



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT VIHIGA

ELC CASE NO E002 OF 2022(O.S)

MADSON AMUKHOYE NYANGWESO

LEONARD MUNALA NYANGWESO.....PLAINTIFFS

VERSUS

JAMES MAKONJIO SIKU.....DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion Application dated 14th February, 2022 filed under certificate of urgency and stated to be brought pursuant to the provisions of sections 3 & 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules 2010. The Application seeks for orders:

- 1.) **THAT** the Application be certified urgent and service of the same be dispensed with in the first instance.
- 2.) **THAT** the honourable court be pleased to issue a prohibitory order upon L.R WEST BUNYORE/EMBALI/1082 pending the hearing and determination of the suit.
- 3.) **THAT** Pending the *inter parties* hearing of the Application there be an interim order restraining the Respondent by himself, his servants, agents and/or employees from intermeddling and/or interfering with the Applicant's peaceful occupation of L.R No. WEST BUNYORE/EMBALI/1082.
- 4.) **THAT** this honourable court be pleased to issue orders restraining the Respondent by himself, his servants, agents, and/or employees from intermeddling and/or interfering with the Applicant's peaceful occupation of LR WEST BUNYORE/EMBALI/1082 pending the hearing of this suit.
- 5.) **THAT** Costs herein be provided for.

2. The Respondent opposes the Application vide the contents of the Replying Affidavit in respect of Notice of Motion sworn on 21st February 2022 and the Further Affidavit sworn on 7th March 2022.

3. In addition, the Applicants filed a Supplementary Affidavit sworn by the 1st Applicant on 2nd March 2022.

4. The parties agreed to canvass the Application by way of written submissions. Consequently, the Applicants filed written submissions dated 2nd March 2022. The Respondent filed written submissions dated 7th March through the firm of Lugadiru & Co. Advocates acting for him.

5. The case of the Applicants is that they have occupied that parcel of land known as WEST BUNYORE/EMBALI/1082 (the suit land) since the year 1973. That the suit land is registered in the name of the Respondent. That they have now filed this suit by way Originating Summons seeking to be declared as owners of the suit land by operation of the doctrine of adverse possession. In the meantime, they desire to secure the register and their occupation of the suit land pending hearing and determination of the suit. They seek the court to intervene by granting the orders sought.

6. The Respondent objects to the Application on the ground that the Applicants' claim is frivolous and offends clear provisions of the law. That the Applicants have their own pieces of land inclusive of WEST BUNYORE/EMBALI/1081 and are therefore not entitled to the suit land. That the Applicants have not demonstrated that the Respondent is on the verge of disposing of the suit land. He prays that the Application be dismissed.

7. What remains of the Application to be decided by this court herein is prayers 2, 4 and 5 of the Application. Prayers 1 and 3 were disposed of *ex parte* at the first hearing when the matter was brought under certificate of urgency.

8. Prayer 2 is a prayer for prohibitory order to protect the status quo of the register in respect of the suit land. It is not disputed that the suit land is registered in the name of the Respondent. Without any restraining orders, there is no guarantee that by the end of the trial the same status quo will still be obtaining in respect of the register of the suit land. In the case of Dorcas Muthoni & 2 Others ...Vs... Michael Ireri Ngari (2016) e KLR, the Court held that: -

“ An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of Prohibitory Injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed of. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial”.

The purpose of a prohibitory order is to preserve the property by prohibiting the registration of any transactions on the register, in this case, pending trial.

9. Prayer 3 is a prayer for restraining orders to protect the status quo of the land on the ground. The Applicants have pleaded that they have been in occupation of the suit land since the year 1973. The Respondent’s reply to this is that the land legally belongs to him. It is after hearing the evidence that the rights of the parties will be determined.

The guiding principles in handling this application are the principles laid down in the case of Giella vs Cassman Brown Co. Ltd (1973) 358 that the Applicant must establish a *prima facie* case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of probabilities. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR as follows:

“ a prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is 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.”

From the Evidence contained in the affidavits filed, the court finds that grounds for grant of the interlocutory relief sought have been demonstrated.

10. Furthermore, this court is enjoined by the Provisions of Article 159 of the Constitution, section 18 of the Environment and Land Act and Sections 1A and 1B of the Civil Procedure Act to do substantial justice as opposed to dwelling on procedural and other technicalities. In this regard, it is my considered view that the interest of justice will be served by preserving the status quo of the suit land both in the register and on the ground pending hearing and determination of the suit.

To further the interest of justice, the court herein makes directions for the expeditious disposal of the entire suit.

11. As such, the Application is allowed in the following terms:

a. A prohibitory order is hereby issued prohibiting the registration of any transactions in relation to land namely: WEST BUNYORE/EMBALI/1082 pending the hearing and determination of the suit (O.S) herein.

b. An order of temporary injunction is hereby issued restraining the Defendant from in any way whatsoever interfering with the Applicant’s occupation of the suit land pending hearing and determination of the suit (O.S).

c. Costs of the Application be in the cause.

d. For expeditious disposal of the case the court directs that: -

i. The parties to file witness statements and bundle of documents, if any, within the next 30 days of this ruling.

ii. Directions on the Originating Summons be taken on 26th April 2022.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 21ST DAY OF MARCH 2022.

E. ASATI

JUDGE, ELC

In the presence of:

Ajevi: Court Assistant.

Munyengu Advocate for the Plaintiffs/Applicants

Defendant/Respondent present in person

E. ASATI

JUDGE, ELC