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Citation:	Christine Nekesa Wafula v Janerose Sakina Nduguyu [2019] eKLR
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 64 OF 2019

CHRISTINE NEKESA WAFULA.....PLAINTIFF

VERSUS

JANEROSE SAKINA NDUGUYU.....DEFENDANT

RULING

1. This is a ruling on two applications, one filed by the defendant on **12/11/2019** and dated the same date and another one filed by the plaintiff on **4/12/2019**, also bearing the same date. On **5/12/2019** this court ordered that the two applications should be heard together. The two applications were heard on Tuesday **10/12/2019** when counsel for both parties highlighted their filed submissions. The application dated **12/11/2019** seeks a temporary injunction restraining the plaintiff from interfering with the defendant's peaceful use and possession of land parcel **No. Kitale Municipality Block 17/Bidii/816** pending the hearing and determination of the suit and an order that the Chief, Bidii location be summoned to explain why he has declined to issue a permit for felling of trees on the suit land. The application is premised on the grounds that the trees on the suit property cause a danger to the defendant's residential house and the plaintiff has colluded with the chief to have permit withheld. The application is supported by the affidavits sworn by the defendant on **12/11/2019**. That affidavit states that during the pendency of **Kitale ELC No. 84 of 2017** it was confirmed that the trees are on the suit land. It exhibits a copy of chief's letter dated **20/6/2018** addressed to the defendant warning her that his office must issue authority before the trees are felled. A copy of an application by the defendant to the Kenya forest service for leave to harvest farm produce is also attached to the affidavit. Finally a copy of a surveyor's report dated **28/3/2019** confirms that the trees "*which were cut down were found to be parcel No. 816*".

2. In the replying affidavit of the plaintiff filed on **4/12/2019** in response to that application she depones that there are mature eucalyptus trees and they are at least 20 metres away from the nearest residential premises on the land and they pose no danger to the defendant; that the surveyor's report relied on was not filed in the previous litigation which report is in any event is disputed; that there is no collusion with the area Chief as alleged; that the Chief's involvement is only informed by the fact that the ownership of the land is in dispute and that there is a restriction registered against the title prohibiting any dealing with the land until the family dispute is resolved; that cutting down of trees is included in such restricted dealings as it affect the character and value of the land; that the defendant only intends to disposal of the trees once cut; that defendant has colluded with a Chief who is not in charge of the local jurisdiction to have a permit to harvest the trees for posts and firewood and that the Chief of the Bidii location cannot be compelled to issue the defendant with a permit when an ownership dispute is pending.

3. In the application dated **4/12/2019** the plaintiff seeks an order of temporary injunction restraining the defendant or her agents from harvesting or felling the trees situate on the suit land pending the hearing and determination of the suit. the application is premised on the grounds that the plaintiff is widow to the late **Hillary Pius Wafula Khaemba** who owned the whole of the suit land; that prior to his demise the deceased and the plaintiff had agreed that the property which the plaintiff refers to as matrimonial property shall be reserved for the benefit of their two children and be transferred to them upon attaining majority; that the defendant has already harvested some trees on the suit land despite the pendency of this suit and the *status quo* requires to be maintained pending the hearing and determination of the suit.

4. The application is supported by the plaintiff's affidavit sworn on **4/2/2019** which reiterates the grounds above.

5. From the above is it clear while the defendant wishes to cut down some trees on the suit land ostensibly for the reason of the danger they pose to the safety of her residential house and her life and limb, the plaintiff is of the view that the *status quo* should be preserved and the defendant restrained from such action pending the hearing and determination of this suit.

6. While considering the two application I note that each of them seeks an injunction against the opposite party and the prayer in the defendant's application that Chief be summoned to explain his failure to issue a tree harvesting permit to the defendant is the only exception. I will therefore deal with the issue of injunctions in the first and return to the issue of summons to the Chief in the latter part of this ruling.

7. The response of the defendant to the plaintiff's application is in an affidavit dated **6/12/2019** and filed on the same date. In that affidavit she depones that she is the registered proprietor of the suit land and exhibits a copy of the title deed in her name. She further asserts that she had resided on the suit land for **15 years** with her husband before his demise and her matrimonial home is located there. She exhibits photographs showing cracks apparently on the walls and floor of what is said to be her house situated on the suit land which damage she attributes to the trees she intends to fell. She depones that she has contacted a "*contractor*" who has advised that unless the trees are removed the whole house will gradually collapse.

8. According to the pleadings and the applications it is common ground that the defendant is in occupation of the suit land hence the application to injunct the plaintiff from interference. It is also common ground that the land has been transferred into the name of the defendant. Further, it is also common ground that the land was previously owned by Hillary Pius Wafula Khaemba. What is disputed is whether the deceased had reserved the land for the plaintiff's children's benefit before he died and whether the matrimonial home of the plaintiff and a residential house for the plaintiff's children are in the suit land and whether the land was fraudulently transferred to the defendant; the issue of whether spousal consent to the transfer to the defendant was required from the plaintiff is also in issue. In the defence the defendant alleges that the plaintiff is the estranged wife of Hillary Pius Wafula Khaemba and from whom she had been separated for over **18 years**.

9. It is no doubt that a land owner is entitled to the use and occupation of his land over which he holds a title. **Section 25** of the **Land Registration Act** provides as follows:

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

10. In these proceedings the defendant is the registered proprietor of the suit land and is in occupation. However the propriety of the registration process that gave birth to her title deed is seriously challenged by the plaintiff who avers that it was fraudulent. **Section 26** of the **Land Registration Act 2012** provides as follows:

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” (emphasis mine)

11. It is therefore clear from the above provisions that a title may be subjected to challenge on the basis of alleged fraud which may be proved to the required balance of probabilities at the hearing of the suit through the evidence adduced.

12. In the instant suit the plaintiff pleads that her marriage with the deceased was solemnized on **14/1/1994** and exhibits a copy of a certificate of marriage demonstrating that fact. Apart from the deposition by the defendant to the effect that the plaintiff was estranged from the deceased there is no claim that the marriage between the plaintiff and the deceased was dissolved at any time. Besides the defendant has not indicated in any manner that there was conducted any formal marriage between her and the deceased such as that between the plaintiff and the deceased. In this regard this court is inclined to believe that the plaintiff has raised a *prima facie* case that she was the lawful wife of the deceased whose marriage had not been dissolved at the time of the deceased demise and that she and her children were entitled to beneficial interest in the deceased's estate. However it is clear the defendant must have obtained possession of the suit land by some means known or unknown to the deceased. From the records at the moment available it is not yet known whether the registration of the defendant as the owner of the suit land occurred before or after the deceased's demise; that is a matter best left to the parties to establish at the hearing through evidence and this court must determine the instant application on the basis of the available evidence.

13. Both parties claim to be widows to the deceased. I have not seen any statement in the replying affidavit of the plaintiff filed on **4/12/2019** that suggests that the defendant was not also married to the deceased. Both parties claim that the suit land is host to among other things what each considers to be their matrimonial home. Subject to a few qualifications that do not apply in the instant suit, the rights of spouses to a matrimonial home is protected by **Article 68 (c) (iii)** of the **Constitution of Kenya** and **Section 12 (3),(4) and (5)** of the **Matrimonial Property Act 2012**.

14. For the above reasons and depending on the affidavit evidence availed, a balance must be struck between the safety of the defendant and the need to preserve the suit land as urged by the plaintiff pending the determination of the suit.

15. I have examined the replying affidavit of the defendant and in my view it falls short of the establishing that the trees are the cause, or the sole cause of the cracks that have been witnessed in the structure of the house she claims to reside in; no expert report has been produced to verify that fact; the photographs exhibited show just the cracks and do not give the court a clue as to degree of proximity of the trees to the house. For that reason that she has failed to establish that the trees pose any danger to her house, for indeed a party must support any claim they make with the requisite evidence and on a balance of probabilities.

16. In respect of the plaintiff's application for an injunction I find that the mere fact of a marriage to the deceased which had not been dissolved as at the time of death of her husband is persuasive of presumption of a *prima facie* case in her favour for the time being notwithstanding the fact that the defendant is in occupation of the suit land. This court notes that the plaintiff does not seek any order that would be deemed to be a mandatory injunction against the possessory interest of the defendant which mandatory injunction at an interlocutory stage would be contrary to the principle laid down in **Locabail International Finance Ltd -vs- Agro Export & Another [1986] ALL ER 901** and other subsequent decisions.

17. Trees possess more than their mere pecuniary or economic value as sources of, *inter alia*, firewood, timber or fencing posts; in certain instances they provide microclimates, habitats and unique aesthetics that would take decades to replace once destroyed. It is therefore the conclusion of this court is that if allowed the harvesting of trees before the conclusion of this suit might occasion the plaintiff loss of a kind that cannot be compensated for by way of pecuniary damages in the event the decision in this suit turns out to be in her favour. In my view the trees, being attached to the land, form part of the factors determining its value and harvesting them might affect the value thereof and the prevailing *status quo* ought to be maintained pending the determination of the rights of the parties in this litigation.

18. In my view also the prayer by the defendant for the local Chief to be summoned to this court to explain why he has not issued a permit is not merited, first because the suit land is truly in dispute and secondly because the Chief is not a party to this suit and no claim has been raised by the defendant against him sufficiently for him to address; besides the process of harvesting trees is within the docket of other authorities in the government who may have their own laid down procedures whose compliance may require to be put to the test before any orders against them are issued.

19. I therefore find that the application by the defendant has no merit and that the plaintiff's application has merit.

20. I therefore dismiss the defendant's application dated **12/11/2019** and I grant the plaintiff's application dated **4/12/2019** in terms of prayer No. (3).

21. However each party shall bear their own costs of the applications.

It is so ordered.

Dated, signed and delivered at Kitale on this 11th day of December, 2019.

MWANGI NJOROGI

JUDGE

11/12/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Collins

Ms. Arunga for the defendant

Mr. Bisonga for the plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

11/12/2019.



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