



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC No. 45 OF 2017

SYLVIA MALECHE (As administrator of the estate of

SIMON MALECHE ACHESA (Deceased).....PLAINTIFF

VERSUS

WELLINGTON ACHESA MALECHE (As administrator of the estate of

JACOB SITEFANO MALECHE (Deceased)1ST DEFENDANT

DAVID OMUTERE MALECHE2ND DEFENDANT

THE LAND REGISTRAR KAKAMEGA..... 3RD DEFENDANT

RULING

1. By Notice of Motion dated 12th July 2021, the second defendant is seeking the following orders:

1. [Spent]

2. *THAT pending the hearing of the application interpartes, the Plaintiff/Respondent either by herself, through her agents, employees, servants, and/or any other person acting under their directions be restrained by a temporary order of injunction from moving onto, trespassing, occupying, renting out, alienating, moving onto, collecting rent, constructing any structures depositing building materials or/ in any manner whatsoever from interfering with the 1st Defendant's quite and/or peaceful occupation, possession and/or use of his parcel of land No. KAKAMEGA/SHIRERE/580.*

3. *THAT upon this Application being heard interpartes the Order issued in prayer No. 2 above be confirmed pending the hearing and final determination of the main suit.*

4. *THAT an Order be issued directing the Plaintiff/Respondent to give an Affidavit of account for all rental income received and being received by the Plaintiff/Respondent from the properties comprised in land parcel No. KAKAMEGA/SHIRERE/580 from February 2017 to the date of this Order.*

5. *THAT an Order be issued directing the Plaintiff/Respondent to pay to the 2nd Defendant/Applicant all the rental income received and being received from the properties comprised in LR KAKAMEGA/SHIRERE from February 2017 to the date of this Order pending the hearing and final determination of the main suit.*

6. *The costs of Application to be provided for.*

2. The application is supported by an affidavit sworn by the second defendant/applicant. He deposed that he is the proprietor of the parcel of land known as Kakamega/Shirere/580 and that there are houses on the property some of which he rented to tenants who used to pay rent to him. That at the time he filed this suit, the plaintiff chased away the tenants and brought his own tenants. That the plaintiff is claiming the property and has since made it difficult for him to access it. He added that the plaintiff's activities on the property have subjected him to irreparable loss and will alter the character of the property.

3. Sylvia Maleche the administrator of the estate of the deceased plaintiff filed a replying affidavit in which she deposed that the deceased plaintiff who was her father constructed houses on the property and rented them out to tenants who paid him rent and who continue paying rent to his estate. She added that the applicant has never collected rent in respect of the premises and denied ever chasing away any tenant. That the applicant has never utilized the land and will not therefore suffer any irreparable loss.

4. The application was canvassed through written submissions which the applicant and the plaintiff duly filed. I have considered the application, the affidavits and the submissions. The applicant filed supplementary submissions in which he stated he erroneously referred to the parcel of land known as Kakamega/Shirere/580 instead of Kakamega/Shirere/2417 both in the application and submissions.

5. The principles that guide the court when considering an interlocutory injunction were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**. Simply put, the applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

6. A reading of the plaint herein shows that the suit property is Kakamega/Shirere/2417 and not Kakamega/Shirere/580 which the applicant has referred to in the application and even on oath in his affidavit. The plaint further reveals that the plaintiff, the first defendant and the second defendant have close family members.

7. While deciphering whether an applicant has a *prima facie* case the court must look beyond mere arguments. Over and above raising issues, the applicant must avail evidence demonstrating an infringement of a right, and the probability of success of the applicant's case upon trial. See **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**. For a case to have even the remotest prospect of success, it must be founded on a pleading such as a plaint, originating summons, defence or even counterclaim. The reasoning behind that is clear enough: parties are bound by their pleadings. See **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**.

8. I have combed through the record in this matter with a view to locating any defence filed by the second defendant/applicant. I found none. One cannot build a case on non-existent pleadings. It follows therefore that the applicant has not demonstrated a *prima facie* case. That being the case, I need not enquire into the other aspects of the test in the **Giella** case. The applicant also sought an order of accounts and an order directing the plaintiff to pay to him rental income. Those are final prayers which ordinarily must await hearing and determination of the suit. No basis has been laid to warrant granting such prayers at this interlocutory stage.

9. In view of the foregoing discourse, I find no merit in Notice of Motion dated 12th July 2021. I dismiss the application. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JANUARY 2022.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

MR GETANDA FOR THE PLAINTIFF

NO APPEARANCE FOR THE 1ST AND 2ND DEFENDANTS

NO APPEARANCE FOR THE 3RD DEFENDANT

COURT ASSISTANT: E. JUMA