

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 11 OF 2019

JATHETH CHITERI.....APPELLANT /APPLICANT

VERSUS

BROOKWAY NYONGE.....RESPONDENT

RULING

The application is dated 8th April 2019 and is brought under section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, order 42 rule 2, 3 and 4 order 51 rules 4, 6, 10 (2) of the Civil Procedure Rules and Article 159 2 (d) of the Constitution of Kenya seeking the following orders;

1. That this application be certified as urgent, be heard on priority basis and exparte in the 1st instance.
2. That the honourable court be pleased to issue an order of interim stay of execution of orders of eviction made in Butere PMCC No. 184 of 2011, and the interim stay of execution of the eviction orders ordered in the same file pending the hearing and determination of this application inter parties, and or pending further orders hereof.
3. That the OCS Butere Police Station and or the officer in-charge of the nearest police station to comply.
4. That the costs of this application be provided for.

The applicant submitted that he stands to suffer irreparable loss should eviction orders be executed in respect of the contested property which houses are his commercial building which is his only source of livelihood. That he is about 60 years old and the building constitutes his life's savings upon which he is dependent. That the disputed parcel of land L.R. NO. MARAMA/SHINAMWENYULI/2 which was originally in the name of the respondent at the time of the eviction order (made about 5 years ago) is now registered in his name through transmission in P & A Cause No. 403 of 1998 and is designated as L.R. NO. MARAMA/SHINAMWENYULI/2094. Annexed is a copy of the Amended Certificate of confirmation of grant, copies of certificate of official searches marked JC 1 (A), (B) and (C). That he is now the valid registered owner and executing an eviction order against him is gross violation of his rights as a proprietor as envisaged in Articles 40 and 64 of the Constitution of Kenya, 2010. That the respondent in his submissions admitted that the suit land has changed into the name of the appellant herein annexed herewith is a copy of the respondent's submissions marked JC 2.

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 prime 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.”*

In this case, the respondents were served but failed to attend court or file any grounds of opposition. The application is based on the annexed affidavit of Jatheth Chiteri, and on the grounds that the applicant/appellant stands to suffer irreparable loss should eviction orders be executed in respect of the contested property which houses are commercial building which is his only source of livelihood. That the applicant/appellant is about 60 years old and the building constitutes his life's savings upon which he is dependent. That the disputed parcel of land L.R. NO. MARAMA/SHINAMWENYULI/2 which was originally in the name of the respondent at the time of the eviction order (made about 5 years ago) is now registered in the name of the applicant/appellant through transmission in P & A Cause No. 403 of 1998, and is designated as L.R. NO. MARAMA/SHINAMWENYULI/2094 after subdivision. That the applicant/appellant is now the valid registered owner; and executing an eviction order against him is gross violation of his rights as a proprietor as envisaged in Articles 40 and 64 of the constitution of Kenya, 2010. I find that the applicant has shown a prima facie case with a probability of success. That the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages if the stay orders are not granted. I find this application has merit and I order that the status quo be maintained pending the hearing and determination of this appeal. Costs to be

in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH MAY 2019.

N.A. MATHEKA

JUDGE