



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC CASE NO. 410 OF 2017

JOHN MAKOMELO KEYA.....PLAINTIFF/APPLICANT

VERSUS

TAMARY OMUKUNDA NDAKWA

JULIUS ODONGO NDAKWA.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 9th November 2017 and is brought under order 40 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified urgent and be heard in ex-parte in the 1st instance.
2. THAT pending interparties hearing of this application the respondents be restrained from disposing off ½ acre portion land parcel Butso/So/Shikoti/1178 which the applicant is claiming and be restrained from interfering with the applicants' use of the said portion.
3. THAT upon interparties hearing the orders in prayer (2) above be confirmed.
4. THAT the District Land surveyor be mandated to survey and identify the portion being claimed together with the extent of its boundaries and demarcation and also ascertain any developments and farming taking place thereon.
5. THAT costs of this suit be provided for.

The applicant submitted that, in the year 2007 he did purchase ½ acre portion of land of the suit parcel which was sold to him by the respondents in the presence of and with the consent of all other beneficiaries. That he completed payment of the agreed purchase price and there is no outstanding balance. That he sent his sister MARY WILETA to purchase this portion on his behalf and this fact was well known to the respondents. That he has been utilizing the said portion and farming since the year he purchased it. That the defendants/respondents have refused to transfer the said parcel to his name causing him to object to the succession proceedings on the estate of the deceased as stated herein. That since succession proceedings have been concluded the defendants are threatening to dispose off the said parcel of land and have gone to the extent of blocking him and preventing him from weeding the trees he had planted on the said portion. The 1st respondent was served but failed to attend court or file any papers to oppose the application. The applicant withdrew the case against the 2nd respondent.

This court has considered the applicants submissions. 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.”*

This application is premised on the grounds that the applicant purchased ½ an acre portion of land parcel BUTSOTSO/SHIKOTI/1178 from the respondents in the year 2008. That the respondents have neglected/refused to transfer to said portion to the applicants. That the respondents filed succession proceedings to the estate of DANIEL OPATI I.E. Kakamega High Court Succession Cause No. 579 of 2014 and the cause was concluded in 2016. That the respondents have identified a buyer and intended to dispose off the said parcel to the detriment of the applicant and have prevented the applicant from utilizing of the said portion. That they refused to transfer the said parcel to his name causing him to object to the succession proceedings on the estate of the deceased as stated herein. That since succession proceedings have been concluded the defendants are threatening to dispose off the said parcel of land and they have gone to the extent of blocking him and preventing him from weeding the tree he had planted on the said portion. That he stands to suffer loss unless the orders sought herein granted.

I find that the applicant has shown a prima facie case with a probability of success. The applicant might suffer irreparable injury, which would not adequately compensated by an award of damages. The defendants are threatening to dispose off the said parcel of land and they have gone to the extent of blocking him and preventing him from weeding the trees he had planted on the said portion. That he stands to suffer loss unless the orders sought herein granted. I find the application has merit and grant the following orders;

1. THAT pending inter parties hearing and determination of this suit the respondent be restrained from disposing off ½ acre portion land parcel Butsotso/Shikoti/1178 which the applicant is claiming and be restrained from interfering with the applicants’ use of the said portion.

2. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE