaintiff/Applicant and the respondents. The process server avers on paragraph 3 that the Plaintiff briefed him **“that the 3<sup>rd</sup> defendant Sabina Rabera is a co-wife and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are her co-wife's sons...”** This information had neither been provided in the present application nor in the plaint. In my considered view such a relationship raises the possibility, albeit a mere possibility, of the suit land being family land with the attendant possibility of the defendants having a legitimate interest in the same notwithstanding the fact of registration in the plaintiff's name.

In view of this, I hold that the prayers sought in the present application, to wit, an injunction against the defendants will not serve the interests of justice. Accordingly, I dismiss the application and order that the Applicant take active steps to prosecute the main suit and bring it to an expeditious determination. I make no order as to costs.

**Ruling dated, signed and delivered at Kisii this 25<sup>th</sup> day of November 2011.**

**R. LAGAT KORIR**

**JUDGE**



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