



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 52 OF 2019 (OS)

SETH OUKO ALAI.....1ST APPLICANT

MARY DEDE OJWANG'2ND APPLICANT

VERSUS

JASON OKOTH OWIYO.....1ST RESPONDENT

DENNIS OTIENO OMONDI.....2ND RESPONDENT

NANCY AKOTH OWITI.....3RD RESPONDENT

ELVIS OTIENO MUGA.....4TH RESPONDENT

RULING

The Applicants filed a Notice of Motion dated 6th April 2020 seeking an order of injunction restraining the Respondents, their employees, servants and/or agents from evicting the Applicants and their families, curbing use of the suit properties by the Applicants and their families, employees and assigns; and or destroying the Applicants' crops and fences until the conclusion of the suit. Furthermore, an order of injunction restraining the Respondents, their employees, servants and/or agents from inviting/allowing/leasing/selling the parcels of land subject to this suit to third parties or interfering by any means howsoever with the status quo as at the time of the filing of the suit, until the conclusion of this suit.

The applicants seek further that they be allowed to annex a copy of the register to the amended originating summons once the land registries are reopened and an order compelling the Respondents to grant access to the Applicants and their families to their homes and use of the property they have been occupying.

That the order be served upon the Officer in Charge of Station, Awasi Police Station and the Chief and Assistant Chief, Border II Sub-Location and the law enforcement agencies under their purview to provide protection to the Applicants, their families and their properties against any adverse acts by the Respondents, their servants, agents and/or assign and further ensure compliance by the Respondents. Costs of this application be borne by the Respondents. Such further and/or other orders be made as the court may deem fit.

The application is based on the grounds gleaned from the body of the application and the supporting affidavit sworn by the 1st Applicant. That the Applicants are the lawful occupants of a portion of the suit property claiming adverse rights over the said property as against the registered proprietor by virtue of which the Applicants are claim exclusive possession and/or occupation of the same.

That the Respondents have during the course of the suit transferred the suit property from the original proprietor into their names and commenced occupation and sale of the same. That the Respondents called a surveyor and put up beacons on the property without the Applicants' consent. That the Respondents have taken possession of the suit parcel, started digging and uprooting trees within the suit parcel, interfering with boundaries, fenced off the property leaving the Applicants with no access routes onto their properties. That the Respondents began putting up poles immediately outside the 1st Applicant's doorstep at the front and at the back of his home. That the 2nd Applicant has been similarly cut off from her house. That the Respondents intend to permanently deprive the Applicants of the suit property despite having absolutely no claim to it.

That the Applicants have a *prima facie* case against the Respondents with an overwhelming chance of success. That the Applicants are ready and willing to give an undertaking as to costs. That the Applicants stand to suffer irreparable loss at the hands of the Respondents that is not compensable by monetary award. That it is in the interest of justice that the orders sought be granted.

Attached to the 1st Applicant's supporting affidavit were copies of photographs showing the felled trees, cut sisal plants and poles erected around the Applicants' homes, as well as two sale agreements between the between Applicants and one Alfred Owiyo Obuon.

The Respondents did not file a response within the time stipulated by the court and the Applicants proceeded to file written submissions dated 4th May 2020.

Applicants' Submissions

Counsel for the Applicants made reference to ***Giella v Cassman Brown*** which established the criterion for considering an application for interlocutory injunction – a *prima facie* case, whether the applicant would suffer irreparable harm, and when in doubt deciding on the balance of convenience.

Counsel submitted that the Applicants have resided on the suit property for more than 12 years and the photographic evidence clearly indicated that the Respondents were in the process of fencing off the land, an activity adverse to the interests of the Applicants' occupation of the property.

Counsel submitted that the court gave the Respondents adequate time to respond but they did not, and thus under Order 15 Rule 14 (4), the matter should proceed *ex parte*. That since the application was unopposed, the prayers sought should be granted.

WHETHER THE ORDERS SOUGHT ARE MERITED

The principles for determining whether to grant an interlocutory injunction are laid out in ***Giella v Cassman Brown [1973] EA 358*** at 360: the applicant must show a *prima facie* case with a probability of success; that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and finally where the court is in doubt, it will decide the application on a balance of convenience.

The Applicants have established a *prima facie* case by tendering evidence that indicates that they purchased portions of the suit property from the original registered proprietor. They have also demonstrated that the actions of the Respondents would occasion significant injury and loss to the Applicants properties on the suit parcel. Moreover, the balance of convenience tilts in favour of the Applicants who have set up homes on the property which they require access to. The failure of the Respondents to file a reply renders this application unopposed.

The orders sought are therefore merited and ought to be, and are hereby granted.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE