



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ENVIRONMENT AND LAND CASE NO. 248 OF 2013 (O.S.)

SIMON MULONGO SIKUKU

DONALD MUSE SIKUKU APPLICANTS/PLAINTIFFS

VERSUS

MUNYANG'OLI MBUYA WEWELA - RESPONDENT/DEFENDANT

RULING

Before me is a Notice of Motion dated 2nd September 2013 for interlocutory injunctive and prohibitory orders filed by two applicants. The application was filed under Order 40 Rule 1 of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Act (Cap.21).

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn by Simon Mulongo Sikuku, one of the applicants.

The application is opposed. A replying affidavit sworn by the respondent on 13th September 2013 was filed.

On the hearing date, the respondent did not appear in court. Mr. Athunga for the applicants acknowledged that the respondent had filed a replying affidavit in opposition to the application. Counsel asked for the grant of prayer 3 and 4 of the application.

This is, in the main, an application for interlocutory injunctive orders. The parameters to be taken into consideration by the court in such an application are well settled. The well known case of **Giella -vs- Cassman Brown Ltd. [1973] EA 358** is clear on this. An applicant has to show a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss which is not capable of compensation in the form of damages in case the injunction is not granted. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

The genesis of this application is that the two applicants filed an Originating Summons herein for adverse possession. It is still pending. They then filed the present application.

A prima facie case is not one that must succeed, but one which may or may not succeed. The Originating Summons herein may or may not succeed. I find that the applicants have shown a prima facie case with probability of success.

Will they suffer irreparable loss if the injunction sought is not granted? In my view, they will only suffer

irreparable loss if the land is sold or disposed of. Failure to grant other requests in prayer 3 cannot give rise to irreparable loss. The applicants have shown that they will suffer irreparable loss only with respect to sale or disposal of the land.

The balance of convenience is also in favour of the applicants as they appear to be in occupation.

I will grant interlocutory injunctive orders, but restricted to sale or disposal of the land.

The application has also asked for issuance of prohibitory orders. I do not see the need for the prohibitory orders sought, as the injunctive orders herein if issued, can be noted against the title.

Consequently, I allow the application and grant injunctive orders against selling or disposing land parcel **No. NORTH KABRAS/ LUANDETI/1022**. These injunctive orders are directed to the respondent, his agents or servants. I decline to grant prohibition orders.

Costs in the cause.

Dated, signed and delivered at Kakamega this 28th day of November, 2013

George Dulu

J U D G E