



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. E2 OF 2021

CHARLES LUKOYE SHIYUKA.....PLAINTIFF/APPLICANT

VERSUS

JAMES MUYANDA NDUKU

GEORGE MZEE MARAMBA MUYANDA

RUDOLF SHITANDI BARASA.....DEFENDANT/RESPONDENTS

RULING

The application is dated 19th January 2021 and brought under order 40 rule 1, 2, 3 & 4 and order 51 rule 1 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this application be certified urgent and be dispensed with on priority basis.
2. That the respondents be restrained either by themselves, servants, agents and any person acting under their instructions from evicting the applicant, trespassing, entering, cultivating, disposing, selling or otherwise interfering with parcel of land Butsotso/Shikoti/2648 pending the hearing of this application inter parties.
3. That the respondents be restrained either by themselves, servants, agents and any person acting under their instructions from evicting the applicant, trespassing, entering, cultivating, disposing, selling or otherwise interfering with parcel of land Butsotso/Shikoti/2648 pending the hearing of this suit.
4. Costs be provided for.

It is premised on the following grounds that the applicant has now occupied the suit land herein for over 40 years and has built a permanent residence therein and developed the same extensively. That the respondents who are now the registered proprietors after succession have threatened to evict the applicant. That this parcel of land is the only land owned by the applicant and unless the respondents are restrained the applicant and his entire family shall be rendered landless. That unless the orders sought are granted, this suit is likely to be rendered nugatory and the applicant stands to suffer irreparable damage and loss that cannot be compensated. That it is in the best interest of justice that the orders sought be granted.

The respondent submitted that the application is misconceived and misplaced and the same should be dismissed with costs. That the suit land known as Butsotso/Shikoti/2648 was originally registered in the name of the late Adriana Muyanda Maramba who died on 11th February, 2012. Annexed and marked "GMMM 1" is a copy of the Certificate of Death. That currently the suit land known as Butsotso/Shikoti/2648 is registered jointly in the three names of the respondents herein. Annexed and marked "GMMM 2" is a copy of the Certificate of official search dated 8th August, 2020. That upon the death of their late father Adriana Muyanda Maramba they pursued succession proceedings in Kakamega HC Succession Cause No. 34 of 2014 in which the applicant herein filed an application dated 16th May, 2016 which was dismissed with costs in a ruling delivered on 12th June, 2019 by his Lordship Justice W. Musyoka. That the applicant cannot succeed in the suit herein having lost in the succession cause and therefore it is in the interest of justice that litigation must come to an end. That it is not true that the applicant is in occupation of land parcel known as Butsotso/Shikoti/2648 as alleged. That the applicant has settled on land parcel known as Butsotso/Shikoti/14329 registered in the name of his son David Ambale Shiyuka which he is in actual occupation and utilization and has constructed his house and settled thereon, they humbly invite this honourable court to visit the site to establish the true position on the ground. Annexed and marked "GMMM 3" is a copy of the certificate of official search in respect of land parcel known as Butsotso/Shikoti/14329. That the applicant has never occupied or utilized their suit parcel known as Butsotso/Shikoti/2648 and thus was never in peaceful, open, continuous occupation and utilization of the same for a period exceeding twelve years in view of the disputes and

claim in Kakamega HC Succession Cause No. 34 of 2014 hence his claim for title of their land by way of adverse possession must fail.

This court has considered the application and submissions therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd* 1973 E.A 358 and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*
2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The applicant submitted that he has occupied the suit land herein for over 40 years and has built a permanent residence therein and developed the same extensively. That the respondents who are now the registered proprietors after succession have threatened to evict the applicant. The respondents submit that it is not true that the applicant is in occupation of land parcel known as Butsotso/Shikoti/2648 as alleged. That the applicant has settled on land parcel known as Butsotso/Shikoti/14329 registered in the name of his son David Ambale Shiyuka which he is in actual occupation and utilization and has and constructed his house and settled thereon. If they are not on the suit land as alleged then the status quo can be maintained. I find this application is not merited and order that status quo be maintained pending the hearing and determination of this matter. Cost to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST JULY 2021.

N.A. MATHEKA

JUDGE