



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ENVIRONMENT & LAND CASE NO. 65 OF 2013

THOMAS MATERE KUSIENYAPLAINTIFF/APPLICANT

VERSUS

JAMIN JUMA WEKESA.....1ST DEFENDANT/RESPONDENT

PATRICK MANYANDIO WEKESA 2ND DEFENDANT/RESPONDENT

KEPHER KHAMALA WEKESA 3RD DEFENDANT/RESPONDENT

RULING

This is a Notice of Motion dated 26/2/13 filed under **Order 40 rule 1 (a)** of the Civil Procedure Rules as well as **Section 1A, 3A, 63 (c) and (e)** of the Civil procedure Act (Cap. 21). The application was filed by the applicant under certificate of urgency. Prayers (a) and (b) have been spent. The prayers that require the determination of the court are (c) and (d) as follows -

(a) (spent)

(b) (spent)

(c) That an order of injunction be issued against the defendants/respondents restraining them either by themselves or through their relatives, employees, servants, agents and/or any other person claiming through them from alienating, selling or offering for sale, laying claim to, trespassing onto, utilizing, developing, constructing on, carrying out any works on and/or in any other manner dealing with land parcel L.R. NO. KAKAMEGA/LUGARI/2079 and/or interfering with the plaintiff's exclusive, quiet and peaceful possession, occupation and use thereof pending the hearing and determination of this suit.

(d) Costs of this application be provided for.

The application has grounds on the face of the Notice of Motion. It was filed with a supporting affidavit sworn by the plaintiff/applicant. It is deponed in the said affidavit that the defendants/respondents have physically denied the applicant the access to the suit land thus preventing him to work on the same, while he was the registered owner. He annexed a copy of the Title Deed issued

under the Registered Land Act (Cap. 300).

The application is opposed. The respondents filed replying affidavit sworn on 3/6/13 by Jamin Juma Wekesa. It was deponed therein inter-alia that the applicant had chosen to hide the truth. That the matter was the subject of Land Dispute Tribunal's proceedings at Lugari and a decision therein had already been made. That the matter was res-judicata.

Counsel for the parties, that is, D. Akwala for the applicant and M. Kiveu for the respondents filed written submissions to the application. They appeared in court on the hearing date and adopted the written submissions filed.

This is an application for injunctive orders. The parameters for consideration by the court in such an application were clearly stated in the case of **Giella vs CassmanBrown [1973] EA 358**. An applicant has to show a prima facie case with a probability of success. Secondly, an injunction will normally not issue unless the applicant will otherwise suffer irreparable loss that is not capable of being adequately compensated in the form of damages. Thirdly, if the court is in doubt, it will determine the matter or application on the balance of convenience.

The applicant has annexed to his affidavit a copy of a Title Deed issued under the Registered Land Act (Cap. 300) on 19/8/2009. The size of the land is indicated therein as 12.1 hectares. The respondents claim that the applicant has been subdividing the land. That out of that land, their father had a share of 7 acres. That the matter was considered by the Land Disputes Tribunal, the magistrate's court and the High Court which delivered a ruling on 18/4/13.

I have perused documents filed, especially the ruling of the High Court in Civil Appeal No. 145 of 2003, in which Wekesa Sinino was the appellant and Marko Kusienya Lisiso was the respondent. In that ruling, it was acknowledged that land parcel No. Kakamega/Lugari/101 was approximately 80 acres. That the matter went to the Land Disputes Tribunal for resolution of a dispute between the parties therein. The decision of the Tribunal was adopted in Kakamega CMCC Misc. Award No. 106 of 2000. However, the respondent Marko Kusienya Sinino filed an application to set aside the orders of the Court. The said application was allowed on 6/11/2001 and the orders of adoption of the award by the Chief Magistrates Court were set aside.

A request to have the award adopted again was dismissed on 12/12/2002. Thereafter, an application for reinstatement of the application for adoption of the Land Disputes Tribunal Award was filed which was dismissed with costs on the ground that the award had already been adopted. Thereafter, an appeal was filed against this dismissal in which ***B. Thurantina Jaden, J.*** allowed the appeal and quashed the order of the subordinate court and ordered that the application dated 26/5/2000 be heard inter-parties.

The decision of the Judge of the High Court was made before the present application was heard. This court does not currently have any information regarding the adoption of the award by the magistrate. This court does not know the position with regard to the hearing and decision of the application dated 26/5/2000. However, in my view the above is not an impediment to considering this present application.

Does the applicant have a prima facie case? A prima facie case is one that may or may not succeed. In my view, with the documents filed in court, the applicant has a prima facie case.

Will the applicant suffer irreparable loss if the orders of injunction sought are not granted? In my view, he will suffer irreparable loss only if the respondents alienate, sale, or offer the land for sale. The other requests by the applicant do not qualify under this requirement of suffering irreparable loss or damage.

The balance of convenience is also in favour of the applicant, as there is no dispute that the land for which he annexed a Title Deed, is part of the land in issue. The title is in his name. The only contra

allegation by the respondents is that the applicant has been subdividing that land which they think is wrong. In my view, with the facts placed before me by both sides, the orders to be issued by this court should also partly affect the applicant, in order to safeguard the interests of both sides and to preserve the subject matter in dispute.

For the above reasons, I order as follows -

1. Both the applicant and the respondents are restrained from alienating, selling or offering for sale land parcel L.R. No. **Kakamega/Lugari/2070** pending the hearing and determination of the suit.
2. In view of the nature of this case, I order that costs of the application be in the cause.

Dated and delivered at Kakamega this 3rd day of April, 2014

George Dulu

J U D G E