



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 223 OF 2017

ZAKARIA MUGATSIA ANYULA.....PLAINTIFF/RESPONDENT

VERSUS

AGNETA MMBONE OKWEMBA.....DEFENDANT/APPLICANT

RULING

The application is dated 14th September 2018 and is brought under order 40 rules 1,2 and 3 of the Civil Procedure Rules seeking the following orders;

1. That service of this application be dispensed with in the first instance.
2. That a temporary injunction be issued against the plaintiff Zakaria Mugatsia Anyula from constructing, cultivating and or any other activity in respect to land parcel number S. MARAGOLI/BUYONGA/795 pending determination of this cause.
3. That the costs of this application be provided for.

It is based on the following main grounds that, the respondent is the registered proprietor of the suit property which proprietorship was fraudulently obtained. That despite the matter being in court and not finalized, the respondent has hurriedly started construction on the suit parcel. That it is in the interest of justice that the respondents be stopped from further construction till the matter has been fully settled. That the respondent actions are likely to cause breach of peace unless restrained from interfering with status quo. That the applicant will suffer irreparable loss unless the respondent is restrained by a court order.

AND UPON further and other grounds to be found in the annexed affidavit of Agnetta Mmbone Okwemba and others to be adduced at the hearing hereof.

The respondent submitted that, the said application is frivolous. Vexatious and otherwise an abuse of the court process. That the said application herein is laced with lies and innuendos. That the applicant herein does not dispute that he is the registered proprietor of the suit property herein. That the application herein has therefore very slim and or remote chances of success. That the applicant claims to be in possession of the suit property herein yet she has not annexed anything to support her claim. That the applicant further alleges that her son was assaulted at the said land but has clearly failed to show and or indicate the Occurrence Book Number (OB). That although the applicant purports he fraudulently acquired the suit property herein she has not refuted the fact that he acquired the suit property.

This court has carefully considered the submissions and the annexures therein. The principals governing the grant of interlocutory orders are clear. As stated in the case of *Giella vs. Cassman Brown* (1973) EA 358.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Further he goes on to state that “..... a *prima facie* case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

The applicant submitted that, the respondent is the registered proprietor of the suit property which proprietorship was fraudulently obtained. That despite the matter being in court and not finalised, the respondent has hurriedly started construction on the suit parcel. However, her family has been in possession of the same. I find that the applicant has shown a *prima facie* case with a probability of success. I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE