



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

E.L.C. NO. 30 OF 2016

EDWARD LILUMBI LITALI ALIAS

EDWARD LILUMNI BITINYU

GEOFFREY MUHANDA

MICHAEL TAABU MACHISU

CHARLES ASHIHUNDU MUKAVALI.....PLAINTIFFS/APPLICANTS

VERSUS

DIHINA AHEMBELWA

SELINA WENDO

SABETI ITECHESI

KENNEDY WENDO

PETER MBALILWA

BENARD ITECHESI

ANTONY MUHATI MUCHIMBA

ELPHAS LUYUKU LUKWA.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 8th March 2016 and is brought under order 40 rule 1 & 2 of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. That the Application be certified urgent and heard on priority basis in the first instance.
2. That an order of temporary injunction do issue restraining the defendants jointly and severally either by themselves, their agents, servants or anybody acting under their instructions from entering into, cultivating, intermeddling with or in any other manner dealing with land parcel No.Isukha/Shirere/2168 pending hearing of this application inter parties.

3. That an order of temporary injunction do issue restraining the defendants jointly and severally either by themselves, their agents, servants or anybody acting under their instructions from entering into, cultivating, intermeddling with or in any other manner dealing with land parcel No.Isukha/Shirere/2168 pending hearing and final determination of this suit.

4. That the costs of this application be provided for.

The applicants submitted that, on 23rd May 2016, Justice Kibunja sitting at Kisumu ordered the County Land Registrar and the District Surveyor Kakamega to confirm the boundaries of land parcel No.Isukha/Shirere/2168, 2169 and 2217. On 5th July 2016 the Land Registrar Kakamega and County Surveyor and their team including the area chief visited the aforesaid parcel number and made their report dated 13th July 2016 which was filed in court.

The Surveyor's report found that there exists a semi-permanent structure homestead along the boundary line belonging to the owner of land parcel No.Isukha/Shirere/2217 or the 1st defendant one Diphina Ahembelwa, a structure which has also encroached partly into parcel Isukha/Shirere/2168 the sued land. A permanent rental structure of Bernard Itechesi the 3rd defendant's son was also under construction in the said parcel Isukha/Shirere/2168.

They also found that land parcel No.Isukha/Shirere/2218 of one Elphas Luyuku which was not mentioned in the order had encroached into land parcel No.Isukha/Shirere/2217 of Diphina Ahembelwa the 1st defendant especially at points along the 11-20 tie line as indicated on the map, about 14 meters, hence affecting reestablishment of boundary n-p-q-m fully, a fact which caused one Elphas Luyuku Lukwa to be enjoined in the case.

The surveyors further found that land parcel No. Isukha/Shirere/2169 at Selina Wendo, Peter Wendo and Kennedy Wendo had also slightly encroached into the said land parcel No.Isukha/Shirere/2168 and as a result the boundary between them was eventually re-established and demarcated. The Surveyors team also found that maize plantation belonging to the 1st defendant Diphina Ahembelwa of land parcel No. Isukha/Shirere/2217 existed along the a-p-q boundary some of which were with land parcel No.Isukha/Shirere/2169. The surveyors also found that the extent of perceived encroachment of the restaurant of Kennedy Wendo along points 4-5-9-10 belonging to land parcel No.Isukha/Shirere/2169 was negligible hence they maintained status quo.

The team of the Land Registrar and District Surveyor Kakamega further concluded and requested that the court do give directions about;

- i) The semi-permanent house belonging to both 1st defendant Diphina Ahembelwa and Sabeti Itechesi.
- ii) The permanent rental houses belonging to Bernard Itechesi
- iii) The maize plantation of Diphina Ahembelwa and Anthony Muhati lying within the said Land parcel No.2168 since all the above were within the boundaries of land parcel No.2168
- iv) The court to issue summons to Elphas Luyuku of land parcel No.2218 to enable the completion of stabling the said boundaries.

Bitinyu Mwera the original owner of land parcel No.Isukha/Shirere/237 which was after his death sub divided into Isukha/Shirere/2168 and 2169 was the plaintiff's grandfather and prior to his death had allocated all his sons their share of ancestral land leaving the disputed. The defendants are already in possession of the said land parcels since 4th May 1973.

The applicants' submissions are that the plaintiffs have passed the requirements laid down in the well celebrated case of Guella Vs Cassman Brown in granting injunctions and urge the court to allow the

application dated 8th March 2016 in it's entirety.

The suit regards the 2nd, 4th and 5th defendants was withdrawn by the plaintiffs. The 1st, 3rd, 6th and 7th respondents filed responses vide replying affidavits sworn on 29.4.2016 and filed on the same date.

The respondents submitted that the Applicants aver that each of the children of Bitinyu Mwera were allocated a share of the ancestral land and hat land parcel No.Isukha/Shirere/237 was left for grandchildren's which land was sub divided in 1982 to create two numbers i.e. land parcel Isukha/Shirere/2168 and land parcel No.Isukha/Shirere/2169 claiming to have bought the same from the alleged trustees when succession was never done further the land parcel Isukha/Shirere/2169 has since been sub divided and registered in the names of 2nd, 4th and the defendants. This suit regards the 2nd, 4th and 5th defendants who are alleged to be beneficiaries of the sub division of land parcel number Isukha/Shirere/2169 has since been withdrawn by the Applicants and the current application pursues only land parcel No.2168. One would then ask himself if it is true that land parcel number 237 was left for the grandchildren i.e. for the benefit of the fourteen families then the same is illegally sub divided to create two or three parcels then why would the plaintiffs be interested only in one of the parcels. Is there some kind of malice on the part of the plaintiffs? The applicants aver that the 2nd, 4th and 5th defendants' father sub divided land parcel number Isukha/Shirere/237 without succession being done. The applicants cannot now come to court based and standing on the same illegality to support the suit.

If the applicants are administrators of the estates of the deceased trustees, do they then in their capacities as personal representatives have the capacity to bring the instant suit in respect of a trust?

Section 37 Cap 167 of the Trustee Act Provides:

1) "Where a trustee either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of Kenya for more than twelve months or desires to be discharged from all or any of the trust powers reposed in or conferred on him or refuses or is unfit to act therein or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees;

a) The person or persons nominated for the purposes of appointing new trustees by the instrument, if any, creating the trust or

b) If there is such person Then the surviving or continuing trustee for the time being, or the personal representative of the last surviving for continuing trustee May in writing appoint one or more persons to be a trustee or trustees In place of the trustee so deceased".

From the foregoing, it is clear that only trustees, duly appointed as per the Act can prosecute the instant suit. Personal representatives do not have the capacity to file a suit in relation to a trust. The personal representative of the last surviving trustee ought to have appointed trustees in respect of the trust.

Lastly, on the issue as to whether the Applicants have satisfied the conditions for the grant of temporary injunctions as set forth in *GiellaVs Cassman brown* which are:

- i) That the Applicants must demonstrate that they have a prima facie case with a probability of success.
- ii) Whether the Applicants will suffer irreparable injury which would not be adequately compensated by way of damages.
- iii) Where the balance of convenience tilts.

From the Replying Affidavits it is the Respondents' position is that they have lived on and utilized the land parcel in contest even before 1982. The Plaintiffs aver that the Respondents have invaded,

trespassed and started utilizing the suit land parcel but they do not say when the said invasion occurred. If the defendants have used the said piece of land with no complaints whatsoever then the balance of convenience tilts in their favour. Secondly, the survey report shows that already there are buildings on the said piece of land. Injuncting them would essentially mean eviction. The status quo should be maintained. Thirdly the said piece of land was not meant for the 14(fourteen) families but for two. This is an issue that has not been dealt with at the hearing. If there is any injury to be suffered by the Applicants then the same can be quantified by way of damages and lastly the Applicants have not established a prima facie case to warrant the grant of an injunction.

This court has carefully considered both the applicants' 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 plaintiffs vide a notice of motion dated 8.3.2016 brought under certificate of urgency and supported by an affidavit sworn by Edward Litali Lilumbi on the same date are seeking orders on the face of the Application. Prayers 1 and 2 of the application have been spent leaving us with two prayers and that is prayer 3 and 4 of the application which are:

1. That an order of temporary injunction do issue restraining the defendants jointly and severally either by themselves, their agents, servants or anybody acting under their instructions from entering into, cultivating, intermeddling with or in any other manner dealing with land parcel No.Isukha/Shirere/2168 pending the hearing and determination of this suit.
2. That the costs of this application be provided for.

The application is based on the following grounds; that the suit land belongs to the deceased's persons in respect of whom the plaintiffs are administrators. That the defendants have invaded and trespassed into the suit land and are in the process of cultivating come the rainy season. That only the respondents who are three (3) families occupy and utilize the suit land to the exclusion of other beneficiaries which are fourteen (14) families of the deceased owners. The applicants submitted that, on 23rd May 2016, Justice Kibunja sitting at Kisumu ordered the County Land Registrar and the District Surveyor Kakamega to confirm the boundaries of land parcel No.Isukha/Shirere/2168, 2169 and 2217. On 5th July 2016 the Land Registrar Kakamega and County Surveyor and their team including the area chief visited the aforesaid parcel number and made their report dated 13th July 2016 which was filed in court. It is this report that they are using to ask for the orders.

The respondents submit that the applicants are administrators of the estates of the deceased trustees. Do they then in their capacities as personal representatives have the capacity to bring the instant suit in

respect of a trust? The Respondents have also submitted that, they have lived on and utilized the land parcel in contest even before 1982. The plaintiffs aver that the respondents have invaded, trespassed and started utilizing the suit land parcel but they do not say when the said invasion occurred.

I find that the prayers sought in this application are final orders and cannot be granted at this stage. . If the defendants have used the said piece of land with no complaints whatsoever then the balance of convenience tilts in their favour. Secondly, the survey report shows that already there are buildings on the said piece of land. I find that the applicants have failed to establish a prima facie case to grant an injunction at this stage. I find this application has no merit and I dismiss it with costs to the respondents.

It is so ordered.

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

N.A. MATHEKA

JUDGE