



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 79 OF 2018

FREDRICK NDONGA MAUNGU.....PLAINTIFF/APPLICANT

VERSUS

MARGARET OMOLLO WERE.....DEFENDANT RESPONDENT

RULING

The application is dated 1st October 2020 and is brought under section 63 (c) and (e) of the Civil Procedure Act (Cap 21), Order 40 Rules 1 & 2 of the Civil Procedure Rules seeking the following orders;

1. This application be certified as urgent and heard ex-parte in the 1st instance.
2. A temporary order of injunction be issued against the defendant/respondent restraining her either by herself or through her agents, relatives, employees and or servants or any other person claiming under or through her from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on or in any other manner dealing or interfering with the suit portion of land parcel No. West Bunyore/Ebutanyi/1788 which is in the plaintiff's possession and occupation pending the hearing and determination of this suit.
3. Costs of this application be provided for.

It is premised on the annexed affidavit of Fredrick Ndonga Maungu and grounds that the defendant/respondent and her agents and/or servants have unlawfully and without any colour of right started trespassing onto the portion of the plaintiff/applicant's land parcel No. West Bunyore/Ebutanyi/1788 and started tilling and/or working thereon thus changing the character of the suit land. The defendant/respondent has threatened and intends to trespass onto a further portion and to remain in wrongful occupation of the suit portion of land and has turned violent and prevented the plaintiff/applicant, his agents, servants and/or relatives from accessing the portion encroached on. The plaintiff/applicant has a purchaser's interest and claims, under the doctrine of adverse possession, a portion of one acre out of land parcel No. West Bunyore/Ebutanyi/1788 which he lawfully purchased and has been in possession of and has built a house thereon.

The respondent submitted that the applicant's application is mischievous and an abuse of the court process. That it is not true what the applicant says that he purchased the suit property from her late husband Samwel Were Odera (deceased). That the agreement annexed therein is a forgery. That the issues the applicant is raising in the Notice of Motion application are the same issues he has raised on his amended originating summons amended on 25th April, 2019 and currently pending hearing. That the applicant is not in possession of the suit property and has never developed or constructed any house therein. The development that is in that suit property was done by her for her children to occupy, currently they are living in her homestead. That the photographs the applicant has annexed in his supplementary affidavit is her development and not his. That the applicant is being dishonest, in that from the photos one can see that the house is incomplete and unoccupied so how can the applicant declare that he is in possession and being threatened with eviction on trespass. That prior to the death of her husband the applicant had once leased a portion of the land and which lease period long expired when her husband was still alive. The applicant had leased it to grow maize. He stopped cultivating it when the lease expired. That she has been the one cultivating the land ever since. That it was only after the death of her husband that the applicant approached her to sell the land to him but she declined.

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 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.

That applicant's submitted that, the defendant/respondent and her agents and/or servants have unlawfully and without any colour of right started trespassing onto the portion of the plaintiff/applicant's land parcel No. West Bunyore/Ebutanyi/1788 and started tilling and/or working thereon thus changing the character of the suit land. The defendant/respondent has threatened and intends to trespass onto a further portion and to remain in wrongful occupation of the suit portion of land and has turned violent and prevented the plaintiff/applicant, his agents, servants and/or relatives from accessing the portion encroached on. That the defendant/respondent and her agents and/or servants have unlawfully and without any colour of right started trespassing onto the portion of the plaintiff/applicant's land parcel No. West Bunyore/Ebutanyi/1788 and started tilling and/or working thereon thus changing the character of the suit land. The defendant/respondent has threatened and intends to trespass onto a further portion and to remain in wrongful occupation of the suit portion of land and has turned violent and prevented the plaintiff/applicant, his agents, servants and/or relatives from accessing the portion encroached on. The respondent submitted that the applicant is not in possession of the suit property and has never developed or constructed any house therein. I find that the applicant has failed to establish a prima facie case in this matter and an injunction cannot be granted. I further find that the applicant has not shown that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages. I find the application has no merit and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 8TH DECEMBER 2020.

N.A. MATHEKA

JUDGE