



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 365 OF 2013

GEORGE JOSEPH OTIENO.....PLAINTIFF/APPLICANT

VERSUS

WAMALANDA OKWAKO.....DEFENDANT/RESPONDENT

RULING

The applicant under a certificate of urgency dated 19th November 2020 urged the court to hear the application below for injunction as the matter had a hearing date of 10th March 2020. The application is dated 11th December 2013 and is brought under section 3, 3A and 63 (c) of the Civil Procedure Act Cap 21 Laws of Kenya and under order 40 rules 1a and b and 4 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified urgent.
2. That a temporary order of injunction be issued restraining the respondent herein, his relatives, agents and or servants from trespassing on, cultivating, occupying, alienating, cutting trees and or dealing in any manner whatsoever with L.R. Marama/Shiatsala/1132 pending the hearing of this application interparties.
3. That a temporary order of injunction be issued restraining the respondent herein, his relatives, agents and or servants from trespassing on, cultivating, occupying, alienating, cutting trees and or dealing in any manner whatsoever with L.R. Marama/Shiatsala/1132 pending the final hearing and determination of this suit.
4. That costs be provided for.

It is premised upon the grounds that the applicant is the registered owner and administrator of L.R. Marama/Shiatsala/1132. That the respondent has without any colour of right and the applicant's consent trespassed onto his land and has unlawfully occupied, ploughed, cultivated and damaged it and has cut down the applicant's trees thereon and is continuing with his said unlawful actions despite the applicant's protests. That the respondent is alienating and selling the applicant's land to unsuspecting buyers. That the respondent's unlawful actions have denied the applicant his proprietary rights of user in his land thus occasioning him substantial loss and damages. That the applicant has a prima facie case against the respondent herein with high chances of success and the balance of convenience lies in favour of the applicant. That the applicant has attached high sentimental value on the suit land herein and he stands to suffer irreparable loss and damages if the order sought herein are denied.

The respondent submitted that the application is fatally defective, unmeritorious, incompetent and bad in law and that the same should be dismissed with costs. That he admits that the applicant is the registered owner of the land known as L.R. No. Marama/Shiatsala/1132. That he is the registered proprietor of land known as L.R. No. Marama/Shiatsala/1065 which was registered in his name on the 21st April, 1967 and certificate of land subsequently issued on the 22nd February, 1968. Annexed and marked "WO 1" is a copy of official search. That the two parcels of land are adjacent to each other and there has been a long standing dispute in boundary separating the two. Annexed and marked "WO 2" is a copy of the index map from the Surveyors of Kenya. That the dispute started about twenty years ago when the applicant's father encroached onto his land and although he had filed a suit in 1993, the same was dismissed for want of prosecution, but the dispute on the boundary subsists to date. That the dispute commenced when the applicant's father interfered with the boundary separating the two parcels of land by uprooting or digging up the fence in early 1990s. That the two parcels of lands are not separated by a permanent stream as alleged by the applicant. This stream forms part of his land that the applicant and his father had encroached prior to his death.

This court has considered the applicant's submissions and the supporting affidavit 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 applicants submitted he is the registered owner and administrator of L.R. Marama/Shiatsala/1132. That the respondent has without any colour of right and the applicant's consent trespassed onto his land. The respondent submitted that he is the registered proprietor of land known as L.R. No. Marama/Shiatsala/1065. That the two parcels of lands are adjacent to each other and there has been a long standing dispute in boundary separating the two. This court also notes that this application was filed way back in 2013 and this matter has never proceeded to hearing. I find that the applicant has not shown that he will suffer loss which cannot be adequately compensated in damages if the application is not granted. I find that this application has no merit and I dismiss the same. This matter has a hearing date and the same should go to full hearing. Cost to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15TH DECEMBER 2020.

N.A. MATHEKA

JUDGE