



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 336 OF 2017

PETER MBATI ::::::::::::::::::::::::::::::::::::::: 1ST PLAINTIFF/APPLICANT

FRANCIS MUCHERA MBATI ::::::::::::::::::::::: 2ND PLAINTIFF /APPLICANT

VERSUS

JIMMY C. KULECHO ::::::::::::::::::::::: 1ST DEFENDANT/ RESPONDENT

LAND REGISTRAR, KAKAMEGA ::::2ND DEFENDANT/ RESPONDENT

RULING

The application is dated 15th September 2015 and brought under order 40 rule 2, 3, 5 and 9 Section 1A CAP 21 Laws of Kenya seeking the following orders;

1. THAT this application be certified urgent and be heard exparte in the 1st instance.
2. THAT pending the hearing and determination of this application /suit, there be an interim injunction to restrain the 1st defendant, his agents, assignees, workers, representatives from carrying out construction, excavation and building on suit land S. KABRAS/LUKUME/1059 or until further orders of the court.
3. THAT there be orders on costs.

It is founded on the following grounds; the applicants have a pending suit on the acreage and size of the 1st respondent's parcel of land. That 1st respondent did acquire excessive land from that purchased of one acre as can evidently and patently be seen from the mutation form as well as green card. That in bid to defeat ends of justice, the 1st respondent has embarked on constructions, excavation etc with view to putting up permanent structures. That unless orders are granted as herein, this suit which stands high chances success and is meritorious may be rendered of academic importance. This application is brought in good faith and on time. That the court is empowered to grant orders prayed.

The 1st defendant/respondent submitted that the plaintiff/applicants are not entitled to the orders sought in the application. The plaintiff/applicants are not entitled to interfere with the use of his own parcel of land which he bought legally. The plaintiff/applicant's claim is frivolous and vexatious since he bought the portion of land from the 1st plaintiff legally and he transferred the parcel of land due to himself. The 2nd plaintiff/applicant has no locus standi to raise any claim since he does not own any part of the suit land. That the plaintiff/applicant's claim deserves to be dismissed since it lacks merit.

This court has carefully considered both the applicants' and the respondents' submissions and the annexures therein. The principles governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003)** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

This application is based on the following grounds that the applicants have a pending suit on the acreage and size of the 1st respondent's parcel of land. That 1st respondent did acquire extra land from that purchased of one acre as can be seen from the mutation form as well as green card. That in a bid to defeat the ends of justice, the 1st respondent has embarked on constructions, excavation etc with view to putting up permanent structures. That unless orders are granted, this suit which stands high chances of success and is meritorious may be rendered of academic importance. I find that from the documents on record it is clear from the land register that the land was transferred to the respondent on the 27th September 1993 and a title deed issued on the same date. No evidence has been adduced at this stage to challenge the title. I find that the applicants have not shown a prima facie case with a probability of success. The applicants have not shown that they will suffer irreparable injury, which would not adequately compensated by an award of damages. As the 1st respondent has been in occupation all this time the balance of convenience tilts in his favour. I find that this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE