



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND COURT**

**AT KAKAMEGA**

**ELC NO. 34 OF 2015**

**AGOSTINO MONYI OBOSU.....PLAINTIFF**

**VERSUS**

**HELLEN MANJEMO OBOSU )**

**LAWRENCE MUBAIZA LUSIKI ).....DEFENDANTS**

**RULING**

The first application is dated 5<sup>th</sup> February 2016 and is brought under Section 3 and 3A and 63e of the Civil Procedure Act, order 40 rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. THAT this application be certified as urgent and service at first instance be dispensed with.
2. THAT an order temporary injunction be issued restraining the 1<sup>st</sup> defendant/respondent her agents, servants and or assigns from further demolishing the applicant's residential houses, interfering in any manner and or threatening to evict the applicant from the portion of land he occupies on land parcel Kakamega/Lumakanda/437 until this application is fully heard and determined.
3. THAT an order temporary injunction be issued restraining the defendants/respondents their agents, servants and or assigns from further demolishing the applicant's residential houses, interfering in any manner and or threatening to evict the applicant from the portion of land he occupies on land parcel Kakamega/Lumakanda/437 until this suit is fully heard and determined.
4. THAT the costs of this application be provided for.

The applicant submitted that, the 1<sup>st</sup> respondent, Hellen Manjemo Obosu herein is his biological mother and the registered owner of land parcel Kakamega/Lumakanda/437. That sometime in 2006 the 1<sup>st</sup> respondent herein allocated him a portion of land measuring about 3 ½ acres including the area where he put up his homestead with semi-permanent houses and he has since been cultivating the said portion until June, 2014 when the 2<sup>nd</sup> respondent forcefully fenced part of his portion of land alleging that he had purchased it. That he was not party to any sale agreement as a family member and son of the 1<sup>st</sup> respondent nor was consent sought from him as required. That when he discovered this he moved to this court and filed this suit which is pending determination. That on 9<sup>th</sup> December, 2015, the 1<sup>st</sup> defendant without any lawful court order and total disregard of this suit pending in court hired people who came to his home and started causing damage to his houses with intention to evict him. That the said people

removed iron sheets, windows, doors to his main house, kitchen and my latrines (attached are photos showing the damage caused marked "AMO1"). That he immediately made a report to the police at Lumakanda police station vide OB 12/9/12/15 recorded his statement with his witnesses but no action was taken until he made complaint to Independent Policing Oversight Authority (IPOA). That the 1<sup>st</sup> defendant/respondent was eventually arraigned at Eldoret Chief Magistrate's Court vide criminal case No. 174 of 2016 (attached is a copy of charge sheet marked "AMO2"). That notwithstanding all this, the 1<sup>st</sup> respondent has now gone ahead and issued him with a 30 days' notice dated 18<sup>th</sup> January 2016 to vacate from land parcel Kakamega/Lumakanda/437 (annexed is a copy of the letter from her advocates marked "AMO3"). That he has no any other land to go to and since he had filed this suit, it would be prudent that the defendants be restrained from evicting him from the said parcel of land. That he has by law an interest and has sentimental interest to the portion he occupies since he has established his home there with his family. That he is likely to suffer great loss and damage with his family particularly now with small children sheltering in the damaged houses without windows and doors. That he is now forced to sleep in his said damaged house without windows and doors and his minor children are likely to contract diseases due to cold and rainy conditions during the day and night.

The second application is dated 22<sup>nd</sup> April 2016 and is brought under section 74(1) of the Land Registration Act No 3 of 2012 and seeks the following orders;

1. THAT the caution placed on land parcel NO. KAKAMEGA/LUMAKANDA/437 on 2<sup>nd</sup> April, 2014 be removed.
2. THAT costs of this application be provided for.

The applicant submitted that she is the absolute registered owner of the land. That she is a female adult of sound mind aged 72 (Annexed is a copy of her ID marked HMO1). That owing to her advanced age she has made up her mind to distribute her land to her children, some relatives and buyers. That one of her children is the plaintiff/respondent who declined to occupy 5 acres of land which she donated to him charitably. That the caution which he placed on her land has frustrated her efforts to fulfill her promise to dish out titles to the people who deserve them. That with her advanced age she is scared that death might knock at her door before she fulfills her promises. She would not like to die with unfulfilled promises. Since the plaintiff declined to occupy the land which she donated to him she has withdrawn it from him and she has given him notice to vacate her homestead. (Annexed is her letter of notice marked HMO 2). That she had applied to the Registrar of Lands to remove the caution but he declined to do so because of this case. That she prays that the court removes the caution for me to save me from stress.

The plaintiff submitted that he is one of the biological sons of the 1<sup>st</sup> defendant/respondent. He has settled on a portion of land measuring about 3 ½ acres where he has settled since 2006 which portion was shown by his mother the 1<sup>st</sup> respondent. The applicant utilizes that portion of land and has his homestead with semi-permanent houses on it. The 1<sup>st</sup> respondent is the registered proprietor of land parcel Kakamega/Lumakanda/437 measuring 12.6 Ha. which includes the portion of about 3 ½ acres which the applicant has been in exclusive occupation and use as stated above. Sometime in June, 2014, the applicant was taken aback when the persons purporting to be agents of the 2<sup>nd</sup> respondent came into land parcel Kakamega/Lumakanda/437 and forcefully fenced part of the portion occupied by the applicant and upon several protests he came to learn that the 2<sup>nd</sup> respondent had purchased the part of the land including the portion the applicant occupies.

The applicant contents that no consent was sought from him nor was he informed by the 1<sup>st</sup> respondent by virtue of being a son and a family member of the 1<sup>st</sup> respondent, the registered proprietor.

This actions prompted the applicant to file this suit on 19<sup>th</sup> February 2015 together with the earlier application dated 19<sup>th</sup> February 2015. This application was prompted by the actions of the 2<sup>nd</sup> respondent who had come and ploughed the whole of the applicant's portion destroying some of his crops on the said portion on 23<sup>rd</sup> January 2015 and interim orders were issued against the respondents. Before the said

application could be heard and determined inter-parties, the 1<sup>st</sup> respondent issued a 30 days' notice threatening to evict the applicant. Prior to this notice the 1<sup>st</sup> respondent had hired goons/persons on 9<sup>th</sup> December 2015, who had come and damaged the applicant's houses with a view to evict the applicant in total disregard of his beneficial interest in the land and in total disregard of this pending case in court purporting to enforce a directive from the District officer Lugari and the OCS Lumakanda Police Station.

Upon destruction of the applicant's houses, the applicant made a report to Lumakanda Police Station and the 1<sup>st</sup> respondent was arrested and arraigned in court vide Eldoret CMCCR. NO. 174 of 2016. The applicant contents that he is a beneficial owner of the portion he occupies which he has a sentimental value to in view of all the developments he has made on the said portion of land and hence no consent was sought from him when the said portion was sold to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent.

Nevertheless, the applicant is not disputing the fact that the 1<sup>st</sup> respondent sold a portion of her land to the 2<sup>nd</sup> respondent herein but the question is; why is it that the 1<sup>st</sup> respondent sold part of a portion that the applicant has extensively developed and/or settled with his family and not any other part of the entire land that has not been developed as such. The applicant's right to own property is a fundamental right protected under Article 40 of the Constitution of Kenya 2010 either individually or in association with other and his human dignity to be respected and protected as provided by Article 28 of the Kenyan Constitution and the 1<sup>st</sup> respondent is in breach of that inherent dignity.

In as much as the 1<sup>st</sup> respondent is the registered owner of land in question in deciding to sell, she ought to have taken the interest of the son/applicant and particularly after the applicant had done extensive development of the portion now in question. The 1<sup>st</sup> respondent has enough land to give the 2<sup>nd</sup> respondent without affecting the portion occupied by the applicant. The 1<sup>st</sup> respondent has also during the pendency of the matter filed the application dated 22/4/2016 seeking the caution placed on land parcel No. Kakamega/Lumakanda/437 on 2/4/2014 be removed. This application is strongly opposed for reasons that it is incompetent, bad in law and an abuse of the court process. , it is incompetent in the sense that, it is totally a different cause of action and there is no such claim raised by the 1<sup>st</sup> respondent in her defence. There is no counter-claim raised in her defence and hence such application has no limbs to stand on in the absence of any counter-claim. The application therefore in essence is an abuse of the court process and the court cannot grant the orders sought in the absence of any counter-claim raised by the applicant/1<sup>st</sup> respondent in her defence.

They further submit that the caution lodged by the plaintiff on title No. Kakamega/Lumakanda/437 was lodged to protect the plaintiff's beneficial interest in the suit land which is now the subject matter of this suit and allowing the application to remove the caution will be prejudicial to the plaintiff's case as the 1<sup>st</sup> respondent want to transfer the land or part of the land to the 2<sup>nd</sup> respondent and if that is done it will mutilate the subject and render this case useless.

The defendants submitted that, the plaintiff is the son of the 1<sup>st</sup> defendant, who owns land parcel NO. KAKAMEGA/LUMAKANDA/437. The 1<sup>st</sup> defendant has 3 sons and one daughter the plaintiff being the last born son. On realising that she was advancing in age the 1<sup>st</sup> defendant (the mother) decided to subdivide her land so that she could distribute plots to those who deserved a donation and to some of her purchasers who included the 2<sup>nd</sup> defendant. The mother needed money to do the survey of the land and she sold 2 acres of land to the 2<sup>nd</sup> defendant. The land was subdivided and the mother donated 5 acres of land to the plaintiff (the son). He rejected the offer because the 5 acres were a distance away from the homestead of the mother where he stays. The son came to court and filed this suit against the mother and the 2<sup>nd</sup> defendant (the purchaser). The son wanted the court to issue injunctive orders against the mother and the purchaser to stop from interfering with his 3 ½ acres of land which he had acquired out of the mothers land. He also wanted the court to declare the sale of land by the mother to the purchaser to be illegal because the mother did not have his consent to sell to the purchaser. He also wanted the court to order the mother to relocate the purchaser. He wanted the mother to give him land which would enable him to continue staying in her homestead which was contrary to her arrangement. The court declined to

give the injunctive order and directed counsels for both parties to visit the site to ascertain whether the purchaser was interfering with the land which the mother donated to him. Since the mother is the registered proprietor of KAKAMEGA/LUMAKANDA/437 she is the ABSOLUTE owner of the land by virtue of S24 of the Land Registration Act No. 3 of 2012. She is the owner to the exclusion of the whole world. She was not expected to get consent of the son to sell to any purchaser of her choice. The only consent she requires was that of the Land Control Board. It is not therefore possible for the court to declare the sale agreement between the mother and the purchaser as being illegal by virtue of lack of consent from the son. The court cannot even restrain the mother from transferring the 2 acres to the purchaser as doing so would be underrating the indefeasibility of title which is protected by S25 of the Registration of Land Act No. 3 of 2012. The mother being the registered owner is at liberty to transfer to her purchaser unless there are other legal hindrances. The son should be made to understand that he is just a licensee on his mother's land without any legal or equitable right which he can enforce in law. Extensive development of the portion which he occupies on the mother's land does not create any right over the land in his favour. It would be prudent for him to move to the 5 acres which his mother has allocated to him for free. He might lose the land if the mother decides to withdraw the donation from him. They referred to the case of **HANNAH WANJIKU GATOTO AND 2 OTHERS VS. MOSES GATOTO KARANJA. [2007] eKLR.**

Land includes fixtures, which include trees, dwelling houses, toilets, commercial premises, swimming pools etc therefore, any development which the son carried out on the mother's land was for the improvement of the mother's land. He should therefore develop the 5 acres donated to him by his mother or she might withhold the grant. This shows clearly that he has no prima facie case against the mother with a probability of success and the injunctive orders which he is seeking against his mother cannot be made. He has not met the essentials for the grant of an interlocutory order as stated in the case of **GIELLA VS. CASMAN BROWN LTD [1973] EA 358.**

The mother filed an application on 22<sup>nd</sup> April, 2016 seeking an order of the court to remove the caution from her land so that she can be at liberty to transfer to the purchasers and her deserving children their shares of land. The mother is advancing in age as she is now about 73 years old. Placing a caution on the mother's land was a deliberate action of interference with the mother's enjoyment of her absolute ownership and an attack on her indefeasibility of her title to the land. He put the caution knowing very well that the land belongs to his mother and he has no right whatsoever over the land. Suing the mother who has offered 5 acres of land to him free of charge amounts to abuse of the process of court. They urge the court to order the caution to be removed from the mother's land to enable her to freely exercise the rights of a registered owner of land. He should be adjudged to pay costs to the mother.

Since the mother (1<sup>st</sup> defendant) is the owner of the land, she did not have to seek consent from the plaintiff (her son) in order to dispose of parts of her land to the 2<sup>nd</sup> defendant or to any other person. She would have to seek consent from the Land Control Board only. The allegation about the demolition of the son's houses was the subject of Eldoret Chief Magistrate's Court Criminal case No. 174 of 2016 where the mother was charged with the offence of malicious damages to property and was acquitted on 30<sup>th</sup> June 2017. The reasons for the acquittal were inter alia that the alleged houses were on the land of the accused and the photographs were not authentic as the photographer was not called to testify. Therefore the mother is innocent in so far as the alleged demolition of the son's buildings is concerned. The son was making concerted efforts to imprison the mother, but thank God the court saw the malice and saved her. The son has no title whatsoever to the mother's land. Her title is absolute. She is the owner of the land to the exclusion of the whole world including the son. He is just a licensee. The issue of the removal of the caution was brought in good faith because the plaintiff (son) himself had raised it in his pleadings. The mother thought the court would help her to be free to give titles to those who are claiming them from her.

This court has carefully considered both the plaintiff's and the defendants' submissions in both the application. 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.”

The first application on granting an injunction is supported by the supporting affidavit of AGOSTINE MONYI OBOSU and on the following general grounds; The applicant has since 2006 occupied and settled by putting his residential houses on the area he occupies with the full consent of the 1<sup>st</sup> defendant who allocated the applicant the said portion on land parcel Kakamega/Lumakanda/437 by virtue of being the 1<sup>st</sup> defendant son. The 1<sup>st</sup> defendant has during pendency of this suit unlawfully taken the law into her hands without any lawful court order hired goons to partially demolish the applicant’s houses with a view to evicting the applicant. The 2<sup>nd</sup> defendant has also forcefully constructed a house on the applicant’s portion of land during the pendency of this suit. The defendants have now issued the applicant with a 30 days’ notice to vacate from land parcel Kakamega/Lumakanda/437. It is in the interest of justice for the order sought to be granted.

The second application on the removal of the caution is based on the following grounds; the cautioner had neither legal nor beneficial right to caution the land. The applicant has several people to whom she is bound to transfer land titles and the caution has prevented her to do so and some of them are threatening to take legal action against her. The caution is contrary to the principles of indefeasibility of the rights of a registered owner of land.

It is not disputed that, the 1<sup>st</sup> respondent, Hellen Manjemo Obosu herein is his biological mother and the registered owner of land parcel Kakamega/Lumakanda/437. That sometime in 2006 the 1<sup>st</sup> respondent herein allocated him a portion of land measuring about 3 ½ acres including the area where he put up his homestead with semi-permanent houses and he has since been cultivating the said portion until June, 2014 when the 2<sup>nd</sup> respondent forcefully fenced part of his portion of land alleging that he had purchased it. I find that the plaintiff has established a prima facie case and he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. I also find that the balance of convenience lies with the plaintiff as he has established his homestead there since 2006. It would therefore be pre mature to remove the caution at this stage as it might render the plaintiff’s case nugatory. Be that as it may, the 1<sup>st</sup> defendant has stated that she is aged 72 (Annexed is a copy of her ID marked HMO1). That owing to her advanced age she has made up her mind to distribute her land to her children, some relatives and buyers. That one of her children is the plaintiff/respondent who declined to occupy 5 acres of land which she donated to him charitably. That the caution which was placed on her land has frustrated her efforts to fulfill her promise to dish out titles to the people who deserve them. I expect the parties to talk the earliest possible date for this matter to be heard and determined. I therefore find that the application dated 22<sup>nd</sup> April 2016 has no merit and I dismiss the same. The application dated 5<sup>th</sup> February 2016 is granted on the following terms;

1. THAT an order temporary injunction be issued restraining the defendants/respondents their agents, servants and or assigns from further demolishing the applicant’s residential houses, interfering in any manner and or threatening to evict the applicant from the portion of land he

occupies on land parcel Kakamega/Lumakanda/437 until this suit is heard and determined.

2. The plaintiff to obtain a hearing date of the main suit within the next 30 (thirty) days from today's date.

3. Costs of both applications to be in the cause.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24<sup>TH</sup> DAY OF JANUARY 2018.**

**N.A. MATHEKA**

**JUDGE**