



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 398 OF 2017

**WILSON AMWAYI BOGE (*Suing Through As Administrator Of The Estate
Of The Late JOHNSON ELAVIS BOGE*) PLAINTIFF/APPLICANT**

VERSUS

PRISCILLAH SULWE 1ST DEFENDANT/RESPONDENT

CATHERINE JENDEKA 2ND DEFENDANT/RESPONDENT

ELPHAS ODERO.....3RD DEFENDANT/RESPONDENT

RULING

This application is dated 13th November 2017 and is brought under Section 1, 1B, 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 50 Rule 1 & 2, Order 40 Rule 1 seeking the following orders;

1. That this matter be certified urgent and service be dispensed with in the first instance.
2. That pending the hearing and determination of this application, the 1st, 2nd and 3rd defendants/respondents, their servants and/or agents or otherwise howsoever be restrained from selling/alienating or in any way dealing with the suit property LR. No. 34 Lumakanda Market.
3. That pending the hearing and determination of the main suit, the 1st, 2nd and 3rd defendants/respondents, their servants and/or agents or otherwise whosoever compelled to vacate and IN THE ALTERNATIVE to deposit an outstanding rent for the period they have been in occupation from the year 2000 to date of the suit property LR. No. 34 Lumakanda Market.
4. That this honourable court does grant leave to the plaintiff to forthwith enter upon and repossess the suit premises, being property LR. No. 34 Lumakanda Market.
5. That the respondents be ordered to vacate the suit premises.
6. That the costs of this application be paid by the defendant/respondents.

The applicant submitted that, he is administrator of the estate of the late Johnstone Elvavisa Boge (attached and marked 'WABI' is a copy of the limited grant letters of administration). That he is the son to the deceased and beneficiary in the estate of the deceased. That upon his demise, his father left behind a widow, Sofia Busaka Elavisa (now deceased) and eight (8) children (attached and marked "WAB-2" is a copy of death certificate of the late Sofia Busaka Elavisa). That during her lifetime, his mother made efforts to distribute the property of the deceased amongst the beneficiaries, and they were each given shares in the estate of the deceased. That on or about 10th June, 2000 and having offset the outstanding A.F.C. loan on plot No. 88 Lumakanda, the family convened a meeting and it was agreed by the family that he be given possession of the suit property Plot No. 34 Lumakanda Market and to that end, he paid a consideration to the estate of the deceased. (attached and marked "WAB3 (a-g)") are copies of the sale agreement and payment receipts towards offsetting the A.F.C. loan and clearance.) That his mother, Sofia Elavisa Busaka died before the transfer of the said property No. 34 Lumakanda Market and/or sale transaction was concluded. That the said family agreement was witnessed by nine (9) witnesses including the respondents who all affixed their signatures. (attached and marked "WAB4" is the agreement showing the names and signatures of the witnesses). That subsequently, and upon request from the 1st and 2nd respondents, who were left as widows by his late brothers Nicholas Eboyi and Aggrey Odari, he agreed to allow them to temporarily reside in the premises with the promise to repossess the property immediately they found places to reside. That he had erected structures within the premises which he allowed the 1st and 2nd respondent reside in on condition that they will surrender possession after they had acquired other places to reside. (Attached and marked "WAB5" is a copy showing names of construction workers

and their signatures confirming payments he made to them as a consideration for their work). That he has been paying the annual land rates and taxes in respect of the said property. (attached and marked "WAB 6 "a-b" are copies of receipts evidencing payments of the said taxes). That he applied for the renewal of the lease to the commissioner of lands and has been paying all the requisite charges all on his own without the help of the respondents. (attached and marked "WAB7" is a copy of the application for the extension of the lease). That he now intends to begin constructions within the suit property and he will not be able to do that with the respondents in occupation. That the respondents have refused to vacate the premises and have even threatened to sell the property (attached and marked "WAB 8" is a letter written by the 3rd respondent showing his intention to sell the property). That the respondents have advertised and/or issued a notice of the sale of the suit property No. 34 Lumakanda Market (attached and marked "WAB 9" is notice of sale). That he has furnished the respondents with sufficient notice. That he risks to suffer irreparably if the orders sought are not granted.

Furthermore, there is a family agreement on record witnessed by all the family members or their representatives, and which agreement has not been disputed by either party. As a matter of fact the respondents make reference to the said family agreement made on 10th June, 2000 and marked as "WAB 4" in the evidence on record. The respondent's only contention is on the assertion that the said family agreement was not signed and or witnessed by all the family members. The family agreement on record was witnessed and signed on 10th June, 2000 in presence of the 1st and 3rd respondents and the husband to the 2nd respondent. The 1st respondent's husband who is son to the deceased had died by the time the agreement was being signed. The said agreement was also signed by the surviving spouse of the deceased and other children of the deceased. The children who did not witness the agreement signified their consent and had no problem with the suit property being given to the applicant herein. The applicant has been paying land rates in respect of the suit property. This fact has not been disputed by the respondents and the evidence on record shows that the applicant has been paying land rates for a very long period of time without the help of the respondents. They submit that this is clear proof that the property belongs to the applicant herein. The 1st and 2nd respondent are all beneficial owners of separate properties allocated to their husbands. They therefore have places to reside and to do business. The 3rd respondent and all other children were all given shares from the estate of the deceased. This is not in dispute. Their claim on the suit property is malicious and in made in bad faith and ought not to stand.

Further, the respondents have made very many assertions in their replying affidavits all of which remain unproved. For instance, the assertions that they made contributions to the development of the suit property and that they were invited to the suit property by wife of the deceased among other assertions remain unproved. The only evidence attached by the respondents are copies of photographs which have not been authenticated. The tenancy agreements attached are not in any way helpful to this case. They therefore submit that the respondents have failed to prove their assertions and the information in their replying affidavits should be disregarded *in toto*. The defendants/respondents having not shown any tangible evidence to challenge the plaintiff's/applicant's entitlement of the suit property ought to vacate the suit property and the applicant allowed immediate possession of the suit property as per the terms in the prayers sought in the application.

It is their submissions that the applicant is entitled to the prayers sought for the reasons stated above, more specifically that the 1st and 2nd respondents are not dependants and/or beneficiaries to the estate of the deceased and further that the 3rd respondent who was allocated a different portion of land from the estate of the deceased and has no interest in the suit property, and also for the reasons that the family agreed to have the applicant take ownership of the property and has no objection to the property being given to the applicant, and also that the 1st and 2nd respondent are intermeddling with the property forming part of the estate of the deceased and also because there is no family objection to the property being given to the applicant herein.

The defendants submit that the plaintiff has not established a prima facie case. Looking at the facts of the case the following issues come out, that the parties litigating herein are related and/or have relations. The property in issue belongs to a deceased person one Johnson Elavisa Boge. The suit property is still in the name of the deceased and has not been distributed. The affidavit by the 1st defendant explained that the deceased one Johnson Elavisa Boge had two parcels of land to wit; -Lumakanda 88 and the suit property herein. That after his demise succession was done in the estate of the deceased and land parcel Lumakanda 88 was distributed. For some reason, Lumakanda Plot No. 34 (suit property) was not distributed.

The plaintiff in an attempt to obtain locus herein obtained a special limited grant in respect of the estate of Johnson Elavisa Boge to be able to institute the instant proceedings. The defendants submit that the actions of the plaintiff are irregular, unprocedural and intended to steal a march not only on the defendants but on all the other members of the deceased family. Without going into the merits on the issues herein there is conclusive evidence to show that one of the deceased property was distributed i.e. Lumakanda Scheme No. 88. There was therefore a succession cause that was instituted that led to the distribution of the property and family members got their respective portions.

The plaintiff has not demonstrated which right has been infringed. The suit property in issue been a property that is still registered in the name of a deceased person; the plaintiff cannot lay exclusive right to the same. The plaintiff is a beneficiary just like all the other beneficiaries. The attempt by the plaintiff to show that the honourable court that the suit property was allegedly given/bequeathed and/or bestowed upon him cannot and should not be an issue for determination before this court. The issue of ownership of a property that is still in the name of a deceased person and the distribution thereof are issue for determination in a succession cause not a land case like the instant case. In *Narenda Chagantal Solanki vs. Neepa Auto space Ltd Kisumu HCC No. 90 of 2003*. It was held:-

"In an interlocutory application for injunction the court must warn itself of the gravity of danger of making conclusive finding that may prejudice the interests of the parties at the hearing of the suit and should as far as possible exercise some precautionary steps."

The plaintiff has failed to establish and/or demonstrate the loss he is likely to suffer if the orders sought are not granted. From the photographs attached (and which have not been disputed) the plaintiff together with the 1st and 2nd defendants have been utilizing the shops on the property. The 1st defendant's affidavit explained that the parties (plaintiff, 1st and 2nd defendants) have been utilizing the property since the year, 2001 to date in a bid to save the property from being repossessed and/or taken by the Government. The question that lingers then is why the plaintiff has started agitating over the property now. The parties have been utilizing the property as agreed without any problem. The plaintiff should not be complaining when he is actually utilizing one of the shops in the premise pending the conclusion of succession cause.

The defendant submits that the plaintiff/applicant is not deserving of the orders sought. An injunction is an equitable remedy. A party coming to court for the same must prove worthy of exercise of the discretion in his favour. The applicant must come to court with clean hands and make full disclosure of material facts. The plaintiff herein is not deserving of the orders as he withheld material information from court by failing to disclose:-

- a. That he has been utilizing one of the shops on the suit property.
- b. That there was a succession cause that distributed one of the property belonging to the deceased and the instant suit property was left out.
- c. Failing to disclose that he has been utilizing the property together with 1st and 2nd defendant since the year 2001.
- d. The applicant also lied and/or misrepresented to the court that the defendants reside on the suit property while knowing very well that is not the case.

Purpose of injunction orders In CMC Holdings Ltd and Another vs. Jaguar Land Rover Exports Ltd., it was held:-

“The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issue.

These orders are not automatic. The purpose of an interim measure of protection (Injunction) is to ensure that the project matter will be in the same state as it was at the commencement or during proceedings.

The jurisdiction to grant injunctive relief was to preserve the subject matter of the suit pending determination of the issues between the parties”.

From the foregoing, the defendants submit that there is nothing this honourable court is being asked to protect. There is nothing that is likely to change concerning the property as the proceedings herein are ongoing. Nothing (except for an order of court) will change the fact that the property is still in the name of the deceased and has not been distributed. The parties utilizing the shops on the premises have been doing so for the last over 10 years. The defendants submit that an order for injunction is not an appropriate order in the circumstances. An order for injunction is ideally meant to prevent/protect an act from happening. The defendants (1st and 2nd defendant) and the plaintiffs have been utilizing the shops on the suit property and are still utilizing the same. An order for injunction at this point would be tantamount to issuing an eviction order against the 1st and 2nd defendant without a full hearing.

From the reading of the pleadings filed by the plaintiff, there is no justifiable and/or any reasonable cause of action against the 3rd defendant. There is no reason (a justifiable reason) in law established by the plaintiff as to why the 3rd defendant should be enjoined with regard to the suit property. The 3rd defendant does not reside on the suit property, does not utilize the property does not lay a claim over the same. The defendants submit that there is no reasonable and/or justifiable reason for grant of the orders sought against the 3rd defendant. The application dated 13th November, 2017 is unmerited, lacks legal basis and should be dismissed with costs.

From the foregoing they submit and in view of the issues advanced, it is clear that the balance of convenience herein tilts in favour of the defendants herein. The defendants submit that the plaintiff has not met the threshold for grant of the orders sought.

This court has carefully considered both 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 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.”

This matter was initiated by way of Notice of Motion application dated 13th November, 2017. The applicant initiated this matter in his capacity as an administrator of the estate of the deceased, having obtained the requisite letters of administration. The application seeks for among others temporary injunctive orders against the respondents in respect of property LR. No. 34 Lumakanda Market, and also for orders to have the respondents vacate the suit property and consequently the plaintiff/applicant to be allowed to repossess the suit property.

The application is premised on among other grounds that the 1st and 2nd respondents are not beneficiaries in the estate of the deceased and

also on the fact that the applicant was rightly given the suit property by the family and is therefore entitled to the suit property. The applicant also relies on the supporting affidavit sworn by Wilson Amwayi Boge on the 13th day of November, 2017 and on a further affidavit sworn by the applicant on 13th day of February, 2018. The application is founded on the grounds that the suit property forms part of the estate of the deceased Johnson Elavisa Boge. Succession in respect of the suit property has not been concluded. The family had agreed to give the property to the applicant upon consideration and after having cleared the outstanding A.F.C loan on parcel No. 88 took possession and had made developments to the property. The 1st and 2nd respondents have been and continue to be licensees in respect of the property Plot No. 34 Lumakanda Market which the applicant received upon consideration who allowed them temporary possession of and limited rights to the property. Despite written demand to vacate the suit property and notice of intention to sue in default having been issued to the defendants, the defendants have refused, neglected and/or otherwise failed to vacate the suit property. Accordingly, the respondents have with the aid of the area chief threatened and have shown intention, unless restrained by this honourable court, to continue or remain in wrongful occupation of the suit property and/or to trespass thereon. The defendants have now, without any justification whatsoever, threatened to sell the suit premises to the likely disadvantage of the beneficiaries of the estate.

The property in issue belongs to a deceased person one Johnson Elavisa Boge. It is a finding of fact that, the suit property is still in the name of the deceased and has not been distributed. The affidavit by the 1st defendant explained that the deceased one Johnson Elavisa Boge had two parcels of land to wit, Lumakanda 88 and the suit property herein. That after his demise succession was done in the estate of the deceased and land parcel Lumakanda 88 was distributed. For some reason, Lumakanda Plot No. 34 (suit property) was not distributed. The plaintiff obtained a special limited grant in respect of the estate of Johnson Elavisa Boge to be able to institute the instant proceedings. The 1st and 2nd respondents contend that they are wives to the sons of the deceased, and further that they had contributed to the developments in the property and as such are entitled to the property. The 3rd respondent on his part cites that no reasonable cause of action has been demonstrated against him and in a way seeks to be excluded from the case, and states further that he does not reside in the property and that he has never utilized the property. I find that this application is to say the least brought before the wrong court and this application appears to be a succession matter. Be that as it may, the plaintiff and the 1st and 2nd respondent are all in occupation of the suit land and are family members. I find that the applicant has not shown a prima facie case with a probability of success. The applicant has also not shown that he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages if an injunction is not granted. The defendants (1st and 2nd defendant) and the plaintiffs have been utilizing the shops on the suit property and are still utilizing the same. An order for injunction at this point would be tantamount to issuing an eviction order against the 1st and 2nd defendant without a full hearing. These are final orders and cannot be granted at this stage. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE