



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. E002 OF 2020

JOSEPHAT KWOBA NYAKUTI.....1ST PLAINTIFF/APPLICANT

BENARD BARASA ODHIAMBO.....2ND PLAINTIFF/APPLICANT

DAVID OKELLO NYAKUTI.....3RD PLAINTIFF/APPLICANT

PHANICE SAAKA NYAKUTI.....4TH PLAINTIFF/APPLICANT

VERSUS

MATAYO TAAKA NAKUTI.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs filed a Notice of Motion under certificate of urgency seeking;

(a) Spent.

(b) Spent.

(c) **THAT pending the hearing and determination of this suit a temporary injunction do issue restraining the Defendant/Respondent, his family, agent, servant, employee, personal representative and/or any other person claiming under him from trespassing/encroaching onto land parcel LR. No. MARACHI/ELUKONGO/1968, 2173 and 2255 and cultivating, planting or otherwise interfere with the plaintiffs' use and enjoyment of the said parcels.**

(d) **THAT costs of this application be provided for.**

2. The plaintiffs claim that they are the registered owners of the said land parcels as a result of transmission and annexed copies of searches to confirm the same. They state that the defendant has without any colour of right invaded their land parcels and cultivated and planted on them and as such denying the plaintiffs possession and right to use their land. they claim they will suffer irreparable loss if their prayer is not granted.

3. The defendant filed a Replying Affidavit where he stated that the plaintiffs are his step-brothers and sister. He began using the said parcels of land in 1988 when their father who was still alive then permitted him. He further stated that they all inherited land from the Estate of the late Nakudi Okello Barasa who was their father. He was shocked to learn that the parcels of land had been registered and issued title deeds without the knowledge of the other beneficiaries or administrators. He claims he has never forcefully moved into the land parcels to cultivate but he had been doing so for about 32 years before the execution of the judgment issued on 11.10.2012. He stated that the applicants are still occupying and renting his land LR. No. N. WANGA/INDANGALA/687 to somebody who has planted maize to date and he cannot access it. He claims that the suit before court has been brought by bad faith and motive and prayed that it should be dismissed with costs.

4. The Plaintiffs filed submissions where they relied on the Section 24(a), 25 and 26 of the Land Registration Act, Order 40 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and *Giella v Cassman* case law. They claim that they have satisfied all the conditions necessary for this court to grant their prayer of temporary injunction.

5. The conditions to be met before an interlocutory injunction can be granted was expounded in *Giella v Cassman Brown Co. Ltd 1973 E.A. 358*.

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

6. The Applicants annexed a copy of certificate of confirmation of grant indicating how the estate of their late father was distributed. The Respondent is aware of the mode of distribution as he alluded to the same in his replying affidavit when he refers to the judgment delivered in court on 11th October 2020. He is however uncomfortable with the allegation made that he forcefully moved into the disputed properties. The Respondent at paragraph 17 of his replying affidavit deposed that he has not refused to relocate to the land he was given i.e N. Wanga/Indangalasia/687.

7. The Respondent urged the court to issue an order directing the applicants to co-operate with other family members to have the judgement obtained in Succession Cause No. KAK HCC No. 457 of 2001 read out to enable every member know and understand their share in the estate of Nakudi Okello Barasa. He added at paragraph 14 that the Applicants had rented out his land No. N. Wanga/Indangalasia/687 to somebody else who has planted maize on it to date. The Respondent is thus not denying that the Applicants are entitled to the suit parcels. Thus the Applicants have a prima facie case.

8. I have looked at the documents annexed in support of the application and there is no demand letter annexed which was addressed to the Respondent before the filing of this suit. The Applicants did not contradict the deposition by the Respondent that he has been using the suit parcels since 1988 during the lifetime of Nakudi Barasa – deceased. The Applicants although have shown a prima facie case, they have not shown that the loss they are likely to suffer is irreparable and or that the balance of convenience is tilting in their favour since they have previously not been in possession.

9. In the circumstances of this case, the interest of justice requires me to exercise my powers under sections 3 & 3A of the Civil Procedure Act. Therefore, I do grant the injunction in terms of **prayer 3** of the application. However, the Respondent is granted 45 days to stop using the suit parcels. The injunction takes effect from the 45th day of the date of the delivery of this ruling. Each party to meet their respective costs.

Dated, signed & delivered at BUSIA this 4th day of March, 2021.

A. OMOLLO

JUDGE