



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO.1 OF 2018**

**DISMAS OTELLA OSIKOYO.....1<sup>ST</sup> APPLICANT**

**BADI OMARI.....2<sup>ND</sup> APPLICANT**

**MARTIN MUKHWANA ODUOR.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**THOMAS BARASA KIMANI.....RESPONDENT**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 26<sup>th</sup> February 2018 and filed on the same day seeking the following orders:

1. }

} *spent*

2. }

**3. That pending the hearing and determination of this suit, there be an order for a temporary injunction against the defendant restraining him, his agents, servants and any other person acting under his authority or direction from transferring, wasting, damaging, alienating, trespassing selling, utilizing, developing removing or otherwise disposing off panels of land No. W. BUKUSU/N. MYANGA/3168 and 3169.**

**4. Costs be provided for.**

The application is grounded on the reasons set out therein and also supported by these affidavits of the plaintiffs.

The gravamen of the application is that the three plaintiffs have each been in possession and occupation of one(1) acre, two(2) acres and three(3) acres respectively of land parcels **No. W. BUKUSU/N. MYANGA/3168** and **3169** (hereinafter the suit land) since 1977 (in the case of the 1<sup>st</sup> plaintiff) and 2000 (in the case of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs) residing thereon and doing farming. That the defendant conducted a secret succession process and obtained registration of the suit land and has now trespassed thereon and stated backing bricks and threatening the plaintiffs.

The defendant filed a replying affidavit describing the application as misconceived, incompetent, vexatious, scandalous and bad in law and should be dismissed. That the orders sought may prejudice the rights of other third parties who have not been enjoined in this suit and granting them will bar him from his own land. He denied the plaintiff's assertions that they bought the portions of land which they claim to occupy adding that if there was any sale agreement, the 1<sup>st</sup> plaintiff would have attended the **LUFU Ceremony** when the purported seller who is the defendant's deceased father died. That the plaintiffs are strangers and have not been in occupation of the suit land as alleged.

The application has been canvassed by way of written submissions filed both by **MR. C.K. AREBA** Counsel for the plaintiffs and **MS. E. CHUNGE** Counsel for the defendant.

I have considered the application, the rival affidavits and the annexures thereto together with the submissions by Counsel.

This suit is commenced by an originating summons in which the plaintiffs claim to have obtained by adverse possession the various portions of the suit land which is a sub-division of the original land parcel **No. W. BUKUSU/N. MYANGA/386**.

An application for temporary injunction pending trial is to be considered in line with the principles set out in the case of GIELLA V CASSMAN BROWN & CO. LTD 1973 E.A. 358 which are:

- 1. The Applicant must show the existence of a prima facie case with a probability of success at the trial.**
- 2. A temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages, and;**
- 3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case has been defined in the case of MRAO V FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A. CIVIL APPEAL NO.39 OF 2002 [2000 eKLR] as:

**“... a case which, on the material presented to the Court, a 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”**

In NGURUMAN LTD V JAN BONDE NIELSEN & OTHERS C.A. CIVIL APPEAL NO.77 OF 2012, the Court of Appeal stated thus:

**“The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”**

The Court went on to add as follows:

**“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.** Emphasis added.

Finally, as was stated in FILMS ROVER INTERNATIONAL V CANNON FILM SALE LTD 1986 3 ALL. E.R. 772, the Court considering such an application should take the route or course that appears to carry the lower risk of injustice should it should it turn out to have been **“wrong”**.

As stated above, the plaintiffs claim to the suit land is hinged on adverse possession. They therefore claim to have been in possession and occupation of their respective portions of the suit land since 1977 and 2000. The 1<sup>st</sup> plaintiff claims to have bought seven (7) acres out of the original land parcel **No. W. BUKUSU/N. NYANGA/386** from the defendant’s deceased father and thereafter sold two (2) acres to the 2<sup>nd</sup> plaintiff and four (4) acres to the 3<sup>rd</sup> plaintiff and retained 1 (one) acre for himself. The defendant has denied that the 1<sup>st</sup> plaintiff bought seven (7) acres from his deceased father or that the plaintiffs occupy the suit land.

The plaintiffs have annexed to their respective supporting affidavits the Green Card to the original land parcel **No. W. BUKUSU/N. NYANGA/386** showing that the title was closed on 21<sup>st</sup> November 2012 upon its sub-division to give rise to the suit land. That land was previously registered in the names of **KIMANAI MARUMBU** the defendant’s deceased father. Other annexures include agreements of sale between **KIMANAI MARUMBU** and the 1<sup>st</sup> plaintiff and also between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. I must point out at this stage that some of the agreements are not very legible. Hopefully better documents will be availed at the trial. One of the documents annexed to the defendant’s own replying affidavit in response to the main Originating Summons is a letter dated 17<sup>th</sup> February 2017 and addressed to him by the Chief Kimaeti location. Paragraphs two (2) and three (3) thereof are relevant to this application and they read:

**“In 1977, your father sold land to DISMAS OTELLA ID 7992789 who later on sold part of the same land to BADI OMARI ID 3438941 in the year 2000.**

**It has been reported in this office that on 10.2.17 you forced away workers belonging to BADI OMARI who reported to Kimaeti Police Patrol Base and my office”**

The import of this letter is that the 2<sup>nd</sup> plaintiff has indeed been in occupation of the land in dispute but the defendant has been interfering with that occupation by chasing away the 2<sup>nd</sup> plaintiff’s workers. Taken together with the other documents herein, I am satisfied that the plaintiffs are in occupation of their respective portions of the suit land and that the defendant is interfering with that occupation. The threat of eviction therefore appears real and as the Court of Appeal held in GEORGE ORAGO V. GEORGE JAGALO & OTHERS C.A. CIVIL APPEAL NO. 62 OF 2009 [2010 eKLR], where the Applicant is in occupation and possession, the denial of an injunction would have the effect of dispossessing him of the land in dispute. A prima facie case has been established by the plaintiffs.

On the test of irreparable injury that cannot be compensated by an award of damages, what the plaintiffs are alleging are a trespass on the suit land and which is a direct transgression of the law. In such circumstances, and as was held in JAJ SUPER POWER CASH AND CARRY V. NAIROBI CITY COUNCIL & OTHERS C.A. CIVIL APPEAL NO.111 OF 2002

**“...it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages.”**

I am therefore satisfied that the plaintiffs have satisfied the second limb of the **GIELLA Case (supra)**.

And if I was in any doubt, which I am not, the balance of convenience would tilt in favour of the plaintiffs because, as the parties in possession, they are, prima facie the owners of the land – **GEORGE ORAGO (supra)**. To deny the plaintiffs the order of temporary injunction will result in a greater risk of injustice.

Ultimately therefore, the plaintiffs Notice of Motion dated 26<sup>th</sup> February 2018 is allowed in the following terms:

**1. Pending the hearing and determination of this suit a temporary order of injunction is issued restraining the defendant by himself, his agents, servants and any other person acting under him from trespassing, wasting, damaging alienating, trespassing, selling, utilizing, developing, removing or otherwise disposing off land parcels No. W. BUKUSU/N. NYANGA/3168 and 3169.**

**2. The parties to comply with pre-trial directions so that this case is heard and determined in the next twelve (12) months otherwise the temporary order of injunction shall lapse.**

**3. Costs shall be in the cause.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

**Ruling dated, delivered and signed in open Court at Bungoma this 22<sup>nd</sup> day of November 2018.**

Mr. Wekesa for Plaintiff – present

Mr. Chungu for defendant – absent

1<sup>st</sup> Applicant – present

2<sup>nd</sup> Applicant – present

3<sup>rd</sup> Applicant – present

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**