



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 116 OF 2017**

**JOHN MUIGAI.....APPLICANT/PLAINTIFF**

**VERSUS**

**TERESIA WAMBUI**

**BEATRICE WANJALA WANYONYI**

**ALBERT ENGENYA LUVISU.....RESPONDENTS/DEFENDANTS**

**RULING**

This application is dated 6<sup>th</sup> April 2016 and is brought under order 40 rules 1 and 2 of the Civil Procedure Rules and seeks the following orders;

1. THAT the application be certified urgent and service of thereof be dispensed with in the first instance.
2. THAT this honourable court do issue orders of temporary injunction against the defendants/respondents, their servants and or agents restraining them from encroaching upon, cultivating, trespassing or developing and selling on or in any other way utilizing the parcel of land known as KAKAMEGA/LUGARI/3313 measuring 0.08Ha pending the hearing and determination of this application interpartes.
3. THAT this honourable court do issue orders of temporary injunction against the defendants/respondents, their servants and or agents restraining them from encroaching upon, cultivating, trespassing or developing and selling on or in any other way utilizing the parcel of land known as KAKAMEGA/LUGARI/3313 measuring 0.08Ha pending the hearing and determination of the main suit.
4. THAT the costs of this application and the suit be borne by the defendants/respondents.

The applicant submitted that he is the registered owner of the piece of land described as KAKAMEGA/LUGARI/3313 (see the title deed marked JM1). That although the entire suit land measuring approximately 2 acres is registered in his name he acknowledges that he is entitled to only 1 acre and therefore hold the other 1 acre in trust for Lumumba who has since sold the 1 acre to Tom Omukatu, Evans Kisia, Moses Licheli. He shall on Lumumba's instructions subdivide his 1 acre to them. That he acquired the 1 acre comprised in the suit land from the 1<sup>st</sup> defendant who is his sister when he exchanged the piece of land with another piece of land that he gave to her. That in the recent past the 1<sup>st</sup> defendant has purported to sell the part of suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant despite the fact that he is

the registered owner of the suit land save for the interest of 1 acre therein to Mr. Lumumba. That as a result of the 1<sup>st</sup> defendant's illegal acts the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants have now invaded his land and attempted to erect structures in it. The 1<sup>st</sup> defendant has no right to sell the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, as she has no interest in it. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are trespasses on the land. It is only fair that the court declares the defendants activities over the land as illegal and restrain them from interfering with his quite possession of the suit land.

The respondent submitted that, at the time of death of 1<sup>st</sup> respondent's father was a registered owner of original land title number KAKAMEGA/LUGARI/2504. That further at the time of death the deceased Joseph Mwangi Gitogo had sold one (1) acre of land to Paul Lwika and other (5) buyers. That during succession the 1<sup>st</sup> respondent's mother did not include on the list the said buyer Paul Lwika as he had re-sold the land to Julius Lumumba Okumu who is the husband of the 1<sup>st</sup> respondent. Attached is a copy of the agreement filed and marked annex TW-1. The 1<sup>st</sup> respondent participated in the whole process of succession and the administrator who is the mother to applicant and 1<sup>st</sup> respondent was given mandate by the court to distribute the properties of the deceased. The 1<sup>st</sup> respondent was given one (1) acre as her share then in addition to the one acre her husband had bought. The survey was done and 1<sup>st</sup> respondent and her husband were entitled to a new title number KAKAMEGA/LUGARI/3313 measuring (2 acres). It is not true the applicant had land to exchange with the 1<sup>st</sup> respondent and she is unaware of the transaction alleged. The applicant is the owner of land title number KAKAMEGA/LUGARI/3322 measuring 6.5 acres his share gift and no explanation is given for him to be registered in trust for Lumumba who is an adult and a buyer. The applicant has come to court in bad faith as after him obtaining title certificate in January, 2017 uprooted respondents sugarcane and wants further to mistreat them using this court. The distribution was done by their mother was unfair to ascertain one acre to 1<sup>st</sup> respondent and the applicant gets 6.5 acres and the 1<sup>st</sup> respondent is going to apply for revocation of grants issued to the administrator of the estate who seem to be colluding to deny daughters of the deceased their rights.

This court has carefully considered both the applicant's and the respondents' submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear beyond peradventure. 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.”*

The application is based on the affidavit of JOHN MUIGA and the grounds that, the plaintiff/applicant is currently the registered owner of all that piece of land described as KAKAMEGA/LUGARI/3313 measuring 0.08Ha. The defendants/respondents have encroached on the parcel of land thereby interfering with the suit land. There is need to permanently restrain the defendants/respondents from further dealings in the said parcel of land in any way. The plaintiff/applicant is likely to suffer irreparable damage shall

this application be declined. It is the interest of justice that this application be allowed. On the other hand the 1<sup>st</sup> respondent states that she was given one (1) acre as her share then in addition to the one acre her husband had bought. The survey was done and 1<sup>st</sup> respondent and her husband were entitled to a new title number KAKAMEGA/LUGARI/3313 measuring (2 acres). It is not true the applicant had land to exchange with the 1<sup>st</sup> respondent and she is unaware of the transaction alleged. The applicant is the owner of land title number KAKAMEGA/LUGARI/3322 measuring 6.5 acres his share gift and no explanation is given for him to be registered in trust for Lumumba who is an adult and a buyer. I find that these issues any only be determined once the matter goes on to full trail.

I find that, applicant has not shown a prima facie case with a probability of success. The applicant has not shown that he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages if the injunction is not granted at this stage. I find this application lacks merit and I dismiss it with costs to the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JANUARY 2018.**

**N.A. MATHEKA**

**JUDGE**