



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

MISCELLANEOUS ELC CASE NO. 407 OF 2017

HOSEA AYOYI MOMBO.....APPLICANT

VERSUS

REPHER TONGOLA MOMBO.....RESPONDENT

RULING

This application is dated 13th November 2017 and brought under section 1 (A), & 63 (E) OF The Civil Procedure Act and order 40 rule (1 & 2) of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified as urgent and be heard ex-parte in the first instance.
2. THAT pending inter-parties hearing of this application this honourable court be pleased to restrain the respondent from interfering with the applicant's occupation and use, or transferring land parcel No. MARAMA/LUNZA/4042.
3. THAT pending the hearing and determination of this suit this honourable court be pleased to restrain the respondent from interfering with the applicant's occupation and use, or transferring land parcel No. MARAMA/LUNZA/4042.
4. THAT in the alternative to (b) above the status obtaining on 13th November, 2017 in respect of land parcel NO. MARAMA/LUNZA/4042 be maintained pending the hearing and determination of this application.
5. THAT in the alternative to (c) above the status obtaining on 13th November, 2017 in respect of land parcel NO. MARAMA/LUNZA/4042 be maintained pending the hearing and determination of this suit.
6. That costs of this application be provided.

The applicant submitted that, the respondent herein is his step sister and the registered proprietor of all that land known as MARAMA/LUNZA/4042 having acquired title on transmission upon sub-division of MARAMA/LUNZA/1822 which later land was registered in the names of SIMON MOMBO AMUNGA [Deceased]. That he purchased this land by a written agreement which was executed on 8th January, 2014 from the defendant and his other sisters, by then the land was still registered in the names of their deceased father and succession proceedings had been concluded though the subdivision on transmission had not been effected. It was an understanding between the respondent and himself that upon the completion of the transmission process and acquisition of the title by the respondent she could transfer the land into his names copy of the agreement and the translation thereof is annexed and marked as HAM-1 (a) & (b) respectively whilst the certificate of confirmation of grant is annexed and marked as HAM-2.

That upon execution of the aforementioned agreement the respondent and his other sisters surrendered vacant possession of the land to himself and he has been in actual possession and use to date. That the transmission process has since been concluded and the respondent obtained title to her land copy of the register is annexed and marked as HAM-3. That whilst his other sisters executed the relevant forms to vest the land into his name the respondent has declined to transfer the said land into his name hence necessity of this suit. That pending the hearing and determination of this suit it will be necessary and in the interest of justice that the status obtaining as at now be maintained as there is an apparent risk that the respondent may transfer the suit land to a 3rd party which will complicate the case. That the status as at now which he desires to be maintained is that he continues to occupy and use the suit land without any interference whilst the respondent remains the registered proprietor without transferring it to a 3rd party. That he has a bonfide case with overwhelming chances of success which can be defeated and or complicated unless the status who is maintained. That the balance of convenience tilts in favour of maintaining the status quo.

The respondent submitted that, the agreement produced is a forgery and she has not entered into any agreement with the applicant. There is no prove to show that money was given to her. There is no date when money was given to her. The court should dismiss this case with costs.

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 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 prima 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 premised on the annexed affidavit of HOSEA AYOYI MOMBO and on the following grounds; that the applicant purchased land from the respondent which was then registered in the names of their deceased father on an understanding that on completion of the transmission the respondent would transfer the said land in to the names of the applicant. That the succession cause was completed and equally the transmission of the land into the respondent's name has also been concluded, the respondent's parcel is L.R. NO. MARAMA/LUNZA/4042. That the respondent has declined to transfer the aforementioned land into the name of the applicant despite the fact that she received the agreed consideration in full. That the respondent is now in the process of disposing the land to a 3rd party making this suit and application necessary and urgent. That it is in the best of justice that the orders sought herein be granted.

The applicant submitted that, he purchased this land by a written agreement which was executed on 8th January, 2014 from the defendant and his other sisters, by then the land was still registered in the names of their deceased father and succession proceedings had been concluded though the subdivision on transmission had not been effected. It was an understanding between the respondent and himself that upon the completion of the transmission process and acquisition of the title by the respondent she could transfer the land into his names copy of the agreement and the translation thereof is annexed and marked as HAM-1 (a) & (b) respectively whilst the certificate of confirmation of grant is annexed and marked as HAM-2. That upon execution of the aforementioned agreement the respondent and his other sisters surrendered vacant possession of the land to himself and he has been in actual possession and use to date. That the transmission process has since been concluded and the respondent obtained title to her land copy of the register is annexed and marked as HAM-3. This is all denied by the respondent. The respondent has not denied that the applicant is in occupation of the suit land. I find that the balance of convenience tilts in favour of the applicant. The applicant has shown a prima facie case with a probability of success. The applicant has also shown that he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. I find this application is merited and I grant the following orders;

1. That an order of inhibition do issue against title No. MARAMA/LUNZA/4042 prohibiting registration of any dealings whatsoever pending hearing and determination of this suit.
2. The status obtaining on 13th November, 2017 in respect of land parcel NO. MARAMA/LUNZA/4042 be maintained pending the hearing and determination of this suit.
3. Costs to be in the cause.

It is so ordered.

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

N.A. MATHEKA

JUDGE