



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 83 OF 2017**

**JARED ASAVA KIYAYI.....PLAINTIFF/APPLICANT**

**VERSUS**

**KIYAYI AKAFULE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**VICTOR AMAHENO OKILA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The application is dated 1<sup>st</sup> November 2017 and the plaintiff/applicant seeks the following orders;

1. This application be certified as urgent and be grant exparte in the 1<sup>st</sup> instance.
2. That pending the hearing and final determination of this application, the 2<sup>nd</sup> defendant/respondent either by himself, through his agents, employees, servants, workers and/or any other person acting under his direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, and/or in any manner whatsoever from interfering with the plaintiff/applicant's quiet and peaceful occupation, possession and use of his parcel of land No. KAKAMEGA/VIGULU/1394 that has a new title being SOUTH MARAGOLI/VIGULU/2227.
3. That pending the hearing and final determination of this suit, the defendant/respondent either by himself, through his agents, employees, servants, workers and/or any other person acting under his direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, and/or in any manner whatsoever from interfering with the plaintiff/applicant's quiet and peaceful occupation, possession and use of his parcel of land No. KAKAMEGA/VIGULU/1394 that has a new title being SOUTH MARAGOLI/VIGULU/2227.
4. That the costs of this application be provided for.

The plaintiff submitted that the 1<sup>st</sup> defendant is his biological father and the 2<sup>nd</sup> defendant bought the parcel of land No. SOUTH MARAGOLI/VIGULU/2227 from his father which was formerly KAKAMEGA/VIGULU/1394 without his knowledge as he is the one staying on the actual piece of land. That the 2<sup>nd</sup> respondent has taken advantage of the 1<sup>st</sup> respondent's age to have the same processed. That in view of his non involvement out of the blues and without any permission and approval, the 2<sup>nd</sup> defendant/respondent, his agents, representatives and/or employees came to his said parcel of land with and threatened to take over as he had obtained titles over the same. That his efforts to take to the respondents and his agents and or employees to allow him peaceful use of his land has not yielded any fruits as he has always turned violent. That the 2<sup>nd</sup> respondent has vowed to continue with his illegal actions on the said land thereby subjecting him to irreparable loss and damage as he cannot utilize his property.

This court has carefully considered all the submissions herein. The principals governing the grant of interlocutory injunction are clear. 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 principal grounds and on the annexed affidavit of Jared Asava Kiyayi and the grounds that, the applicant is the proprietor of the parcel of land No. KAKAMEGA/VIGULU/1394 that has a new title being SOUGHT MARAGOLI/VIGULU/2227. That the 2<sup>nd</sup> defendant/respondent is threatening to move on to the plaintiff/applicant’s land and hence deny the applicant the use of the said land without any color of right. That the respondent’s actions are illegal and unjustifiable and without basis and are only calculated at promoting breach of peace. That the respondent has no interest in the said parcel of land and is using force to deny the applicant enjoyment of his property. That the respondent and his agents and or servants acting under his direction have engaged into wanton acts of destruction and wastage of the said properties and unless an injunction is issued the said properties will be turned to total ruins. That the balance of convenience tilts in favour of the plaintiff/applicant who is the proprietor of the suit parcel.

The 1<sup>st</sup> respondent submits that this was his land and he sold it to 2<sup>nd</sup> respondent and the plaintiff was aware. The 2<sup>nd</sup> respondent maintains that he is an innocent purchaser for value. I find that the applicant has some beneficial interest in this land. I find that he has established a prima facie case in this matter and order that the status quo be maintained pending the hearing and determination of this matter. There will be no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**