



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 325 OF 2017

MARGARET ONYACH MALOBA :::::::::::PLAINTIFF/APPLICANT

VERSUS

ELIZABETH BUTEGE MIMO::::::::::::: DEFENDANT/RESPONDENT

RULING

The application is dated 18th November 2017 and is brought under order 40 rule 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking the following orders;

1. THAT the application be heard under certificate of urgency in the first instance.
2. THAT the respondent, her agents, servants, employees and/or whatsoever working under the respondent's instructions, be restrained from, constructing, and/or putting up a structure in the applicant's compound pending hearing and determination of this application inter parte.
3. THAT the respondent, her agents, servants, employees and/or whatsoever working under the respondent's instructions, be restrained from, constructing, and/or putting up a structure in the applicant's compound pending sharing of the suit land under Nairobi Succession cause No. 166 of 2000.
4. THAT costs of this suit be provided for.

The applicant submitted that, she is a co-registered owner of that whole land parcel No. N/WANGA/LUNG'ANYIRO/806 measuring 9.5 acres with the respondent herein. Attached and marked MOM-01 is a copy of official search. That she is a co-wife to the respondent herein. That before the demise of the late Fredrick Maloba (Deceased husband) she had a homestead in the said suit land whereas the respondent had no homestead. That the respondent has authority and or mandate to have a home in the said suit land but the same is still pending sharing so that the site is established for her to put a home. Attached and marked MOM-2 (a) and (b) respectively are copies of letters of administration and confirmation of grant. It was on or about 8th September, 2017 when the respondent without colour of right, and/or without her consent, forcefully put up a permanent house structure adjacent to her house. Attached and marked MOM-3 are copies of house photos of the house structure. That a portion occupied by the new structure of the respondent is meant for her children who are adults and are ready to construct houses of their own and if that structure remains in her homestead it will cause interference. That the respondent has her own share out of the suit land whereby she is supposed to develop, utilize, construct, cultivate and or alienate to anyone if she so wishes as she deems fit without interfering with her own share. It is her prayer that the respondent, her agents, servants employees and /or whatsoever working under the respondent's instructions, be restrained from , constructing , and/or putting up a structure in the

applicant's compound pending the sharing of the estate of the late Fredrick Maloba (Deceased husband). That if the orders sought are not granted, this suit will be rendered nugatory and her entire family as her sons will be forced to construct homes outside her compound which was established before the death of her husband. The orders sought if granted shall not cause the respondent to suffer any loss.

The respondent submitted she is the 2nd wife of Fredrick Yafes Maloba, deceased. That at the time of her husband's death, the plaintiff was her co-wife. That her husband died in the 7th August 1998 bomb blast in Nairobi. At the time of his death, her husband had a house on Land Title Number North Wanga/Lung'anyiro/806. Her husband used to live with both of them (his wives) in this three bed roomed house in the compound. This is the same compound where their mother in law was buried, together with their father in law. This is the same compound where their only blood brother in law is living to date and his name is George Oluoch. This home is where her husband was buried. This is where she put up a two roomed house in December, 1998 and the house has been used by her interrupted for about 20 years. This home is therefore not just the plaintiff-applicant's home but a home for all of them. She has two sons and a daughter. These are children of Fredrick Maloba, deceased. That these children deserve to stay in this home just like those of the plaintiff applicant. That she has not trespassed into the plaintiff applicant's home. The applicant in any event remarried and now has a home in Busia where her current husband Chrispanus Osanyo with whom they have had a baby girl called S has a home for both of them, she is a second wife there. The house whose construction is sought to be enjoined is already built up to roof level and plastered. Annexed and marked "EVM 1" is bunch of photos showing the extent to which the house has been built. That by building in the home where her old house stands, she was just putting up a new shelter so that the old one does not fall on her, and it is a sign that she is am not remarried and do not intend to remarry or go anywhere 20 years after losing her husband. They are both registered as proprietors of the North Wanga/Lunganyiro/806. Annexed and marked "EVM 2" is a copy of the confirmation of grant. They attempted to subdivide the land by going to the ground with the applicant earlier but the villagers turned violent and turned her away as she had committed an abomination by marrying their husband's nephew who lived and grew up under their husband's care and in their husband's home. Since then, they have never had a united attempt to subdivide the land and share it out to the children of Maloba who are all grown up now. She also has grown sons who want to put up houses just like those of the applicant and since she has not stopped anyone from putting up a house in the compound, she confirms to the court that all the sons, whether mine or the applicant's have equal rights to put up dwelling houses on the land in their father's compound. That the home needs a face lift since the building previously built on it are now old and dilapidated. Annexed and marked "EVM 3" are photographs to show the extent of dilapidation. That if she does not put up a house and keep the place lively and vibrant, nobody will come visiting and the home will be abandoned since all the sons and daughters of their deceased husband are now grown and live in Nairobi and elsewhere outside Mumias and the home risks becoming a ghost home considering that the applicant has moved on and the so called George Oluoch, or husband's only real brother, is mentally challenged. That the step she has taken to put up a residential house on the suit land is meant to take care of the home and protect the estate of the deceased.

This court has carefully considered both the applicant's and the respondent's 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 Ban 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.*”

It is based on the following grounds, that the applicant has made a home on the suit parcel no. N/WANGA/LUNG’ANYIRO/806. The respondent is a co-wife and they filed succession cause to inherit the estate of their late husband which is pending sharing. That it is in the interest of justice that the land be shared out so that each party herein to develop on her own portion without interference from each other. That the deceased died before having constructed a house and/or home for the respondent and she has started constructing a house in the applicant’s compound without the applicant’s consent thus this application. That it is in the interest of justice that the orders sought be granted. The application is supported by the amended affidavit of MARGARET ONYACH MALOBA.

It is not disputed that the applicant and the respondent were co wives and they are both registered as proprietors of the North Wanga/Lunganyiro/806. Annexed and marked “EVM 2” is a copy of the confirmation of grant. The respondent states that the home needs a face lift since the building previously built on it is now old and dilapidated. Annexed and marked “EVM 3” are photographs to show the extent of dilapidation. That the house whose construction is sought to be injuncted is already built up to roof level and plastered. Annexed and marked “EVM 1” is bunch of photos showing the extent to which the house has been built. That by building in the home where her old house stands she has not trespassed into the plaintiff /applicant’s home. The applicant in any event according to the respondent is remarried and now has a home in Busia where her current husband Chrispanus Osanyo with whom they have had a baby girl called S has a home for both of them, she is a second wife there. I find that the applicant has failed to show a prima facie case with a probability of success. The applicant has not shown that she might suffer irreparable injury, which would not adequately compensated by an award of damages if the injunction is not granted at this stage. The orders sought in this application are final orders and can only be determined during the full hearing. I find for these reasons this application has no merit and I dismiss it with costs to the respondent.

It is so ordered.

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

N.A. MATHEKA

JUDGE