



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 191 OF 2016

JOHNSON WYCLIFE AMBANI

JOHN OMUYULA M. ODINGA.....PLAINTIFFS/APPLICANTS

VERSUS

HENRY LUBANGA MWIMALI

MICHAEL OTINGA MWIMALI.....DEFENDANTS/RESPONDENTS

RULING

The plaintiff/applicant filed notice of motion dated 26th September 2016 and is brought under sections 3A and 63 e of the Civil Procedure Act and order 40 and order 50 rule 1 of the Civil Procedure Rules seeking the following 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, an interim injunction be is hereby issued against the defendants, their family agents, servants or any other person claiming/ acting on their behalf restraining them from trespassing encroaching onto land parcels E. Wanga/Malaha/1163,1164 and 1165 and cultivating or use of the same in any manner.
3. That pending the hearing and determination of this application inter parties, an interim injunction be is hereby issued against the defendants, their family agents, servants or any other person claiming/ acting on their behalf restraining them from trespassing encroaching onto land parcels E. Wanga/Malaha/1163,1164 and 1165 and cultivating or use of the same in any manner.
4. That the costs of this application be provided for.

The plaintiff/applicants submitted that, they are the sole proprietors of land parcels E. Wanga/Malaha/1163,1164 and 1165. The respondent/defendants have without any colour of right, consent and/or authority entered into the said plot and thereby trespassed and are cultivating the same. 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, all the parties in this matter are siblings and the suit land is subject to a succession cause No 413 of 1995 which the said land parcel parcel E. Wanga/Malaha/167 was subdivided to create parcels E. Wanga/Malaha/1163, 1164, 1165, 1167, 1168 and 1169 which numbers were apportioned to all the beneficiaries including the parties in this matter. The respondents file objection proceedings therein and the applicants filed an application for eviction and both applications were dismissed in a ruling dated 11th May 2017. 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 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 was based on the grounds that the plaintiff/applicants are the proprietors of land parcels E. Wanga/Malaha/1163, 1164 and 1165. That the defendant/respondent has trespassed upon and continues to trespass on the said suit land. That unless restrained by the orders of this honourable court, the defendant intends to continue with the said unlawful occupation, waste and damage upon the said plot thereby occasioning the plaintiff irreparable loss. The defendant submitted this matter is res judicata as there is a similar matter before the high court touching on the same land and the same parties. This court cannot issue orders when there is another court dealing with the same matters. I find this application lacks merit and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE