



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 117 OF 2016

MARY OMBIKWA ODUOR.....PLAINTIFF/APPLICANT

VERSUS

CAROLYNE AUMA AKHUTU

PETER AKAMA MUDIWO

MARTIN MUKHOLI SHIKUKU.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 7th March 2017 and is brought under Order 40 rule 1, 2, 3 and 4 of the Civil Procedure Rules and sections 1A, 1B, 3 and 3A and 63 (e) of the Civil Procedure Act seeking the following orders;

- (i) That this application be certified as urgent and heard ex-parte in the first instance.
- (ii) That an order of temporary injunction do issue restraining the defendants/respondents herein either by themselves, their agents, representatives, assignees and/or servants or whosoever claiming title or acting on their behalf from selling, disposing off, interfering with, remaining in, occupying, continuing to occupy, developing or doing any acts on all land parcel number South Wanga/Bukaya/624 (formerly) and currently South Wanga/Bukaya/1433 and South Wanga/Bukaya/1434 pending hearing and determination of this application.
- (iii) That an order of temporary injunction do issue restraining the defendants/respondents herein either by themselves, their agents, representatives, assignees and/or servants or whosoever claiming title or acting on their behalf from selling, disposing off, interfering with, remaining in, occupying, continuing to occupy, developing or doing any act on all land parcel number South Wanga/Bukaya/624 (formerly) and currently South Wanga/Bukaya/1433 and South Wanga/Bukaya/1434 pending hearing and determination of this suit.
- (iv) That the costs of this application be in the cause.

It is grounded on the following, that the subject matter of this suit namely all land parcel number south Wanga/Bukaya/624 previously registered in the name of the late Stephen Malala Ondongu (deceased) and fraudulently subdivided to south Wanga/Bukaya/1433 and South Wanga/Bukaya/1434 should be preserved to allow this honourable court to arrive at a just conclusion of the case. That the 1st respondent/defendant fraudulently transferred all land parcel number South Wanga/Bukaya/624 (formerly) to her name proceeded to subdivided it to South Wanga/Bukaya/1433 and South Wanga/Bukaya/1434 and sold later on to the 2nd and 3rd respondents/defendants herein. That the respondents/defendants are currently wasting, damaging, alienating, selling, removing and disposing the property subject matter of this suit to the detriment of the applicant/plaintiff and other beneficiaries of the deceased's estate.

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 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 is based on the grounds mentioned above that the 1st respondent/defendant fraudulently transferred all land parcel number South Wanga/Bukaya/624 (formerly) to her name proceeded to subdivide it to South Wanga/Bukaya/1433 and South Wanga/Bukaya/1434 and sold later on to the 2nd and 3rd respondents/defendants herein. That the respondents/defendants are currently wasting, damaging, alienating, selling, removing and disposing the property subject matter of this suit to the detriment of the applicant/plaintiff and other beneficiaries of the deceased’s estate. The application is not opposed. I find that the Plaintiff/ Applicant will suffer irreparable loss and damages unless the Defendants/ Respondents are restrained by court order. I find that the balance of convenience tilts in favor of the Plaintiff/ Applicant. I also find that it is in the interest of justice that the orders sought be granted. 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. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21ST DAY NOVEMBER 2018.

N.A. MATHEKA

JUDGE