



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 120 OF 2017

MERIDINA ALWALA

LIVINGSTONE ALWALA

BELLA ALOSA ALWALA.....PLAINTIFFS

VERSUS

PRAJAPATI PRA VINBHAI JIVASHAI

SAMWEL ATSWONG'O ALWALA

AINEA ALWALA ODWOGO.....DEFENDANTS/RESPONDENT

RULING

The first application is dated 7th April 2017 and brought under order 40 rule 1 and order 51 rule 1 of the Civil Procedure Rules 2010 section 1A, 3A and 63 (C) of the Civil Procedure Act seeking the following orders:-

1. That the application herein be certified urgent and be heard ex-parte in the first instance.
2. That the honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant, his agents, servants and/or persons or legal entities claiming any proprietary interest over land title number Kakamega/Municipality Block 1/220 through the 1st defendant from alienating, selling, transferring or in any manner whatsoever disposing of the said land title number Kakamega/Municipality Block 1/220 pending the hearing and determination of this application.
3. That the honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant, his agents, servants and/or persons or legal entities claiming any proprietary interest over land title number Kakamega/Municipality Block 1/220 and/or from effecting any demolition of the buildings or structures erected thereon and/or from making any modification whatsoever to such buildings or structures pending the hearing and determination of this application.
4. That the honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant, his agents, servants from interfering with the occupancy or tenancy of the existing tenant (s) on the said land title number Kakamega/Municipality Block 1/220 and who had been in occupancy by the time of registration of the challenged transfer to the 1st defendant pending the hearing and determination of this application.
5. That the honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant, his agents, servants and/or persons or legal entities claiming any proprietary interest over land title number Kakamega/Municipality Block 1/220 through the 1st defendant from alienating, selling, transferring or in any manner whatsoever disposing of the said land title number Kakamega/Municipality Block 1/220 pending the hearing and determination of the main suit herein.
6. That the honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant, his agents or servants from making any developments on the said land title number Kakamega/Municipality Block 1/220 and/or from effecting any demolition of the buildings or structures erected thereon and/or from making any modification whatsoever to such buildings or structures pending the hearing and determination of the main suit.
7. That the honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant, his agents or servants from interfering with the occupancy or tenancy of the existing tenant (s) on the said land title number Kakamega/Municipality Block

1/220 and who had been in occupancy by the time of registration of the challenged transfer to the 1st defendant pending the hearing and determination of the main suit herein.

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

It is based upon the grounds that the 1st plaintiff and the 3rd defendant are spouses, having been married to each other under Luhya customary law in the year 1959. The registered leasehold over land title number Kakamega/Municipality Block 1/220 (hereinafter referred to as "the suit property") was in the year 1967 or thereabout, with a formal renewal of the leasehold tenure taking place on 3/10/2006 whose effect was to extend the leasehold for further 99 year period from 1/8/1999. The 1st plaintiff even made greater contribution than the 3rd defendant in the acquisition of the suit property, which suit property was then rendered a matrimonial home on which the issues of the marriage were housed during their entire primary schooling. Notwithstanding the greater involvement by the 1st plaintiff/applicant in the acquisition of the suit property, it had to be registered in the name of the 3rd defendant as the head of the family and custodian of immovable matrimonial property as dictated by the Luhya custom hence the registration of the suit property in the sole name of the 3rd defendant/respondent herein. In the year 2013 the 3rd defendant suffered a stroke and organic Brain Syndrome as a result whereof his mental faculties got impaired. His brain condition defied necessary medical interventions and deteriorated to a state such as to render him perpetually confused and of an unsound mind; a state that persists to date, albeit at a much aggravated degree. Aware of the 3rd defendant's mental infirmity rendering him totally unable to make sound judgment or even comprehend his deeds, the 2nd defendant made a fraudulent attempt to procure the transfer of the suit property to himself (2nd defendant) by falsifying necessary documents to make it seem that the suit property had been freely gifted to him but that fraudulent scheme botched up. Later and through the instrumentality of or connivance by the 2nd defendant/respondent, the 1st defendant acting with full knowledge about the 3rd defendant's infirmity of mind fraudulently procured the transfer of the suit property to the 1st defendant/respondent. The fraudulent transfer of the suit property to the 1st defendant/respondent shown to have been formally effected at the land registry on 22/2/2016 was done in such a discreet manner that it went unnoticed by the 1st plaintiff until the time she got wind of the eviction threats and suit-property demolition threats recently communicated by the 1st defendant to the existing tenant who had lease part of the suit property in the year 2012 for a 10 year period that is to formally lapse in the year 2022. All indications are that the transfer of the suit property to the 1st defendant is fraudulent, unprocedural and therefore null and void ab initio as particularised in the plaint and as shall be fully proved at the hearing of the main suit hence the need to preserve the suit property by granting the orders prayed for herein to avert the danger of the main suit being rendered nugatory or the substratum thereof being wiped out through possible fraudulent disposition of the suit property during the pendency of the suit.

This court has carefully considered the submissions and the annexures therein. The principles 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 plaintiffs/applicants submitted that, the 1st plaintiff and the 3rd defendant are spouses, having been married to each other under Luhya customary law in the year 1959. The registered leasehold over land title number Kakamega/Municipality Block 1/220 (hereinafter referred to as "the suit property") was in the year 1967 or thereabout, with a formal renewal of the leasehold tenure taking place on 3/10/2006 whose effect was to extend the leasehold for further 99 year period from 1/8/1999. The suit property was then rendered a matrimonial home on which the issues of the marriage were housed during their entire primary schooling. In the acquisition of the suit property, it had to be registered in the name of the 3rd defendant as the head of the family and custodian of immovable matrimonial property. Later and through the instrumentality of or connivance by the 2nd defendant/respondent, the 1st defendant acting with full knowledge about the 3rd defendant's infirmity of mind fraudulently procured the transfer of the suit property to the 1st defendant/respondent. The 1st plaintiff got wind of the eviction threats and suit-property demolition threats recently communicated by the 1st defendant. I find that the 1st plaintiff has locus standi having beneficial interest on the suit premises. 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.

The second application is by the 2nd defendant and is dated 10th September 2018 and brought under order 25 rule 4 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That there be a stay of proceedings herein till the respondents pay Ksh. 1,175,200/= being the total party and party costs in Kakamega CMCC No. 101 of 2016.
2. That costs of this application be provided for.

That on the 24th of March, 2016, the 1st respondent herein instituted a suit being Kakamega CMCC No. 101 of 2016 and even obtained interim orders on an application (annexture marked as HAO 1 being a copy of the plaint, application and order). That on 29/3/2016 and 31/3/2016, they entered appearances. (annextures marked as HAO 2 (a) and (b) being a copy of the memorandum of appearances). That the 1st respondent herein on 7/4/2016 withdrew Kakamega CMCC No. 101 of 2016 (annexture marked as HAO 3). That on the 7/4/2016 the defendant's party and party costs of Civil Case No. 101 of 2016 was agreed at a total of Ksh. 1,175,200/= (annexture marked as HAO 4 (a) and (b)). That to date the total agreed party and party costs in Kakamega CMCC No. 101 of 2016 remains unpaid. That the suit herein has the same cause of action with Kakamega CMCC No. 101 of 2016. (annexture marked as HAO 5 being a copy of the plaint). That this suit be stayed until the costs in Kakamega Civil Case No. 101 of 2016 has been paid. That the respondents shall suffer no prejudice if this application is allowed. The 2nd defendant is not opposed to this application.

The plaintiffs/respondents oppose the 2nd defendant's application dated 10/9/2018 on the grounds that she lacks locus standi. It is premature. Invalidity and/or nullity of supposed juristic acts. Application is premised on conjecture and devoid of cogency.

I have considered the second application and submissions therein. This court cannot be used to enforce orders of a lower court and/or stay its proceedings for those orders to be obeyed. Parties should enforce court orders in the appropriate court. I see no reason to stay these proceedings. This application is frivolous and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE