



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC NO. 1 OF 2021

JACOB AGENGO IMBARU..... PLAINTIFF

VERSUS

JAMIN AVOGA IMBALO.... 1ST DEFENDANT

JOSHUA IJAKA IMBALO...2ND DEFENDANT

RULING

1. The plaintiff herein moved the court through plaint filed on 18th January 2021, initially at the Environment and Land Court Eldoret. The matter was transferred to this court on the very day of filing. Together with the plaint, the plaintiff filed Notice of Motion dated 4th January, 2021, the subject of this ruling. The following orders are sought in the application:

1. [Spent]

2. [Spent]

3. THAT pending the hearing of this suit, a temporary injunction is issued restraining the Defendants either by themselves, servants, beneficiaries, any person claiming through the Defendants and/or agents from trespassing, cultivating, subdividing, laying beacons, selling, transferring, wasting and or alienating parcel of Land title No. Kakamega/Lugari/168.

4. THAT OCS Pan Paper Police Post to ensure compliance.

5. THAT the costs of this application be provided for.

2. The application is supported by the affidavit sworn by the plaintiff. He who deposed that after obtaining confirmation of grant in respect of the estate of his deceased father Timonnah Imbaru Walianga in Kakamega High Court Succession Cause No. 654 of 2014, he became the registered proprietor of the parcel of land known as title No. Kakamega/Lugari/168 on 27th January 2020. That the defendants without just cause have commenced trespassing on and are attempting to till the said parcel of land and that they resist him whenever he attempts to access the land thereby rendering futile his efforts to be fully in control of the suit property.

3. In response, a replying affidavit sworn by the 2nd defendant was filed. He deposed that the suit property is family land that was previously owned by their deceased father Timonnah Imbaru Walianga and that the plaintiff is among ten children of the deceased, all of whom reside on the suit property. That each of the siblings holds a portion of the suit property given to them by the deceased. That the property has been their source of livelihood for many years and that their continued use cannot amount to trespass. He further deposed that the plaintiff secretly obtained the grant with a view to controlling the suit property to the detriment of other occupants. He referred to a Summons for revocation of grant but did not annex any copy. In conclusion, he deposed that the plaintiff has not approached court with clean hands and prayed that the application be dismissed with costs.

4. The 1st defendant did not file any response.

5. Parties relied entirely on the material on record and urged the court to render a ruling.

6. I have considered the application and the affidavits on record. The law is that an applicant seeking an interlocutory must establish a *prima facie* case with a probability of success. Even if she succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the

matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

7. There is no dispute that the applicant is the registered proprietor of the suit property and that he became registered proprietor after obtaining confirmation of grant in respect of the estate of his deceased father Timonnah Imbaru Walianga in Kakamega High Court Succession Cause No. 654 of 2014. The second defendant has contended that the suit property is family land which has been their source of livelihood for many years. He denies that they are trespassers and adds that the plaintiff obtained the grant behind their backs and that they have applied for its revocation.

8. I note that the defendants have filed a counterclaim seeking a declaration that the plaintiff holds the suit property in trust for himself and his 7 siblings. The plaintiff did not file any further affidavit to challenge the 2nd defendant's allegations. The plaintiff's complaint is that the defendants have begun to trespass onto the suit property and that they are attempting to till it. There is no allegation that anybody has threatened the plaintiff's title beyond the alleged summons for revocation of grant.

9. In view of the foregoing, I am not persuaded that the plaintiff has established a *prima facie* case. Although subject to confirmation at trial, it seems to me that the suit property could be family land. If indeed the plaintiff's grant is threatened with revocation, his title will equally be affected.

10. In the circumstances, I find no merit in Notice of Motion dated 4th January, 2021. I dismiss the application. Considering the relationship between the parties, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF OCTOBER, 2021

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Kombwayo holding brief for Mr Onindo for the Plaintiff/Applicant

The 1st Defendant present in person

The 2nd Defendant present in person

Court Assistant: E. Juma