REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 2 OF 2019

CHAVUGAMI PAG (suing through

REV. JAVAN OMEGA).....APPELLANT/APPLICANT

VERSUS

JOSEPH AGESA & ANOTHER.....RESPONDENTS

RULING

The application is dated 11th February 2019 and is brought under Order 42 Rule 6 (6) of the Civil Procedure Rules, Section 1 (A) and S. 1 (B) of The Civil Procedure Act seeking the following orders;

1. The application hereto be certified urgent and heard ex-parte in the first instance.

2. Pending the hearing of this application inter parties, this honourable court be pleased in the first instance to grant a temporary injunction to forthwith stop the respondents, whether acting jointly and or severally, their agents and or family members from continuing with construction on land parcel No. SOUTH/MARAGOLI/LUGOVO/1718 or in any way fundamentally altering the solum of the suit parcel.

3. On inter parties hearing this honourable court be pleased to grant a temporary injunction to forthwith stop the respondents, whether acting jointly and or severally, their agents and or family members from continuing with construction on land parcel No. SOUTH/MARAGOLI/LUGOVO/1718 or in any way fundamentally altering the solum of the suit parcel pending the hearing and final determination of the appeal filed herein.

4. The costs of this application be provided for.

It is based on the affidavit of Rev. Javan Omega as well as the general grounds that, the appellant is the absolute registered proprietor of L.R. NO. SOUTH MARAGOLI/LUGOVO/1718 hereinafter referred to as the suit parcel. The appellant instituted suit vide Vihiga Principal Magistrate's Court Environment and Land Court Case No. 26 of 2018 against respondents above named for inter alias declaratory orders that it is the valid, legitimate and rightful owner of the suit parcel. The appellant was prompted to file the above suit after the respondents started illegally tilling the suit parcel. The appellant was compelled to file an application dated 8/2/2018 mainly to injunct the respondents from tilling the suit land. When the suit was filed the respondents had merely started to illegally till the suit land. The application was dismissed on the 10th day of May, 2016. After institution of the above suit, the respondents with an intention to defeat the court of justice herein forcefully took possession of the suit parcel by fencing and commencing construction of permanent buildings on the suit parcel and thereafter filed a defence and counter claim for adverse possession in the said suit. The appellant filed an application dated 22/11/2018 to restrain the respondents from these activities of construction of permanent buildings on the suit land. The said application dated 22/11/2018 was dismissed on 5/2/2019 prompting the filing of the instant appeal. The appeal raises substantial issues of fact and law. Substantial loss will result to the applicant unless temporary injunctive orders are granted. The application has been made without unreasonable delay and it will serve the interest of justice to grant orders sought.

The respondent at the hearing of the application dated 11th February, 2019 opposed the same on the following grounds that, the prayers being sought in the said application are similar to the prayers being sought in the memorandum of appeal dated the 11th February, 2019. It is a ploy to circumvent the appeal and have the orders sought therein determined through the instant application. The issues being raised in the current application are similar to the issues raised in their application in the lower court and which is awaiting the hearing of this appeal. The issue of ownership of land parcel South Maragoli/Logovo/1718 was determined in Vihiga Misc. application No. 8 of 2001 where a decree has been issued and upheld by the High Court in Civil Appeal No. 3 of 2015. The appellant has contemporaneous to this appeal and application filed herein, filed another application dated 11th February, 2019 in Vihiga Court for leave to amend his pleadings which essentially changes the circumstances of the instant suit. The entire application is therefore an abuse of the process of the court and is geared towards wasting court's valuable time. The orders being sought in the application for injunction when there is pendency of an appeal for similar orders cannot avail to the appellant/applicant. The entire application by the appellant is therefore still birth and cannot be granted. Legal provisions do not support

the grant of the said orders under order 42.

This court has carefully considered the submissions and the annextures therein. The principals governing the grant of interlocutory orders are clear. As stated in the case of Giella vs. Cassman Brown (1973) EA 358.

> *"The conditions of granting an injunction are now, I think well settled in East Africa. 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 injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."*

Furthermore, as elaborated in the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) Hon Bosire J.A. held that:

> *"So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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 ....."*

> Further he goes on to state that *"..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

The applicant submitted that he was prompted to file the above suit after the respondents started illegally tilling the suit parcel. The appellant was compelled to file an application dated 8/2/2018 mainly to injunct the respondents from tilling the suit land. When the suit was filed the respondents had merely started to illegally till the suit land. The application was dismissed on the 10th day of May, 2016. After institution of the above suit, the respondents with an intention to defeat the court of justice herein forcefully took possession of the suit parcel by fencing and commencing construction of permanent buildings on the suit parcel and thereafter filed a defence and counter claim for adverse possession in the said suit. The appellant filed an application dated 22/11/2018 to restrain the respondents from these activities of construction of permanent buildings on the suit land. The said application dated 22/11/2018 was dismissed on 5/2/2019 prompting the filing of the instant appeal. I find that the applicant has not shown a prima facie case with a probability of success. It has not been shown that the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages if the orders are not granted. The respondent are in possession and the balance of convenience tilts in their favour. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 4TH JULY 2019.

N.A. MATHEKA

JUDGE