



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 300 OF 2015

DAVID A. ANEKEYA ::::::::::::::::::::::::::::::PLAINTIFF/APPLICANT

VERSUS

DANIEL ANEKEYA

HYMPHREY NJIRIMAM MUKABI::::::::::::DEFENDANT/RESPONDENTS

RULING

This application is dated 18th November 2015 and brought under order 40 Rule 1 and 2 of the Civil Procedure Rules seeking the following orders;

1. The application hereto be certified as urgent and orders be granted in terms of prayer 2 ex-parte.
2. That pending the inter-parties hearing of this application the defendants whether acting in person or through their agents and or servants be restrained from selling, leasing, charging and entering onto land parcel No. Butsotso/Ingotse/2944 and 2945 to harvest the sugar crop planted thereon and or be restrained from dealing or interfering in any way with he said parcels of land.
3. That prayer 2 above be confirmed pending the final determination of the substantive suit filed herein.
4. The second defendant to pay the plaintiff the sum of Ksh. 96,000/= being the estimated value of the damage occasioned to his sugar cane crop by the second defendant.
5. The costs of this application be provided for.

The applicant submitted that he has instituted the suit herein for a claim inter alia that it be declared that land parcel No. Butsotso/Ingotse/1869 is family land and that the subdivision of the said land and transfers made by the first defendant to the second defendant be nullified (attach hereto a copy of the relevant green card marked 'DAA-1').That he has constructed a homestead on the said land where he lives with his family and brothers.That he was born on that land and have lived on it since 1970 from his childhood.That the first defendant is the older brother to his father one Alex Taabu Anekeya who died on 5th June, 2014 and was buried on the same land (a copy of the relevant death certificate is annexed hereto and marked 'DAA-2').That the first defendant was registered to hold land parcel No. Butsotso/Ingotse/1869 on trust for their family.That in breach of the said trust the first defendant has illegally subdivided the said land and retained in his names a portion registered as land parcel No. Butsotso/Ingotse /2944 and transferred the portion comprising land parcel No. Butsotso/Ingotse/2945 to the second defendant (a copy of the relevant certificates of search is annexed hereto and marked 'DAA-3 (a) and (b) respectively).That since being registered the second defendant has unsuccessfully tried to interfere with his possession of a portion of the said land including fabricating a criminal case against him for alleged forcible detainer which case was dismissed vide Kakamega CMCR No. 519 of 2013 (a copy of the relevant judgment in that case is annexed hereto and marked 'DAA-4').That in furtherance of his wrong and unlawful action on the land the second defendant has uprooted his sugarcane which he had planted and contracted to Mumias Sugar Co. Ltd (a copy of the cane farming contract and a crop damage assessment report is annexed hereto and marked 'DAA-5 (a) and (b) respectively). That the second defendant does not reside on the land and has no legal right to claim the land as his since it is family land. That the first defendant is threatening to sell the remaining portion of land while the second defendant is threatening to evict them from the suit land. That it will serve the interest of justice if the defendants are restrained from further dealing with the portions of land the subject matter herein in any way until the substantive suit filed herein has been heard and finally determined.That the second defendant should also be compelled to compensate him for the damage of his sugar cane crop.

This court has carefully considered the applicant's submissions and the annexures therein. The respondents were served but failed to attend court and the application was unopposed. 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 sworn affidavit of DAVID AMBOKA ANEKEYA the grounds are that, the plaintiff and his family members live on the suit parcels since their childhood. The suit parcel is ancestral family land which was registered in the names of the first defendant to hold on trust for the rest of other family members. The first defendant has illegally sub divided the original land and sold a portion to the second defendant who has illegally uprooted the sugar canes planted by the plaintiff and contracted to Mumias Sugar Company Ltd. The second defendant is now threatening to enter the suit parcel and evict the plaintiff and other family members without due process of the law. Unless the orders sought herein are granted the plaintiff and his family members face the danger of being illegally rendered landless. The applicant has shown a prima facie case with a probability of success. He has also shown that unless an interlocutory injunction is granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. The balance of convenience is also on the applicant as he has resided there since his childhood. I find that the application has merit and order that the status quo be maintained pending the hearing and determination of this suit. Prayer 4 cannot be granted at this stage. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 29TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE