



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC. NO.252 OF 2017

JULIUS BARASA BURUDI.....1ST APPLICANT

ISAAC JOAB BUIRUDI.....2ND APPLICANT

JACOB WAMBUYA.....3RD APPLICANT

MACHONI WAMBUYA.....4TH APPLICANT

JAMES WAMBUNYA.....5TH APPLICANT

AND

JIMMY HABIL MKOMBO.....RESPONDENT

RULING

The application is dated 20th July 2015 and brought under order 40 rule 1, 2 of the Civil Procedure Rules and Sections 3, 31 & 63(e) of the Civil Procedure Act and section 68 of the Land Registration Act No. 3 of 2012 seeking the following orders;

1. That this application be certified as urgent and its service be dispensed with in the first instance.
2. That an order of inhibition do issue against title No. South/Kabras/Shamberere/367 prohibiting registration of any dealings whatsoever thereon pending hearing and determination of this suit.
3. That a temporary injunction be issued against the respondent, his agents, servants or employees restraining them jointly and severally from entering, ploughing, building, charging, selling, transferring or interfering with the applicant's occupation of the suit parcels of land South Kabras/Shamberere/367 in any manner whatsoever pending hearing and determination of this suit.
4. That a temporary injunction in terms of paragraph 3 above be issued against the Respondent pending hearing of this application inter parties or until further orders of the court.
5. That costs of this application be provide for.

The applicants submitted that they have never been evicted from the suit land and that they have also never been sued by the respondent in a court of law in respect of the subject matter of the suit. That in the contrary it is the respondent who has concealed material facts from the court that they were never party to Kakamega ELC No.53 of 2014 or any suit. As per a copy of the decree/order in Kakamega ELC No.513 of 2014 marked a JHMI and from that annexure it is clear that none of the applicants was a party to that

case and therefore no eviction of any of the applicants would have been effected and indeed they have not been evicted from the land. That the allegation by the respondent that they are not in occupation of the land is anchored on ignorance because he has not been to the land and he is relying on unqualified rumors. The applicants have satisfied the threshold for granting injunctions and the application should be allowed pending the hearing and determination of the suit. The applicants state that they have acquired title by adverse possession over land parcel L.R.South Kabras/Shamberere/367. To qualify this, the applicants state in their supporting affidavit that they have been living on the suit land since the date of registration peacefully, continuously and without interruption from the respondent. According to annexure JBB2 the certified copy of the register for L.R. South Kabras/Shamberere/367 the suit land was first registered on 9th July 1973 in the names of Ambunya Musungu. The land was transferred to Habel Robin Mikimmo on 24th October 1978. The current registered proprietor, the respondent herein was registered as a proprietor on 27th June 2000. While the land has exchanged hands severally, the applicants have been all this period which amounts to 43 years in occupation, peacefully, continuously without any interruption. They refer to the case of **Githu Vs Ndete 1984 KLR** page 776 where the Court of Appeal sitting in Nairobi held:

1) “ *Mere change of ownership of land occupied by another under adverse possession does not interrupt such persons adverse possession*’

2) *Where a person in possession has already began and is in the course of acquiring right under section 7 of the Litigation of Actions Act (Cap 22) and by virtue of section 30(f) of the Registered Land Act (Cap 300), those rights are overriding interests to which the new registered purchaser’s title will be subject.*

The applicants’ claim against the respondent is from 27th June 2000 to date when the respondent became the registered owner of the suit land. This is to say that the applicants have been occupying the suit land openly, peacefully and continuously for 12 years since years 27th June 2000. The applicants have qualified the 12 years threshold as the required period to claim adverse possession. Equally if the period is to be computed from 9th July 1973 the applicant’s claim over the land still stands. That they have been utilizing the suit land all this time with their respective families independently and have been farming on the suit land to feed their families. The respondent is not denying that the applicants have been in and are still in occupation of the suit land with his knowledge, and that the applicants, occupation has been open, continuous and uninterrupted for over 12 years.

Further that the respondent has decided to break the rules of practice by responding to a stranger who is not party to the pleadings before this court. The respondent is responding to a strange party best known to himself as Solomon Juma Ambunya who is not the applicant in this matter. In other words, the respondent has created his own case and has not opposed the applicant’s claim. The applicants pray for an injunction and the notorious question is whether the applicants have satisfied the legal threshold for grant of injunctions. In the leading case of **Giella Vs Cassman Brown & Company Limited (1973) EA 358**, the court set out the principles for grant of interlocutory injunctions as follows:

‘First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience’.

The court in **MRAO vs. First American bank of Kenya Limited and 2 others (2003) KLR 125** described a prima facie case as follows:

‘A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a 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.

The applicants have discharged their duty and have met the threshold for grant of injunctions. The respondent on his part has failed to rebut and claims that the occupation by the applicants is illegal. They wish to echo the words of Justice E. **Obaga in James Muigai vs The County Government of Trans Nzoia and 2 others (2015) eKLR** who held that: ‘The allegations by the respondents that the property was illegally allocated can only come out during the hearing. Otherwise or now the applicant has demonstrate that he is entitled to an injunction to preserve the property until suit is heard and determined.

The respondent submitted that, the applicants herein are not in occupation of the disputed parcel of land as they were evicted from the land parcel after successful litigation on his part vide Kakamega ELC Case No.513 of 2014 (annexed is court order dated 9th June 2015 marked ‘JHM-1’). That at all the material times he was the registered proprietor of the land parcel S/Kabras/Shamberere/367. That the applicants herein and all other persons illegally residing on the parcel of land were evicted on or about the 2nd July 2015. That the applicants do not reside on the parcel of land and suffer no loss or consequence. That he has twice been successful in litigation relating to this parcel of land and the court has already determined his absolute rights in ownership. That the orders sought in the application herein have been overtaken by events as he has already legally and lawfully transferred the land to another proprietor.

The respondent submitted that, the application herein by the five applicants is frivolous, vexatious, lacks merit and is an abuse of the court process. We also submit that this matter is res judicata, section 7 of the Civil Procedure Act provides:

‘..No court shall try any suit in which the matter directly and substantially in issue in a favour suit between the parties or between parties under whom they or any of them claim which such issues has been raised and has been heard or finally determined by court...’

The suit land parcel has been adjudicated on by the courts twice, the main issue/fact of ownership, already determined twice. The applicants herein are not in occupation of the disputed land parcel as they were evicted through a due process of law, vide Kakamega Environment and Land Case No.513 of 2014 formerly Kakamega High Court Civil Suit No.99 of 2010. In that suit, it was held that the defendant at the time has no claim or any colour of right on that land parcel. An eviction order was then issued against him and his family members or agents, the order also required demolition of any structures illegally constructed on the land parcel better known as S.Kabras/Shamberere/367. This eviction order issued on 9th June 2015 was duly executed and the defendant together with the applicants herein were evicted from the suit parcel on 2nd July 2015 by Eshikhono Auctioneers. Kakamega Environment and Land case No.513 of 2014 is not the only court determination inexistence granting the respondent all rights on this disputed land parcel. Kakamega High Court Civil Suit No.167 of 2000, involving the respondent and one Solomon Juma Ambunya, it was held that the respondent is rightly and legally the owner of the land parcel better known as S. Kabras/Shamberere/367, with these two decisions any person staying on this land parcel is a trespasser. They submit also that the respondent herein is the absolute registered proprietor of the land parcel (annexed a copy of the title deed marked ‘JHM-1’). The Land Registration Act No.3of 2012, section 24 read together with section 26 provides that a certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as a proprietor of land is the absolute and indefeasible owner subject to any encumbrances or restrictions contained on the title. Therefore the Applicants are trespassers on the parcel of land and that their application is an abuse of court process seeking to delay and defeat justice, in the process they are denying the respondent his rights to enjoy and use his property as envisioned by Article 40 of the Constitution of Kenya 2010, further the orders sought are redundant and as the respondent in exercising his constitutional rights has already transferred the suit parcel to another person.

This court has carefully considered both the applicants’ and the respondent’s 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 applicants filed the Notice of Motion dated 20.7.2015 under a certificate of urgency seeking prayers 1,2,3,4 and 5 as per the Notice of Motion. The applicants equally filed an originating summons dated 20.7.015 seeking title over LR No.SouthKabras/Shamberere/367 by way of adverse possession. The respondent opposed the applicants Notice of Motion and filed a Replying Affidavit sworn on 24.8.2015 filed on 26.8.2015.

The applicants relied on the grounds on the face of the application and the supporting affidavit. The grounds were that; the applicants have been and still in occupation of the suit parcels of land since the date of registration of the suit land to date. The applicants have filed the suit herein against the respondent seeking title under adverse possession. The respondent is threatening to evict the applicants from the suit parcels of land on or before 23rd July 2015. The applicants have no other place to call home other than the suit parcel of land. The orders sought herein seek preservation of the subject matter of the suit parcels of land pending hearing and determination of the same. That the suit herein shall be rendered nugatory if the orders sought are not granted. The applicants together with their families are facing imminent threats of eviction hence the urgency of this application. It is in the interest of justice that the orders sought be granted.

The respondent in response submitted that the suit land parcel has been adjudicated on by the courts twice, the main issue/fact of ownership, already determined twice. The applicants herein are not in occupation of the disputed land parcel as they were evicted through a due process of law, vide Kakamega Environment and Land Case No.513 of 2014 formerly Kakamega High Court Civil Suit No.99 of 2010. In that suit, it was held that the defendant at the time has no claim or any colour of right on that land parcel. An eviction order was then issued against him and his family members or agents, the order also required a demolition of any structures illegally constructed on the land parcel better known as S.Kabras/Shamberere/367. This eviction order issued on 9th June 2015 was duly executed and the defendant together with the applicants herein were evicted from the suit parcel on 2nd July 2015 by Eshikhono Auctioneers. Kakamega Environment and Land case No.513 of 2014 is not the only court determination inexistence granting the respondent all rights on this disputed land parcel. In Kakamega High Court Civil Suit No.167 of 2000, involving the respondent and one Solomon Juma Ambunya, it was held that the respondent is rightly and legally the owner of the land parcel better known as S. Kabras/Shamberere/367, with these two decisions any person staying on this land parcel is a trespasser. They submit also that the respondent herein is the absolute registered proprietor of the land parcel (annexed a copy of the title deed marked ‘JHM-1’). This court cannot issue orders in vain. Indeed this application was filed way back in 2015 and the respondent states the applicants have already been evicted. The applicants have failed to show a prima facie case with a probability of success. The applicants have failed to show that they might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Be that as it may, they should be given an opportunity to be heard and I hence grant the following orders;

1. That an order of inhibition do issue against title No. South/Kabras/Shamberere/367 prohibiting registration of any dealings whatsoever pending hearing and determination of this suit.

2. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF
FEBRUARY 2018.**

N.A. MATHEKA

JUDGE