



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA.

ELC CASE NO. 346 OF 2013.

FRANCIS MUSOLIO CHELOTI.....PLAINTIFF/APPLICANT

VERSUS

MAIGWE KIARIE

JANE MAIGWE KIARIE.....DEFENDANT/RESPONDENTS

RULING

This application is dated 21st January 2014 and brought under section 3A & 63 (c) and (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 urgent and heard ex parte in the 1st instance.
2. That the honourable court be pleased to issue an order of temporary injunction restraining the respondents either acting in person or through their agents, workers, relatives, or any person acting under their instructions from tilling, constructing, trespassing, selling, leasing or in any other manner interfering with the plaintiff's ½ of land parcel No. S. Kabras/Chemuche/1248 pending the hearing of this application inter partes.
3. That the honourable court be pleased to issue an order of temporary injunction restraining the respondents either acting in person or through their agents, workers, relatives, or any person acting under their instructions from tilling, constructing, trespassing, selling, leasing or in any other manner interfering with the plaintiff's ½ of land parcel No. S. Kabras/Chemuche/1248 pending the hearing and determination of this suit.
4. That costs here of be provided for.

The applicant submitted that he purchased ½ of that parcel of land designated as S. Kabras/Chemuche/1248 at the consideration of Ksh. 350,000/= which he paid in full. (Attached is a copy of the agreement marked "FMC-1") That the respondents who were to transfer the property have so far failed to do so. That he heard from reliable sources that the respondents want to sell his portion to a 3rd party. That he stands to suffer irreparable loss as he invested all his savings in the project. That the respondents' refusal to transfer the portion of land to him has no basis at all. That he believes that his suit has overwhelming chances of success. That he has to date not been able to get the green card to the parcel of land at the lands office and he is afraid of illegal dealing, on the register. That even the title deed has questionable entries which borders on forgery. (Attached is a copy of the title deed marked "FMC-2").

The 2nd defendant/respondent herein submitted that, the said application is misplaced, bad in law and otherwise an abuse of the court process. That she has never on 3rd December, 2010 or any other day either with the 1st defendant/respondent agreed to sell any portion of their joint land parcel L.R. S. Kabras/Chemuche/1248 to the plaintiff/applicant herein. That she has looked at the purported land sale agreement and noted that the same does not bear his name/signature and or identity card numbers as a seller and or witness to the said land sale agreement. That it is true that she placed a caution on the said land when she received rumors that her estranged husband the 1st defendant herein intended to secretly dispose of the said land. That the application herein and by extension the suit herein is a fallacy. That she is wrongly sued in this suit and or case. That the suit herein ought to be therefore dismissed with costs. The 1st respondent in his supplementary affidavit supports the application.

This court has carefully considered the applicant's and the respondents' submissions therein. The principles 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. 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.”*

This application is grounded on the annexed affidavit of Francis Musolio Cheloti, the applicant and the grounds that the applicant’s suit has overwhelming chances of success. The applicant stands to suffer irreparable loss unless the orders sought are granted. The applicant purchased the suit portion of the parcel of land from the 1st respondent leaving the other half for the 2nd respondent. The respondents have failed and/or refused to transfer the portion to the applicant and they have offered it out for sale to a 3rd party behind the applicant’s back. I have perused the court file and there are no annexures to support the application. Be that as it may, it is not in dispute that the property is jointly owned by the respondents. The 1st respondent maintains that she is not a party to the land sale agreement and hence placed a caution on the land. I find that the applicant has failed to show a prima facie case with a probability of success. Secondly the applicant has also failed to show that if the injunction is not granted he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. I find this application has no merit and dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF MAY 2018.

N.A. MATHEKA

JUDGE