



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC NO. 299 OF 2014**

**MARISSELA KHATAMBI KWEYU.....PLAINTIFF/APPLICANT**

**VERSUS**

**FRANCIS JUMA WANYAMA.....DEFENDANT/RESPONDENT**

**RULING**

This application is dated 23<sup>rd</sup> October 2014 and is brought under order 1 rule 10 (2) & 4, order 8 rule 3 (1) and order 40 rule 1 & 4 of the Civil Procedure Rules and section 68 of the Land Registration Act No. 3 of 2012 seeking the following orders;

1. This application be certified as urgent, service thereof be dispersed with and the same be heard ex-parte in the 1<sup>st</sup> instance.
2. A prohibitory order and or inhibition be placed on title No. South Wanga/Lureko/1403 to preserve and protect it pending the hearing and determination of this suit.
3. The plaintiff/applicant be granted leave to enjoin HENRY OMUKAMANI WANYUNDI as a defendant herein and the plaint be amended as per the attached draft.
4. An order of injunction do issue against the defendants, their agents, servants, relatives and or employees from trespassing onto, alienating, selling or offering for sale, transferring, wasting and or in any other manner interfering with the plaintiff's occupation and use of land parcel NO. S WANGA/LUREKO/1403 and or the status quo prevailing on the suit parcel of land be maintained pending the hearing and determination of this suit.
5. Costs of this application be borne by the defendants/respondents.

The applicant submitted that, she is the administratrix and heir of the deceased DESTERYO KWEYU NYAPORE who was the owner of land parcel NO. S. WANGA/LUREKO/1403 (Attached is a copy of the grant of letters of administration interstate, marked "MKK1"). That the deceased DESTERYO KWEYU NYAPORE who died on 23<sup>rd</sup> March 2003 was so registered as the proprietor of title NO. S. WANGA/LUREKO/1403 until 30<sup>th</sup> August 2013 when the defendant, without taking out succession proceedings, fraudulently, illegally and irregularly had the said title transferred from the deceased's name into the defendant's name. When she discovered the defendant's fraud she had title NO. S. WANGA/LUREKO/1403 cautioned and filed this suit but upon service of the summons to enter appearance and the pleadings herein upon the defendant and after he had filed his own defence on 15<sup>th</sup> August, 2014 the defendant secretly, fraudulently and unprocedurally had the caution removed from the suit title and purported to transfer the said title to Henry Omukamani Wanyundi on 18<sup>th</sup> September 2014.

(Attached is a copy of the register for the suit title, marked “MKK2”). That it is necessary that the transferee Henry Omukamani Wanyundi be enjoined to this suit as a defendant as his presence is necessary to enable this court effectively and finally adjudicate over the issues herein and the suit title NO. S. WANGA/LUREKO/1403 ought to be protected by way of an inhibition or prohibitory order pending the outcome of this suit otherwise the title may be further transferred which will negate these proceedings. (Attached is a copy of a draft amended plaint, marked “MKK3”). That neither the defendant/respondent nor the transferee Henry Omukamani Wanyundi has ever stepped on, occupied, utilized or used the suit parcel of land which parcel of land the applicant occupies and uses exclusively, peacefully and undisturbed to-date and it is her prayer that this status quo be maintained and the defendant/respondent and transferee and or their agents or servants be restrained by way of injunction from trespassing onto, laying claim to, alienating, selling, transferring, wasting or in any other manner interfering with her occupation and use of the suit land pending the hearing and determination of this suit.

The respondent submitted that, land parcel registration number SOUTH/WANGA/LUREKO/1403 is registered in the names of Henry Omukamani Wanyundi. It is not true that the said parcel of land was fraudulently, unprocedurally and illegally transferred to the said Henry Omukamani Wanyundi as alleged by the applicant. That by the time he was transferring the title to the said Henry Omukamani Wanyundi, he had full authority and rights to do so having procedurally acquired the said title. It is not true that he unlawfully and unprocedurally and irregularly had the caution placed on the suit title number SOUTH/WANGA/LUREKO/1403 secretly removed. He is aware that the said caution was safely and legally removed after the land registrar exercised due diligence and procedurally served the plaintiff/applicant with notices of intention to remove a caution as required by law (Annexed and marked FJW1 (A& b) are copies of the notices). That the applicant cannot therefore allege that he had the caution secretly and or fraudulently removed. That he was in occupation of the suit parcel of land registration number SOUTH/WANGA/LUREKO/1403 until the plaintiff instructed one Julius Okanda Apuruka to demolish his houses and structures situated on the suit parcel. The said Julius Okanda Apuruka was charged in court vide MUMIAS SPMCCR CASE NO. 143 OF 2013 where he was convicted and sentenced (Annexed and marked FJW2 is a copy of the judgment). Since then, he has been rendered homeless and he has never trespassed or wasted the suit parcel, therefore there is no need to have an injunction issued against him. The suit property has changed hands and he has no intention and or capacity to have it transferred or offer for sale to a third party.

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.”

It is the applicant’s submissions that she is the administratrix and heir of the estate of the deceased DESTERYO KWEYU NYAPORE and beneficially entitled to the suit land L.R. NO. S.

WANGA/LUREKO/1403. The defendant/respondent fraudulently, unprocedurally and illegally had title NO.S WANGA/LUREKO/1403 transferred into his name from the name of the deceased DESTERYO KWEYU NYAPORE without undertaking succession proceedings thereby disinheriting the deceased's lawful heirs and resulting into this suit. That upon service upon him of the pleadings herein and after filing his defence the defendant/respondent herein secretly, unlawfully and irregularly had the caution placed on the suit title NO. S. WANGA/LUREKO/1403 hurriedly removed whereafter he fraudulently transferred the said title to Henry Omukamani Wanyundi in a bid to negate this suit. The respondent on the other hand submitted that by the time he was transferring the title to the said Henry Omukamani Wanyundi, he had full authority and rights to do so having procedurally acquired the said title. It is not true that he unlawfully and unprocedurally and irregularly had the caution placed on the suit title number SOUTH/WANGA/LUREKO/1403 secretly removed. However, it is not in dispute that the applicant is in occupation of the said parcel of land title number SOUTH/WANGA/LUREKO/1403. It has now changed hands to a third party who is not party to this suit one, Henry Omukamani Wanyundi it is therefore necessary that the transferee Henry Omukamani Wanyundi be enjoined to this suit as a defendant as his presence is necessary to enable this court effectively and finally adjudicate over the issues herein. The suit title NO. S. WANGA/LUREKO/1403 ought to be protected by way of an inhibition order pending the outcome of this suit otherwise the title may further transferred to another party. It has been established that, neither the defendant/respondent nor the transferee Henry Omukamani Wanyundi reside, occupy, utilize or use the suit parcel of land which parcel of land the applicant occupies and uses exclusively, peacefully and undisturbed to-date and it is fair that this status quo be maintained. I find that the applicant has established a prima facie case and I grant the following orders;

1. The status quo be maintained and an inhibition be placed on title No. South Wanga/Lureko/1403 to preserve and protect it pending the hearing and determination of this suit.
2. The plaintiff/applicant be granted leave to enjoin Henry Omukamani Wanyundi as a defendant herein and the plaint be amended as per the attached draft.
3. Costs of this application be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF JANUARY 2018.**

**N.A. MATHEKA**

**JUDGE**