



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**IN THE ENVIRONMENT AND LAND DIVISION.**

**ELC. NO.166 OF 2016.**

**NICHOLAS OKUMU WENIORE.....PLAINTIFF**

**VERSUS**

**CONSTANCE NEKESA KHAYENDE.....DEFENDANT**

**R U L I N G .**

1. The application under consideration is a Notice of Motion dated 24/11/2016 and filed on the same date. It was filed contemporaneously with a suit of even date. It is anchored on Order 40 Rules 1 and 2 of Civil Procedure Rules. The plaintiff – NICHOLAS OKUMU WENIORE - is essentially seeking injunctive relief against the defendant – CONSTANCE NEKESA KHAYENDE. What is in dispute is land parcel NO. SAMIA/BUTABONA/1667.

2. As filed, the application has three (3) prayers but prayer 1 is not for consideration at this stage. It was meant for exparte stage and that stage is gone. For consideration therefore are prayers 2 and 3, which I reproduce here IPSISSIMA VERBA (using same words).

Prayer 2: That the defendant, her servants or agents or anybody claiming through her be and is hereby restrained from entering, cultivating, or otherwise dealing with the plaintiff's parcel of land number SAMIA/BUTABONA/1667 until the hearing and final determination of this suit.

Prayer 3: That the costs of this application be provided for.

3. The plaintiff said he is the registered owner of land parcel NO. SAMIA/BUTABONA/1667 ("suit land" hereafter ) but the defendant has forcefully moved into it and cultivated. His efforts to handle the dispute through the area local administration have not borne fruit, hence this suit.

4. The defendant responded to the plaintiffs application through a replying affidavit filed on 13/12/2016. She said she was the first in time on the land. Her late husband DICKSON KHAYENDE WANJALA purchased it. She has been cultivating the land and was surprised when the plaintiff turned up to claim he owned it. She also said there were attempts to handle the matter locally but the higher levels of the area administration tried to shortchange her by insisting that she accepts alternative land as the plaintiff already had title to the suit land.

5. The court heard the application on 24/11/2016 and each side generally reiterated what had already been put in writing. But the applicant seemed to add a twist by asserting that the defendant's is claiming a different piece of land as the number of the parcel she gave is different from the plaintiffs number. This however was not very convincing as it was clear that though the numbers were different, the parties were

referring to the same piece of land on the ground.

6. I have considered the application, the response made, and the rival arguments made during hearing. The plaintiff is the registered owner, no doubt, and this gives him a head start. The defendant has not filed her defence to the suit yet. She has only entered appearance. It is hard to tell if the defendant was shortchanged. The legal entitlements that go with registered ownership need to be presumed in favour of the plaintiff at this stage.

7. As the registered owner of the land, the plaintiff is entitled to use it without interference. The requisite threshold for grant of temporary injunctive relief was set out in the case of ***GIELA VS CASSMAN BROWN & CO. LTD [1973] EA 358***. The threshold entails establishing a prima facie case with a probability of success; demonstrating a likelihood of suffering irreparable loss not compensable in damages; and, where doubts arise as to the suitability of these two, invoking the balance of convenience.

8. The fact that the plaintiff is the registered owner while the defendant is not such owner makes him easily establish a prima facie case. As to the likelihood of suffering irreparable loss, the court has at time relaxed this requirement where it is shown that the rights of a registered owner are being interfered with by one whose rights, if any, are not registered or in any other appropriate circumstances. For instance, in ***MUIGAI VS HOUSING FINANCE CO of Kenya LTD & another*** ; [2002] 2 KLR 332, Ringera J, ( as he then was) pointed out that it is not an inexorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. This same position emerges in **STEVE OUMA'S BOOK:**

***“A commentary on the Civil Procedure Act, cap 21, second edition,” at page 440 where he observes “It is not settled, however, that where damages may be an appropriate remedy, an interlocutory injunction should never issue”***

9. I think this is one instance where the rule as to likelihood of irreparable damages needs to be relaxed. The plaintiff has shown that he is the registered owner and the defendant insists on using the suit land. If the court agrees with her position at this stage, it would look like the rights of a registered owner are being given short shrift or demeaned.

10. And I think that even when it comes to consideration of the balance of convenience, the plaintiff still has the upper hand as he is the registered owner and the defendant has not given an undertaking to pay damages should she ultimately lose the case. In the final analysis therefore, this is an application in which the injunctive relief sought for is merited. I therefore allow the application in terms of prayer 2. Costs of the application will be in the cause.

**A.K. KANIARU**

**JUDGE.**

**DATED AND DELIVERED ON 31<sup>ST</sup> DAY OF JANUARY, 2017.**

**IN THE PRESENCE OF;**

**PLAINTIFF ABSENT**

**DEFENDANT PRESENT**

**J U D G E.**