



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELS CASE NO. 176 OF 2016

ISAAC LUSENO NATILI.....PLAINTIFF/APPLICANT

VERSUS

ZAKAYO NABWERA.....1ST DEFENDANT/RESPONDENT

PHILIP NATIRI.....2ND DEFENDANT/RESPONDENT

RULING

The application is dated 26th September 2017 seeking the following orders;

1. That this application be certified as urgent and be heard exparte in the 1st instance.
2. That pending the hearing of this application inter parties and/or until further order of this Honourable Court a temporary order of injunction be issued restraining the defendants/respondents either by themselves, their agents, representatives, servants or any other persons acting under their direction either severally or jointly from laying claim to trespassing onto, cultivating and/or in any other manner from interfering with the plaintiff's peaceful use and/or occupation of his parcel of land number South Kabras/Chemuche/2054.
3. That pending the hearing and final determination of this suit a temporary order of injunction be issued restraining the defendant/respondent either by themselves, their agents, representatives, servants or any other persons acting under their direction either severally or jointly from claim to, trespassing onto, cultivating and/or in any other manner from interfering with the plaintiff's peaceful use and/or occupation of his parcel of land number South Kabras/Chemuche/2054.
4. That this Honourable court be pleased to grant any other order as shall meet the ends of justice to the parties herein.
5. That the costs of this application be provided for.

The plaintiff submitted that he is the absolute registered owner of parcel of land No. South Kabras/Chemuche/2054 annexed is a copy of title deed and search certificate marked "I.L.N.I." That he is the one who has been in physical occupation of the suit parcel of land with constant interruptions from the defendants/respondents. That the defendants/respondents are cutting down trees and cultivating the suit parcel without his authority to his detriment. That the defendants have commenced cultivation process also without his knowledge. That it is within his knowledge that the defendants/respondent's actions are bound to change the character of the suit land and amounts to altering the character and/or status of the suit land before determination of the suit herein. That the defendants/respondents have turned violent and threatening him time and again. That it is therefore only just, proper and fair that restraining orders in terms of his application herein be granted in order to protect the subject matter of this suit.

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 on the annexed affidavit of Isaac Luseno Natili and the grounds that the applicant is the registered owner of parcel of land number South Kabras/Chemuche/2054annexed is a copy of title deed and search certificate marked “I.L.N.I”.That the defendants have taken advantage of his absence as he is away at school and made the life of the applicant unbearable with a view to changing its character to the detriment of the applicant as the lawful occupier.That the defendants/respondents have cut down and are threatening to continue cutting down and sell trees in the suit parcel without authority from the plaintiff.That the defendants/respondents are using force to usurp the power of the owner in respect of the suit land.That the suit herein, will be rendered nugatory if the defendants/respondents are not restrained from interfering with the status quo and evidence of actual occupation.That the plaintiff/Applicant will suffer irreparable loss unless the defendants are restrained by a court order.That the defendants have no right whatsoever to take by force ownership of the suit property owned by the applicant. I find that the applicant has shown a prima facie case with a probability of success. I find that unless the injunction is granted the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. The application has merit and I grant the following orders;

1. That pending the hearing and final determination of this suit a temporary order of injunction be issued restraining the defendant/respondent either by themselves, their agents, representatives, servants or any other persons acting under their direction either severally or jointly from claim to, trespassing onto, cultivating and/or in any other manner from interfering with the plaintiff’s peaceful use and/or occupation of his parcel of land number South Kabras/Chemuche/2054.

2. That the costs of this application be in the cause.

It is so ordered.

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

N.A. MATHEKA

JUDGE