



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 279 OF 2014

LABAN MASINJILA.....PLAINTIFF

VERSUS

SULUMAN SUMBA MINISTER FOR LANDS

COUNTY MINISTRY OF LANDS

COUNTY GOVERNMENT OF KAKAMEGA.....DEFENDANTS

RULING

The plaintiff/applicant filed notice of motion dated 10th July, 2014 under certificate of urgency claiming inter alia for orders:-

1. That the application filed herein be certified as urgent and its service be dispensed with in the first instance.
2. That pending the hearing and determination of this application inter parties, this honourable court be pleased to restrain the respondent/defendant, its servants and/or agents from this continued unlawful trespass and constructing structures or in any way interfering with or wasting plot number 1. Extension until this application is heard and determined.
3. That an interlocutory injunction do issue restraining the defendant by himself, his servants and/or agents from trespassing, wasting, damaging through construction or otherwise plot number 1. Extension until the hearing and determination of the suit herein.
4. That this honourable court be pleased to order the officer commanding Kakamega South District Police Station, to ensure compliance of the court orders.
5. That the costs of this application be provided for.

The plaintiff/applicant submitted that, he is the owner of plot number 1. Extension. (Annexed is a bundle containing copies of documents to prove this). The plaintiff/applicant was allocated plot number 1 Shikulu market in 1960s' by African District Council which later came to be known as County Council of Kakamega by extension County Government of Kakamega. The applicant has occupied the plot for over fifty years and has been paying rates and rent for the said plot annexed herewith are copies of receipts. The respondent/defendant has without any colour of right, consent and/or authority entered into the said plot and thereby trespassed and is constructing structures thereon. (Annexed is a bundle of photographs showing construction going on the said plot). Unless restrained by the orders of this honourable court, the defendant threatens and intends to continue being in wrongful occupation and construction of structures on the said plot thereby occasioning the plaintiff irreparable loss and damage.

The defendant submitted that, he is the County Executive Member in charge of the Ministry Lands, Housing, Urban Areas and Physical Planning within the County Government of Kakamega, well versed with the facts of this matter and, being duly authorised, to swear this Affidavit for and on behalf of the Defendants herein. That Shikulu market, which is being claimed by the Plaintiff, purportedly as an extension of Plot No. Idakho/Shikulu/Market/1, resides on and is a portion of a totally different parcel of land, namely Plot No. Idakho/Shikulu/1770, while Plot No. Idakho/Shikulu/Market/1 is what was allocated to the Plaintiff herein sometime in or about 1972. Annexed as 'AM' is a certified copy of the Survey Map for Idakho/Shikulu-Diagram 13. That the extension, known as Plot No. Idakho/Shikulu/Market/IB and was allocated to one, Micah Munzala, having been repossessed from one, A.L. Shihanga. That as regards the dispute herein, that there exists a vacant parcel of land/space also commonly and informally referred to as Plot 1 B, being part of land parcel No. Idakho/Shikulu/1770, which the Plaintiff is wrongfully claiming as his land (Shikulu Market). That the said vacant/open parcel/space No. 1B was meant for Open-Air Market use and is already covered by a perimeter block walling and was used as such open-air market grounds until when it was recently allocated for construction of modern toilets by the County Government of Kakamega. That as per the records of the erstwhile Kakamega County Council, the said open space has never been part of Plot No. Idakho/Shikulu/Market/1B as

alleged by the Plaintiff or at all and no construction has ever been carried out on it save for the perimeter wall aforesaid and, now, the modern toilets whose construction has, in any event, been stopped by the Order of the Honourable Court. That in any event, there is no Part Development Plan (PDP) for allocation with Plot No. Idakho/Shikulu/Market/1770 and that the numbering of most of those parcels, including but not limited to the Plaintiff's own Plot No. Idakho/Shikulu/Market/1 was a preliminary numbering system of the erstwhile Kakamega County Council, there having been no survey of those parcels of land. That therefore, the parcel on which the modern toilets for the County Government of Kakamega were proposed to be developed is Plot No. Idakho/Shikulu/Market/1770, which is quite apart from the Plaintiff's Plot No. Idakho/Shikulu/Market/1. That in the circumstances, the application herein is misconceived, unmerited and fails to meet the required threshold for grant of the reliefs sought therein.

This court has carefully considered all the submissions herein. 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 was based on the grounds that the plaintiff/applicant is the owner of plot number 1. Extension Shikulu Market. That the defendant/respondent has trespassed upon and continues to trespass on the said plot. That the defendant has committed and continues to commit waste and damage through fencing and construction of structures on the said plot. That in spite of several requests, reminders and demands made by the plaintiff to the defendant to provide vacant possession thereof the defendant has wrongfully failed and refused to do so. That unless restrained by the orders of this honourable court, the defendant intends to continue with the said unlawful occupation of waste and damage upon the said plot thereby occasioning the plaintiff irreparable loss.

The defendant submitted in the replying affidavit that, he is the County Executive Member in charge of the Ministry Lands, Housing, Urban Areas and Physical Planning within the County Government of Kakamega, well versed with the facts of this matter and, being duly authorised, to swear this Affidavit for and on behalf of the Defendants herein. That Shikulu market, which is being claimed by the Plaintiff, purportedly as an extension of Plot No. Idakho/Shikulu/Market/1, resides on and is a portion of a totally different parcel of land, namely Plot No. Idakho/Shikulu/1770, while Plot No. Idakho/Shikulu/Market/1 is what was allocated to the Plaintiff herein sometime in or about 1972. Annexed as 'AM' is a certified copy of the Survey Map for Idakho/Shikulu-Diagram 13. That the extension, known as Plot No. Idakho/Shikulu/Market/IB and was allocated to one, Micah Munzala, having been repossessed from one, A.L. Shihanga. It has come out in submissions that these plots have not been surveyed and the court cannot determine the actual owner at this stage. Be that as it may the applicant does have letters of allocation of a certain plot which he maintains is the same on the respondents have trespassed on. I find that the applicant has established a prima facie case and I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE