



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

CIVIL CASE NO. 250 OF 2016

DARIYA SHINYANZWA.....1ST PLAINTIFF/APPLICANT

JANE AGISTA LUSIMBA.....2ND PLAINTIFF/APPLICANT

VERSUS

JOSEPHAT LISIOLO LISHENGA.....1ST DEFENDANT/RESPONDENT

MAURICE MITEKHO LISHENGA.....2ND DEFENDANT/RESPONDENT

JACKON KHAUMBI INZIANI.....3RD DEFENDANT/RESPONDENT

P/A. J.I. KHAYUMBI & CO. ADVOCATES....4TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

The application is dated 4th March 2017 and is brought under section 1A, 1B and 3A of the Civil Procedure Act Order 51 Rule 1 and Order 40 Rules 1 and 2 of the Civil Procedure Rules seeking the following orders;

1. This application be certified as urgent and be heard ex-parte in the first instance.
2. Pending the hearing of this application inter-parties the first and second defendants/respondents, by themselves, family members or agents or any other person claiming and/or acting on their behalf be and are hereby restrained from entering, ploughing, occupying or any other manner interfering with the plaintiff's quiet occupation of all that parcel of land known as ISUKHA/SHIRERE/1183 situated within Kakamega County.
3. Pending the hearing and final determination of this suit, the first and second defendants/respondents by themselves, family members or agents or any other person claiming and/or acting on their behalf be and are hereby restrained from entering, ploughing, occupying or in any other manner interfering with the plaintiff's ownership of land reference number ISUKHA/SHIRERE/1183.
4. Costs of this application be provided for.

The application is supported by the annexed affidavit sworn by **DARIYA SHINYANZWA** . the applicants submitted that he first plaintiff is the registered proprietor of all that parcel of land known as ISUKHA/SHIRERE/1183. The second plaintiff has legally bought the said parcel of land from the first plaintiff has paid the purchase price in full and is the legal owner of the said parcel of land. The first and second defendants have unlawfully trespassed onto the plaintiff's parcel of land in complete violation of the plaintiff's Constitutional Right to own the said parcel of land and to quietly enjoy the use of the same. The first and second defendants/respondents are ploughing the suit property to the exclusion of the registered proprietor, the first plaintiff. The first and second defendants are wasting the said parcel of land.

The 1st and 2nd respondents submitted that the late ALPHONE LISHENGA SHUNZA was their father. The prior to the demise of the said late father sometimes in 2010 he had filed a suit in KAKAMEGA HCCC NO. 52 OF 2007 (OS) against the 1st plaintiff herein DARIYA SHINYWANZWA claiming a portion measuring 0.6 Ha or thereabouts by adverse possession while a measuring 0.3 Ha or thereabouts be registered in names of the 1st plaintiff/applicant herein in respect of land parcel known as ISUKHA/SHIRERE/1183. That their said father passed on before the said suit was heard and determined. That the 1st respondent has obtained the Grant Letter of Administration Intestate in respect of his said father's estate in KAKAMEGA HC UCC. CAUSE NO. 26 OF 2014 and he is currently in the process of making the appropriate application to substitute and revive the said suit in an application dated 27th May 2016 in KAKAMEGA HCCC NO. 52 OF 2007 (OS). The delay in filing the said application was occasioned by the missing of the original court file in the registry. That the 1st plaintiff/applicant herein had also filed a case in KAKAMEGA CMCCC NO. 323 OF 2007 against his father which is also pending in court. That during my late father's lifetime he inherited the entire parcel of land known as ISUKHA/SHIRERE/1183 from my late grandfather SHUNZA MUMATUSI. In 1985 when his father came home from Uganda where he was working and residing for again he found one JOSEPH SEDA BUBIRU having trespassed onto the said parcel of land without his permission and or authority. The late JOSEPH SEDA BUIRU was the father to the 1st plaintiff DARIYA SHINYANZWA. That purely on humanitarian grounds my late father took possession of 0.6 Ha or thereabout of the said and the remaining portion of 0.3 Ha given to the late JOSEPH SEDA BUBIRU during his lifetime. The said late JOSEPH SEDA BUBIRU since 1985 never utilized and or occupied a portion of his father's land measuring 0.6 Ha. That the said JOSEPH SEDA BUBIRU died together with his wife and since then there is no one from the family of the 1st plaintiff utilization and or occupying the said portion measuring 0.3 Ha or thereabouts.

The 1st plaintiff/applicant has no *locus standi* to institute and or even prosecute the instant application as she does not have any registrable interest over title in respect of land parcel known as ISUKHA/SHIRERE/1183 which is now registered in the names of JANE AGITSA LUSIMBA through fraudulent and illegal means perpetuated by the plaintiff/applicants herein without his knowledge and or consent with a view to defeat the ends of justice. (See annexure DS 1 attached to the 1st plaintiff/applicant's instant application at page 27 a copy of Title Deed.) THAT in view of the fact that my late father acquired possession of the said land and the fact that our family including my brother the 2nd defendant have been using the same for a period exceeding twelve (12) years the plaintiffs/applicant claim is statutory time barred, incompetent and an abuse of the due process of the court. THAT the 2nd the plaintiff has no good and proper registrable interest over the suit land which was alter nullified by the District Land Registrar Kakamega thus her claim I baseless and should be dismissed with costs. THAT the plaintiffs/applicant herein are deliberately misleading this honourable court that both of them hold title to the suit land. (See annexure DS 1 attached to the plaintiffs/applicants' application at pages 8 and 27) thus have failed to disclose to this honourable court all the material facts touching on the title in issue which is unclean and unlawful hence the plaintiffs/applicants do not deserve any orders from this honourable court just from their bad conduct as they are economical with truth. THAT my brother 2nd defendant/respondent and myself were not party to the fraudulent means and unlawful acts by the plaintiffs obtained title of the suit land using illegal process without our knowledge and consent.

THAT the title obtained by the 1st plaintiff/applicant which was subsequently transferred to the 2nd

plaintiff/applicant was cancelled by the District Land Registrar since the same was obtained fraudulently by issuing a fake title deed and the entire transaction is subject of criminal investigation. THAT in view of the preceding paragraphs and given that the plaintiffs/applicants are not in actual occupation and or utilization of the suit land it will be prejudicial to us for the court to grant the order sought of injunction when the main suit is pending hearing and determination.

This court has considered the applicant's submissions and the supporting affidavit therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358 and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial**
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,**
- 3. If in doubt, the Court will decide the application on a balance of convenience.**

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The applicants submitted that the first plaintiff is the registered proprietor of all that parcel of land known as ISUKHA/SHIRERE/1183. The second plaintiff has legally bought the said parcel of land from the first plaintiff has paid the purchase price in full and is the legal owner of the said parcel of land. The first and second defendants have unlawfully trespassed onto the plaintiff's parcel of land in complete violation of the plaintiff's Constitutional Right to own the said parcel of land and to quietly enjoy the use of the same. The first and second defendants/respondents are ploughing the suit property to the exclusion of the registered proprietor, the first plaintiff. The first and second defendants are wasting the said parcel of land. Be that as it may it appears that the 1st and 2nd Respondents reside in that land and are claiming adverse possession and fraudulent transfer of the title deed. I find that the applicants have not shown a prima facie case with a probability of success at the trial. The applicants have also not shown that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages. I find that the application has no merit and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE