



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 38 OF 2012

ATANUS ASIENWA MUTEKWA.....PLAINTIFF/APPLICANT

VERSUS

SALIMU ASUMANI

MUSTAFA ASUMANI

SHARIFU ASUMANI

ASINAS VUGUTSA

NIFREDA IMUCHE

VERONIKA WANJIKO

BEATRICE ISAYA

JACKOB SUKURI

ABRAHAM NYONGESA.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 21st September 2017 and is brought under section 3A of the Civil Procedure Act and order 39 rule 1, 2 and 3 of the Civil Procedure Rules seeking the following orders;

1. That a temporary order of injunction be issued restraining the defendants/respondents herein, their agents, servants, workers and or representatives from developing, constructing, working and or in any manner whatsoever from carrying out activities and or developments/improvements on disputed plot Nos. Lugari/Likuyani/Block 1/Vihiga/204 & 205 at Likuyani within Likuyani Sub County pending the hearing and or final determination of the main hearing.
2. That service of this application upon the defendants/respondents be dispensed with in the 1st instance.
3. That the costs of this application be provided for.

The applicant submitted that, he bought the disputed plots herein Lugari/Likuyani/Block 1/Vihiga/204 and 205 way back in 1979. That he constructed his residential house on plot No. Lugari/Likuyani/Bloc 1/Vihiga/205 and rental premises on Lugari/Likuyani/Block 1/Vihiga/204. That he later moved from plot No. Lugari/Likuyani/Block 1/Vihiga/205 leaving his tenants on the said plots. That he was registered and obtained the respective land title deeds for the said plots as the absolute owner thereof in 1989. Annexed and marked "ASM 1 (a) and (b)" are copies of the land title deeds to that effect. That the defendants/respondents herein are complete strangers to his said two plots who have forcefully remained in occupation thereon without any colour of right something that prompted the filing of the instant case herein on 24th January, 2013. That the said case is still pending determination before this honourable court. That it is in the interest of justice that the defendants be restrained from their illegal actions of undertaking further developments on the disputed plots until the case herein is fully heard and determined.

The respondent submitted that, he is the 8th defendant/respondent and he has the due authority of the rest of the defendants herein to swear this affidavit both on their behalf and on his own behalf. That the contents of the plaintiff's purported notice of motion dated 21st of September, 2017, the supporting affidavit thereof sworn on even date and the certificate of urgency have been read to them and upon understanding the essence thereof they reply thereto in the following terms. That the application is based on hotly disputed facts as the proprietorship of the plaintiff in respect to the disputed suit parcels is questionable. That each of them has been in occupation of the suit parcels since 1978 or thereabouts to date. That it is their contention that the plaintiff has illegally combined all their parcels and illegally registered the same under his names. That the plaintiff is not a bonafide member of Vihiga farmers Ltd and has not shown any proof how he acquired the suit parcels which was the property of the said company where the defendants by virtue of being bonafide members were allocated portions forming the suit property. That it will serve the interests of justice for them to remain on the suit parcels as the persons currently in possession until the substantive suit field herein has been heard and determined. That the allegation that they have forcefully entered the suit parcels and have started demolishing the plaintiff's structures on the disputed land parcels is a white lie not evidenced by any proof and used to gain underserved sympathy from the court and create an imaginary emergency. That they intend to prove by asking the court to visit the actual disputed parcels and show that the plaintiff's land is different from the disputed parcels. That there is no proper basis or foundation laid by the plaintiff for the orders sought.

This court has carefully considered the applicant's and the respondents' 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."*

The application is based on the affidavit of Atanus Asienwa Mutenyo annexed hereto and on the grounds that, the defendants have forcefully started the construction of further structures on the disputed plots and demolishing of the ones he had constructed without his consent and of colour of right. That the defendants have ignored verbal warning from him on several occasions. That the plaintiff/applicant will suffer irreparable harm and loss if the orders sought herein are not granted. That the orders sought are intended to preserve the property and save it from further wastage or misuse by the defendants/respondents. That this suit will be rendered nugatory if the orders sought are not granted. The respondents submitted that, the Applicant did is to combine plots belonging to other members of the said company together with his and registering it as BLOCK 1/Vihiga/ 204 through fictitious means which the court had prohibited in KAKAMGA CIVIL CASE NO. 344 OF 1988 and also registering his brother one JAMES ASIENWA who is not a member of the company as the owner of BLOCK 1/Vihiga/ 205 which block comprises plots legitimately owned by the members of the company who are now threatened by the Applicant. (A copy of the judgment in KAKAMEGA CIVIL CASE NO. 344 OF 1988 is attached hereto).

I find that the Plaintiff/Applicant has provided proof of ownership of the land though the same is in dispute. The applicant has shown a prima facie case with chances of success. I therefore order that status quo of the suit property be maintained until the final determination of the substantive suit and costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 30TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE