



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 165 OF 2017

FLORA MAKOKHA WANJALA.....PLAINTIFF/APPLICANT

VERSUS

TIMOTHY ISAYA WAKUKHA

YOHANA MUCHISI ISAYA.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 12th May 2017 and is brought under section 3 and 3A of the Civil Procedure Act and Order 40 rules 1,2,3 and 4 and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified urgent.
2. THAT an order of temporary injunction to issue and which is hereby issued restraining the defendants herein, their agents, servants and or relatives from trespassing on, encroaching, occupying, utilizing , selling, alienating, constructing on and or dealing in any manner whatsoever with the plaintiffs L.R. SOUTH KABRAS/BUSHU/3611 (0.81 Ha) pending the hearing of this application inter parties.
3. THAT an order of temporary injunction to issue and which is hereby issued restraining the defendants herein, their agents, servants and or relatives from trespassing on, encroaching, occupying, utilizing , selling, alienating, constructing on and or dealing in any manner whatsoever with the plaintiffs L.R. SOUTH KABRAS/BUSHU/3611 (0.81 Ha) pending the finalization of this suit.
4. THAT costs be provided for.

The plaintiff/applicant submitted that she is the registered owner of L.R. SOUTH KABRAS/BUSHU/3611 (0.81 Ha) as per the annexure marked FMW-copy of the title deed. The defendants herein their agents, servants and or relatives have trespassed on, encroached, occupied, are utilising, constructing houses on, and are interfering with her rights of user in her land L.R. SOUTH/KABRAS/BUSHU/3611 (0.81 ha.) despite her numerous protests. That even the District Surveyor visited her said land, surveyed it, established its acreages and planted beacons which the defendants/respondents herein uprooted thereafter (annexture marked FMW-2 attached herein is a copy of the report) The Assistant Chief Mwera sub location has tried to resolve the dispute by asking the defendants/respondents herein to vacate her land in vain. (annexure marked FMW – 3 A, B, attached

herein are the letters). She has a prima facie case against the defendants/respondents herein with high chances of success. That she has attached high sentimental value to the said land and she stands to suffer substantial loss if the orders sought herein are denied. That the balance of convenience lies in her favour.

The 2nd defendant/respondent submitted that he is currently residing on the said parcel of land S. KABRAS/BUSHU/3611 together with his family and his ageing father and that he has been staying on it since time immemorial. That the said S. KABRAS/BUSHU/3611 was divided from S. KABRAS/BUSHU/1430 which he was the sole registered owner. (attached and marked Y.M.1-1 (a) and (b) is a copy of the title deed and certificate of search) That if anything the transfer and division of the land NO. S. KABRAS/BUSHU/1430 into two parts being S. KABRAS/BUSHU/3610 and 3611 was done without his consent or being made aware of the same despite being the owner of the said land. That the implication of the orders sought is that neither his family nor him will be allowed access onto the said land which he is currently staying on and which is the source of livelihood. That if the said orders are allowed as they are then his constitutional right to own property and freedom of movement will be curtailed. That he is not in any way intending to alienate or sale the said land as it is his family land of which selling it will mean he remains landless. The applicant herein neither stays/resides nor utilize the said land in anyway whatsoever and has never before stayed or utilized it before hence she stands to suffer no irreparable harm if the said orders are not granted. That the application is made in bad faith and aimed at frustrating ends of justice and should be dismissed with costs.

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 court has considered both the applicant and the respondents’ submissions. The application is premised upon the following main grounds that the applicant is the absolute registered proprietor of L.R. SOUTH KABRAS/BUSHU/3611 (0.81Ha.) The defendants/respondents herein, their agents, servants and or relatives have trespassed on, encroached, are occupying, utilising, have constructed houses on and are continuing with such constructions and are interfering with the plaintiffs’ rights of user in her said land. The plaintiff/applicant has a prima facie case against the defendants/respondents herein with high chances of success. The balance of convenience lies in favour of the plaintiff/applicant herein. That it shall be in the interests of justice to restrain the actions of the defendants/respondents herein by granting the orders sought. The 2nd defendant/respondent submitted that he is currently residing on the said parcel of land S. KABRAS/BUSHU/3611 together with his family and his ageing father and that he has been staying on it since time immemorial. That the said S. KABRAS/BUSHU/3611 was divided from S. KABRAS/BUSHU/1430 which he was the sole registered owner. (attached and marked Y.M.1-1 (a) and (b) is a copy of the title deed and certificate of search). That if anything the transfer and division of the land NO. S. KABRAS/BUSHU/1430 into two parts being S. KABRAS/BUSHU/3610 and 3611 was done without his consent or being made aware of the same despite being the owner of the said land. The

defendants/respondent are raising an issue of fraud in this matter which can only be determined during the full hearing. I find that the applicant has not shown that she might suffer irreparable injury, which would not adequately compensated by an award of damages. The balance of convenience lies in favour of the defendants as they are currently residing on the said parcel of land S. KABRAS/BUSHU/3611 together with their families. That the said S. KABRAS/BUSHU/3611 was divided from S. KABRAS/BUSHU/1430 which he, the 2nd respondent was the sole registered owner. I find that the application has no merit and I dismiss the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE