



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 221 OF 2017

JOEL EREGWA KIDIVA PLAINTIFF/APPLICANT

VERSUS

JOHN MUDASIA MUGADIA....DEFENDANT/APPLICANT

RULING

This application is dated 22nd August 2017 and is brought under order 40 of the Civil Procedure Rules and section 63(e) of the Civil Procedure Act seeking the following orders;

1. THAT the present application is urgent and deserves to be heard on priority basis.
2. THAT pending the hearing of this application inter parties there be a temporary order of injunction restraining the respondent, his agents, assigns, representatives from trespassing, tilling, cultivating and or in any other manner interfering with the suit land No. NYANGORI/BANJA/146.
3. THAT pending the hearing of this suit there be a temporary order of injunction restraining the respondent, his agents, assigns, representatives from trespassing, tilling, cultivating and or in any other manner interfering with the suit land NO. NYANGORI/BANJA/146.
4. THAT costs hereof be provided for.

The applicant submitted that, he is the registered owner of land parcel No. NYANGORI/BANJA/146. (Annexed and marked “JK-1a & b” is a copy of title deed and search certificate). The respondent has unlawfully and forcefully trespassed and encroached on a portion of the suit land herein. That the respondent has built structures on the portion of land and is tilling and cultivating crops the portion. That he has used the village elders to persuade him to peacefully move out of his parcel of land but he has refused, ignored and neglected the peaceful departure. That currently he is ploughing the suit land ready to plant crops. The defendant’s actions are not only provocative but also illegal as they have no interest in the suit land.

The respondent submitted that, the plaintiff/applicant has not demonstrated the mandatory requirement for grant of the prayers sought. That the balance of convenience does not tilt in favour of the plaintiff/applicant. That on diverse dates between the 7th day January, 2006 and 27th day of January, 2006 and 27th day of March, 2006, he entered into land sale agreement with one ZAKARIA IGADWA MATAYO purchasing a portion of land comprised in that parcel of land better known as L.R. NO. NYANGORI/BANJA/146 (Annexed are copies of agreements marked JMM1.” The said ZAKARIA I. MATAYO had a beneficial interest in the aforesaid parcel of land better known as L.R. NO. NYANGORI/BANJA/146 which passed to him by virtue of the sale agreement. That he took immediate

vacant possession of the portion to date 11 years down the line. On or about the 13th day of April, 2006, there was a family meeting to deliberate on the issues arising out of the parcel of land in question, which the plaintiff/applicant attended and fully participated. (Annexed is a copy of the minutes marked JMM2”). He has intensively developed the portion of land with full knowledge of the plaintiff/applicant, establishing homestead and doing peasant farming. He has invested in the portion of land the very hard earned income and he has no other place he can move to and call a home. That the prayers sought by the plaintiff/applicant are meant to occasion hardship to his family as they derive food for their substance from the land.

This court has carefully considered both the applicant’s and the respondents’ 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 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.*”

The application is grounded on the affidavit of JOEL EREGWA KIDIVA, the applicant and the following grounds; the plaintiff is the registered owner of the suit land. That the respondent has unlawfully and forceful encroached ½ of the suit parcel of land. That the respondent is unlawfully and forcefully trespassing, tilling and cultivating crops on the portion of the suit land. That it is in the interest of justice that he be stopped from utilizing the portion of land until this suit determined. That the respondent is wasting the portion of land to the detriment of the applicant.

The respondent on the other hand states that, on diverse dates between the 7th day January, 2006 and 27th day of January, 2006 and 27th day of March, 2006, he entered into land sale agreement with one ZAKARIA IGADWA MATAYO purchasing a portion of land comprised in that parcel of land better known as L.R. NO. NYANGORI/BANJA/146 (Annexed are copies of agreements marked JMM1)”. That he took immediate vacant possession of the portion to date 11 years down the line. On or about the 13th day of April, 2006, there was a family meeting to deliberate on the issues arising out of the parcel of land in question, which the plaintiff/applicant attended and fully participated. (Annexed is a copy of the minutes marked JMM2”). The court finds that the balance of convenience does not tilt in favour of the plaintiff/applicant. The applicant has not shown that unless the orders are granted he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. I find this application has no merit and order that the status quo be maintained pending the hearing and determination of the matter. Costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF FEBRUARY 2018.

N.A. MATHEKA

JUDGE