



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 409 OF 2017**

**RICHARD WALALA OGOLLAH ..... PLAINTIFFS/APPLICANT**

**VERSUS**

**LUKA NDALUSIA YESWA ..... DEFENDANT/RESPONDENT**

**RULING**

This application is dated 13<sup>th</sup> November 2018 and is brought pursuant to Sections 1A & 3A of the Civil Procedure Act and Order 40 Rules 1. 2 & 3 of The Civil Procedure Rules 2010 seeking the following orders;

1. That this application be certified as urgent and be grant *ex parte* in the 1<sup>st</sup> instance.
2. That pending the hearing and final determination of this application, the Defendant/Respondent either by himself, through his agents, employees, servants, workers and/ or any other person acting under his direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, and/ or in any manner whatsoever from interfering with the Plaintiff/Applicant's quiet and peaceful occupation, possession and use of her parcel of land No. Butsotso/Indangalasia/5665.
3. That pending the hearing and final determination of this suit, the Defendant/Respondent either by himself, through his agents, employees, servants, workers and/ or any other person acting under his direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, and/ or in any manner whatsoever from interfering with the Plaintiff/Applicant's quiet and peaceful occupation, possession and use of her parcel of land No. Butsotso/Indangalasia/5663.
4. That the costs of this application be provided for.

The applicant submitted that, he is the registered proprietor of parcel of land No. Butsotso/Indangalasia/5663 which he bought from the Defendant's aunt one Frida Lubeya Andala vide an agreement made on 11<sup>th</sup> September, 2014. (Annexed is a copy of the said sale agreement and a copy of title deed and search marked "R.W.O- 1a, 1b & 1c" respectively). That the Respondent's father one Joshua Yeswa Andala was and is aware of the sale as he was in fact a witness in the sale agreement as a witness for the seller. That it is within his knowledge that the seller gave him vacant possession of the suit parcel of land. That on or about 22.02.2016, he instructed a surveyor one Peter Makaka Omuyanda whom he accompanied alongside casual workers with a view to fencing his land. That out of the blues and without any permission and approval the Defendant/Respondent, his agents, representatives and/or employees came to his said parcel of land with a panga and used the same to cut the tape measure they were using and chased them away. That his efforts to talk to the Respondent and his agents and or employees to allow him access his land and till has not yielded any fruits as he has always turned violent whenever he sees him around his legally acquired parcel of land. The same prompted him to report the same to Kakamega Police Station vide OB No.24/23/02/2016. That the Respondent has vowed to continue with his illegal activities on the said land thereby subjecting him to irreparable loss and damage as he cannot utilize his lawfully acquired property. That the Respondent's actions are therefore bound to change the character of the suit property and amounts to altering the character and status of the suit property to his detriment. That the Respondent has absolutely no right whatsoever to interfere with his peaceful occupation of the said land and/or carrying thereon any work whatsoever without his consent and/or approval.

The respondent submitted that, the seller of the parcel of land Number Butsotso/Indangalasia/5663 Fridah Lubeya Andala fraudulently obtained the title deed through fraudulent means therefore nullifying the claim by the plaintiff. That the intent to defraud the land was to sale. One and a half years after being issued with the fraudulent title, Fridah Lubeya Andala disposed the land to the plaintiff. That the land parcel Number Butsotso/Indangalasia/5663 was hived off land parcel Number Butsotso/Indangalasia/5297 in the names of Joshua Yeswa Andala the defendant's father and the seller's brother. That the land parcel Number Butsotso/Indangalasia/5297 is his ancestral land. That the late Joshua Yeswa Andala has four children. 1. Margaret Awinja Yeswa 2. Luka Ndalusia Yeswa. 3. John Andala Yeswa. 4. Joab Juma Yeswa. That the land parcel Number Butsotso/Indangalasia/554 had at the request of his late father in 2010 been divided into three parcels by the Assistant Chief of Indangalasia Sub-Location Mr. Mukoshi Nambala for the three sons of Mr. Joshua Yeswa Andala in the presence of local elders. After sub-division of the land parcel Number Butsotso/Indangalasia/554 into three portions: Numbers Butsotso/Indangalasia/5297, Butsotso/Indangalasia 5298 and Butsotso/Indangalasia 5299. My brother Joab Juma Yeswa processed his title for parcel number, Butsotso/Indangalasia 5298. John Andala Yeswa processed his title of Butsotso/Indangalasia 5299. At the time of sub-division he did not have money to process his portion of the land parcel Number Butsotso/Indangalasia/5297 and it remained in trust in his

father's name. The land portion Number Butsotso/Indangalasia/S297 therefore remained in his father's name Mr. Joshua Yeswa Andala. His Aunt Fridah Lubeya Yeswa took advantage of his ailing father who was suffering from early symptoms of dementia to hoodwink him that she wanted to take a loan to treat him on the land parcel Number Butsotso/Indangalasia/5297. That one of the two different sales agreements, only in one of them did one family member John Andala Yeswa appear to have been present during the sale. In the final sales agreement none of the family member was present on its execution. In another sales agreement other than his aunt and her son Sammy Likuyi Adema no other family witness was present. That this sales agreement was executed in Busia in the absence of all the interested parties including his late father Joshua Yeswa Andala. That the Assistant Chief for Indangalasia sub-location who portioned the land to the three sons was not involved in the sale of this land. That Chief of East Butsotso Lurambi Division wrote to District Lands Office a letter on 10<sup>th</sup> August 2012 placing caution on land parcel Number Butsotso/Indangalasia/5297 due to the dispute on the parcel.

This court has carefully considered the 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.”*

The application is based on the following grounds and on the annexed Affidavit of Richard Walala Ogollah. That the Defendant/Respondent has moved on to the Plaintiff/Applicant's land and hence deny the Applicant the use of the said land without any color of right. That the Respondent has now taken advantage of his violent character to deny the Applicant peaceful use of the said land and as such turned it into his own illegally. That respondent is using force to usurp the power of the registered owner of the suit land. That the balance of convenience tilts in favour of the Plaintiff/Applicant who is the registered proprietor of the suit plot. It is not in dispute that the Applicant herein is the registered owner of the land parcel No. BUTSOTSO/INDANGALASIA/5663 which land he has been denied access to and even usage by the Respondent herein. The applicant further argues that, even if he were to win the main suit and he was to be compensated now, the Respondent being a man of no means and no known assets registered in his name will not be able to pay him the said money. I find that the applicant has shown a prima facie case with a probability of success. I find this application has merit and order that the status quo be maintained pending the hearing and determination of this case.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**