



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 205 OF 2017**

**LEONARD MAKWA SHIBWONI ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**SAMSON MAKHAYA MUKABANA ..... DEFENDANT/APPLICANT**

**RULING**

This application is dated 13<sup>th</sup> November 2017 and is brought under order 40 rules 1&2 of the Civil Procedure Rules and section 1A, 1B and 63(e) of the Civil Procedure Act seeking the following orders;

1. THAT this application be certified as urgent and fit to be heard ex-parte in the first instance and/or on a priority basis.
2. THAT the demolition of the defendant's house on the suit property by the plaintiff is manifestly illegal and irregular.
3. THAT this honourable court issue a temporary order of injunction prohibiting the plaintiff, his agents, servants, employees and/or anybody or authority howsoever claiming through the plaintiff from encroaching, erecting structures, alienating, transferring or in any manner dealing with the suit property known as SOUTH KABRAS/SHAMBERERE/83 owned by the defendant's family pending the hearing and determination of this suit.
4. THAT this honourable court issue a permanent order of injunction prohibiting the plaintiff, his agents, servants, employees and/or anybody or authority howsoever claiming through the plaintiff from encroaching, erecting structures, alienating, transferring or in any manner dealing with the suit property known as SOUTH KABRAS/SHAMBERERE/83 owned by the defendant's family pending the hearing and determination of this suit.
5. THAT OCS Kakamega Police Station to ensure compliance of this honourable court's orders.
6. THAT cost of this application be provided for.

The applicant submitted that, he is one of the beneficiaries of land reference number SOUTH KABRAS/SHAMBERERE/83. On or about 11<sup>th</sup> May, 2013 entered in to a sale agreement for part of said parcel of land No. SOUTH KABRAS/SHAMBERERE/83 with the plaintiff herein. That the plaintiff herein had a representative during the said sale agreement and who executed the agreement on his behalf. That during the execution he explained to the plaintiff that the land is in the family succession Cause No. 624 of 2014 before High Court of Kenya at Kakamega and therefore all parties should wait until it is over so that the land would be subdivided. That on or about 6<sup>th</sup> November, 2017 the plaintiff herein without

any proper or statutory notice demolished and seized his house materials on the suit property. That the plaintiff herein is in the process of constructing permanent structures on the suit property. That the unlawful and illegal acts of the plaintiff who is in blatant breach of law ought to be stopped forthwith, otherwise he will suffer irreparable loss and damage. The action of demolition and seizing of materials of his house on the suit property without orders and/or notices did not conform to the legal requirements. The meddling with the suit property is illegal under the law of succession.

The respondent submitted that, that the defendant/applicant sold him a portion of land parcel number SOUTH KABRAS/SHAMBERERE/83 and allowed him to take possession and start his developments therein. That he took possession of the portion of land and started doing his developments therein. That he is only developing the portion that the defendant/applicant demarcated and gave to him. That he has not interfered with the portion belonging to the defendant/applicant. That he has not demolished any house belonging to the defendant/applicant as alleged. The defendant/applicant's house came down due to the age and lack of maintenance by the defendant/applicant. The defendant/applicant has made this application in bad faith to interfere with his development on the portion of land sold to him. That defendant/applicant has no interest on the portion of land sold to him and hence not entitled to stop him from developing his portion of land.

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 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 based on the following grounds; the defendant stands the risk of being dispossessed of the whole suit property of which is the only source of income for the family and himself. The plaintiff intends to realize his right by demolishing and seizing the defendant's only house by unlawfully evicting him and the family in a purported attempt to exercise his dues without any orders or notices. It is inequitable and illegal for the plaintiff to enforce its rights against the defendant prior to determination of this suit and/or without following the substantive procedure. The action to forcefully demolishing and evicting the defendant contravenes the express provisions of the Land Act. The defendant stands to suffer irreparable loss and damages should the plaintiff continue to construct the structures on the suit property in that he shall be rendered a destitute.

The respondent submitted that, that the defendant/applicant sold him a portion of land parcel number SOUTH KABRAS/SHAMBERERE/83 and allowed him to take possession and start his developments therein. That he took possession of the portion of land and started doing his developments therein. That he is only developing the portion that the defendant/applicant demarcated and gave to him. The defendant stated that during the execution he explained to the plaintiff that the land is in the family succession Cause No. 624 of 2014 before High Court of Kenya at Kakamega and is still pending in court. I find that

the defendant is not legally able to transfer this property at this stage. The applicant/defendant has shown a prima facie case with a probability of success. I find this application has merit and I grant the following orders;

1. THAT this court issue a temporary order of injunction prohibiting the plaintiff, his agents, servants, employees and/or anybody or authority howsoever claiming through the plaintiff from encroaching, erecting structures, alienating, transferring or in any manner dealing with the suit property known as SOUTH KABRAS/SHAMBERERE/83 owned by the defendant's family pending the hearing and determination of this suit.

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

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7<sup>TH</sup> DAY OF FEBRUARY 2018.**

**N.A. MATHEKA**

**JUDGE**