



**REPUBLIC OF KENYA.**

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

**CIVIL SUIT NO. 37 OF 2012.**

**PAUL OPIYO .....PLAINTIFF/APPLICANT**

**=VERSUS=**

**CHRISPINUS OJIAMBO.....1<sup>ST</sup> DEFEDANT/ RESPONDENT**

**SYLVESTER JUMA OPADO.....2<sup>RD</sup> DEFENDANT/RESPONDENT**

**RONEX KUNDU OPADO.....3<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOSEPH MBIYE OCHUBE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOSHUA AUMA OCHUBE.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**R U L I N G.**

The Applicant, through M/S. Maloba & company Advocates filed the notice of Motion dated 4<sup>th</sup> June, 2012 under certificate of urgency, simultaneously with the filing of the plaint. The application is brought section 3 A and 63 (c) and (e) of the Civil Procedure Act and Order 4 Rules 1, 3, and 4 and Order 51 of Civil Procedure Rules 2010. The application is primarily for injunction restraining the defendants either by themselves, their agents, servants, or anyone acting under them from farming on, using, putting up structures or in any other way interfering with Land parcel Bunyala/Bulemia/253. The Application is based on six grounds on the face of the application and is supported by affidavit of the applicant, sworn on 4<sup>th</sup> June, 2012.

The application is opposed through the grounds of opposition filed by M/S. J.V. Juma Advocate for the defendants, and a replying affidavit of Joshua Auma Ochube sworn on 18<sup>th</sup> June, 2012 on behalf of himself and the other respondents. During the hearing, Counsel agreed to proceed with the application by way of filing written submissions which they subsequently filed. The court has carefully considered the contents of the supporting and replying affidavits and submissions by counsel. In dealing with issues of temporary injunctions, the principles to be considered are as set out in the case of ***Giella -vs- Cassman Brown and Co. Ltd. 1973 EA 358***. The first principle an Applicant is expected to satisfy is that of establishing a prima facie case with a probability of success. The second is that the applicant should establish that he/she would suffer irreparable damage if temporary injunction was not issued. Thirdly, where the court is in doubt, then the decision would be made on a balance of convenience. To add to the three principles, courts have overtime recognized a 4<sup>th</sup> principle that an applicant must have come before it with clean hands to deserve the issuance of a temporary injunction as it is an equitable remedy. This can be understood by looking at the case of ***Albert Mario Cordeiro -vs- Cyperr Enterprises Ltd., & others HCC. NO.2430 of 1996 where Ringera j, (as he then was) held;***

**“.....I must add that an injunction is an equitable remedy and accordingly, it will not issue even if the necessary conditions are satisfied if it is proved to the court that the applicant is undeserving of the equitable relief.”**

The applicant herein, had in his supporting affidavit indicated that he is the owner of Bunyala/Bulemia/253 and that the name of Ojiambo Odongo had been included as joint owner by error. This was however disputed in the replying affidavit filed in opposition of the application. The

respondents have indicated that they are in possession of a portion of the land contrary to the claim by the applicant. They have also indicated that the applicant was not, himself in occupation of the land, as the persons who occupy his portion are his son-in-law and his daughter. These claims by the respondents have not been rebutted by the applicant. It would therefore mean that the applicant has at this stage failed to establish a prima facie case sufficient to entitle him to an order of temporary injunction. The applicant has also not shown this court what the respondents have done on the land to make him apprehensive that he would suffer irreparable damage. He has also not shown that the balance of convenience weighs in his favour or that he deserves the injunction at this stage.

The claim by the respondents that they were placed on the portion of the land that they have been using by Ojiambo Odongo who is indicated to be entitled to half share of Bunyala/Bulemia/253, before the applicant got his share has also not been rebutted. It is important to note that the registration of the applicant and Ojiambo Odongo as the joint owners of Bunyala/Bulemia/253, was a first registration and has not been challenged in a court of law. It would therefore be unfair to remove or restrain the respondents from accessing the portion of the land which they claim to have been in occupation of without hearing the main suit. For this reason, the court finds the applicants application dated 4<sup>th</sup> June, 2012 without merit and is dismissed with costs. It is so ordered.

**S. M. KIBUNJA,**

**JUDGE.**

***Delivered on 17th day of July, 2013.***