



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 500 OF 2017

JOSEPH BULINGA KEYA.....PLAINTIFF/APPLICANT

VERSUS

PHILIP OWINO.....1ST DEFENDANT/RESPONDENT

ALICE AUMA OTIENO.....2ND DEFENDANT/RESPONDENT

RULING

This application is dated 6th December 2017 and brought under Order 40 Rules 1, 2 & 3 Civil Procedure Rules 2010 read with Sections 1A & B & 3A Civil Procedure Act seeking the following orders;

1. This matter be certified urgent and heard on priority basis in the first instance.
2. Pending the hearing and determination of this application inter-parties, an order of injunction be issued to stop and restrain the 1st defendant whether acting by himself or through his agents or through anybody acting on his authority from getting into, fencing, demarcating, cultivating and generally from interfering with the plaintiff's ownership and quiet possession of his land specifically the 1 acre of land forming part of L.R. Shiatsala/Marama/556 being the land clearly demarcated, occupied and cultivated by the plaintiff which is now being trespassed into by the 1st defendant and further the 1st defendant be stopped from cutting down the plaintiff's crops and interfering in any manner whatsoever with the plaintiff's developments on the stated parcel of land.
3. That the Officer Commanding Station at Butere Police Station be ordered to ensure compliance with these orders and to ensure that peace prevails.
4. Pending the hearing and determination of the main suit, an order of injunction be issued to stop and restrain the 1st defendant whether acting by himself or through his agents or through anybody acting on his authority from getting into, fencing, demarcating, cultivating and generally from interfering with the Plaintiff's ownership and quiet possession of his land specifically the 1 acre of land forming part of L.R. Shiatsala/Marama/556 being the land clearly demarcated, occupied and cultivated by the plaintiff which is now being trespassed into by the 1st defendant and further the 1st defendant be stopped from cutting down the plaintiff's crops and interfering in any manner whatsoever with the plaintiff's developments on the stated parcel of land.
5. Costs of this application be borne by the respondents in any event.

The plaintiff submitted that, On the 18th of November 2002 vide an agreement of the same date he purchased one acre of land out of the land registration No. Shiatsala/Marama/556 owned by one Paul Otieno Shikhutu but by then still registered in the names of his earlier deceased father Jeremiah Shikhutu (annexed and marked JBK-1 is a copy of the agreement). Immediately after the purchase of the one acre parcel of land they got it demarcated out with the said seller and the elders present and he took possession of it and he has all along cultivated the same to-date without any dispute and interference. Upon completion of the succession process in respect of the estate of Jeremiah Shikhutu, where he was named as one of the beneficiaries to L.R. Shiatsala/Marama/556 the whole land was transferred into their joint names awaiting subdivision and excision of individual titles(Annexed and marked JBK-2 is the chief's letter; JBK-3 is the confirmed grant, JBK-4 is the earlier search certificate and JBK-5 is the current search showing their joint ownership of the land).Unfortunately sometime in early October this year before the subdivision and excision of the land from the joint to individual titles could be completed, Paul Otieno Shikhutu passed away. On or about the 27th October 2017, he discovered that the 1st defendant herein allegedly on the authority of the 2nd defendant who is the widow of Paulo Otieno Shikhutu had trespassed into his one acre of the land being part of L.R. No. Shiatsala/Marama/556, cut down his maize crops on the farm started to fence off half of the stated farm claiming to have acquired the same by purchase from the 2nd defendant. Alice Auma the 2nd defendant was married to Paul Otieno Shikhutu after the sale transaction herein had been completed, she has no history of the transaction and neither does she possess any right over his 1 acre of land and in any event not being a title holder and having not even

commenced the process of the succession to the estate of Paul Otieno Shikhutu, she cannot purport to pass any title or interest in the land. In any event the 2nd defendant has all along been aware of his right and title to the land and has seen him cultivate the land all along without interference from her now deceased husband. In the circumstances the defendants' actions amount to malicious and criminal trespass to his land and an attempt to convert his private property without consideration and due process. His advocate served a demand letter and he also went to the area chief, assistant chief and the area police department who all intervened to stop the 1st defendant but he has persisted in the trespass and has even commenced erecting a fence inside his parcel of land hence this cause of action. (Annexed and marked JBK-6 is the letter). He stands to suffer irreparably since this is his only arable land from which he gets his food and he has no chance and opportunity of getting any other land. He has equally developed and found attachment with this land for the last 15 years all which cannot be compensated in damages. It is in the interest of justice, good order and respect for private property and the rule of law that the orders sought herein be granted.

The 2nd respondent submitted that on the court proceeding of 13th February 2018 the applicant herein applied and had claim and the entire suit against the 1st respondent withdrawn. Therefore the claim in the Notice of Motion having been directed to 1st respondent alone, then there is no suit or claim against the 2nd respondent as far as the pleadings are concerned. The applicant having withdrawn the suit against the 1st respondent, the Notice of Motion does not stand; therefore the 2nd Respondent stands discharged from any claim as for the application is concerned. That it is trite law that parties are bound by their own pleadings. In the entire application, the 2nd respondent is not mentioned.

Thirdly the 2nd respondent is in occupation of land parcel No. Shiatsala/Marama/556 since 1995 when she got married to the late Paul Otieno Wandayi the alleged seller in transaction she was not involved. That it is her averments in her main replying affidavit paragraph 6 and 7 that the applicant has never stayed on the suit land and it is only her who has been in occupation and the issue of trying to restrain her from interfering or entering the land cannot arise here, she is already in occupation. That she further states that she was never involved in the sale agreement if at all it was there nor did she give the spousal consent as required by law. That even in the alleged Butere Succession Cause No. 133/2006, in which the applicant claims to have been named as beneficiary, the 2nd respondent was not listed as an administrator or beneficiary nor has the case been amended to substitute her on behalf of her late husband as the administrator to give capacity to deal with the estate of her late husband.

The 2nd respondent further submits that this suit is an afterthought, unmerited, misdirected and the same lacks merit as the applicants seem not to be sure when the alleged 1 acre was even purchased if at all, for instant in his Demand Notice Annexure marked BK – 6 paragraph 1, he alleges to have purchased the suit land on 21st June 2010 from one Paul Otieno (see Demand Notice dated 27th October 2017 from the applicants advocate) while in his main pleadings at paragraph 4 of the plaint and his affidavit, the applicant indicate that he bought the land on 18th November 2002. The 2nd respondent further wishes to submit that annexure marked JBK-1 is actually a forgery and fabrication brought into suit the applicants intention of grabbing the 2nd respondents land. The annexure of the minutes marked JBK in the first place are incomprehensible and the content does not make sense to her. The same cannot even qualify to be called minutes. They urge the court to ignore the document. The applicant further states, he purchased one(1) acre of land vide annexure marked JBK – 1. The applicant claims to have purchased 'Kipande cha shamba kwa bei ya Kshs 45,000/= ' but in his pleadings he claims to have purchased one(1) acre of land forming part of land parcel No. Shiatsala/Marama/556. It is their submission that if indeed he bought one(1) acre of land, why the agreement couldn't be clear that he purchased one(1) acre. One wonders whether 'Kipande' is equivalent to one(1) acre.

The applicants claim to have bought one(1) acre from one Paul Otieno Shikhutu who passed on 9th April 2017 and the alleged 1 acre forms part of his estate. That it is their submission that the proceedings herein against the 2nd respondent is a nullity as she is not the administrator to the sellers estate, the sale of that 1 acre. Therefore the applicant herein lacks locus to institute a suit against the 2nd respondent having not filed a citation proceeding to bring her on board. Therefore the claim against the 2nd respondent is a nullity and the same ought to be struck out.

On 13th February 2018 the applicant herein applied and had claim and the entire suit against the 1st respondent withdrawn. This court has carefully considered the applicant's and the 2nd respondent's 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 be 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 supported by the sworn annexed affidavit of Joseph Bulinga Keya, and based on the grounds. That, the plaintiff is a joint owner of LR No. Shiatsala/Marama/556 from which he owns one acre of land clearly demarcated on the ground. The plaintiff acquired the said one acre parcel of land from one Paul Otieno Shikhutu in the year 2002 and has been in occupation and cultivation of the land since then to date. Paul Otieno Shutulu recently passed away leaving the 2nd defendant, his widow. The 1st defendant purporting to have been sold part of the plaintiffs one acre by the 2nd defendant has trespassed into the plaintiff's land, destroyed his crops and now in the process of re-

demarcating the said land and fencing the same off for his use and occupation. In spite of the intervention of the local administration and law enforcement agencies to try and stop him from the trespass, the 1st defendant has persisted in the same hence his cause of action. It is in the interest of justice, fairness and for the enforcement of order and the rule of law that the orders sought herein be granted. The plaintiff stands to suffer irreparable damage and loss if the 1st defendant's actions are not stopped immediately which loss and damage cannot be compensated in any manner whatsoever. The applicant has gone to great lengths to explain the process of acquisition of the parcel of land and the multitude of persons involved in witnessing the transaction (the sale agreement attached as annexure JBK – 1 in the applicant's supporting affidavit sworn on the 7th December 2017). The applicant further secured his interest in the purchased parcel after he was named and listed as a beneficiary of the property as a buyer (the letter written by the Assistant Chief way back on the 1st September 2006). The same is corroborated by the Certificate of Confirmation of Grant issued on the 4th January 2013. The successions process commenced way back in 2006. This is about 11 years after the 2nd respondent had been married to the deceased Paul Wandayi Shikhutu. The Succession process was concluded on the 4th January 2013 upon the issuance of the Certificate of Confirmation. I find that applicant has shown a prima facie case with a probability of success. Be that as it may, the suit was withdrawn against the 1st respondent and hence the court cannot issue orders in vain against a someone who is not party to this suit. That it is trite law that parties are bound by their own pleadings. In the entire application, the 2nd respondent is not mentioned. In the court proceeding of 13th February 2018 the applicant herein applied and had claim and the entire suit against the 1st respondent withdrawn. Therefore the claim in the Notice of Motion having been directed to 1st respondent alone, then there is no claim against the 2nd respondent as far as the pleadings in the application are concerned. For these reasons this application is dismissed with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE