



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 181 OF 2015

SAMMY LIKUYU ADEMA.....PLAINTIFF/APPLICANT

VERSUS

CHARLES SHIMWATI SHISIKANI.....1ST DEFENDANT/RESPONDENT

JOSEPHINE CHEMUTAI KAKAMEGA DIST. SURVEYOR.....2ND DEFENDANT/RESPONDENT

RULING

This application is dated 3rd September, 2018 and is brought under order 40 rule 1, 3 and 4 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act seeking the following orders;

1. That the present application is urgent and deserves to be heard during this vacation on priority basis.
2. That this honourable court be pleased do issue an order of temporary injunction against the 1st defendant/respondent restraining him either by himself, his agents, representatives or any other persons acting under his instructions from trespassing, encroaching, ploughing, accessing, fencing, utilizing and or in any other manner interfering with land parcels No. S/KABRAS/SHAMBERERE/3855 and 3856 pending the hearing of this application interparties.
3. That this honourable court be pleased do issue an order of temporary injunction against the 1st defendant/respondent restraining him either by himself, his agents, representatives or any other persons acting under his instructions from trespassing, encroaching, ploughing, accessing, fencing, utilizing and or in any other manner interfering with land parcels No. S/KABRAS/SHAMBERERE/3855 and 3856 pending the hearing and determination of this suit.
4. That upon interpartes hearing the orders in (2) and (3) be confirmed.
5. That costs hereof be provided for.

The applicant submitted that he is the absolute registered proprietor of that parcels of land designated as S/KABRAS/SHAMBERERE/3855 and 3856. (Annexed hereto and marked "SL-1 & 2" are copies of the search certificates). That the 1st defendant/respondent has without any colour of right or justification encroached on his parcels of land No. S/KABRAS/SHAMBERERE/3855 and 3856 and proceeded farming activities thereon which actions are denying him his right for peaceful use of this parcels of land. That 1st defendant/respondent is a violent person who on 30th August, 2018 invaded his parcels of land.

The respondent submitted that, he is in occupation of subdivisions of the suit land that is parcels arising out of Land Parcel No. S. Kabras/Shamberere/2650 from land parcel No. S. Kabras/Shamberere/1984 to date and the issue of trespass is not true. That he has not in any way encroached on the plaintiff's portion as the said portion is the same one he has been using prior to the courts' decision in the Kisumu High Court Civil Appeal No. 3 of 2014 wherein the plaintiff was directed that he sub-divide the suit land and transfer to him 2 acres of his rightful share which is exactly two (2) acres where he occupies and not anywhere else that is the bond of contention in his counter claim. That he sought the services of surveyors to enable him determine where the 2 acres when the plaintiff filed suit restraining the survey process as the Court of appeal had ordered within ninety (90) days if he does not get his rightful share he proceeded to carve it out. (A copy of the court's judgment annexed herewith and marked as 'CSS1'). That the plaintiff's insistence that he should be the one to decide which part of the 2 acres he should give him is unfair and the plaintiff is out to frustrate him. That the plaintiff is a litigious man and cannot rest without interfering with the hearing of this suit and there is an application dated 22nd June, 2015 filed by the plaintiff seeking similar orders which he refused to prosecute.

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.”*

This application is grounded on the annexed affidavit of Sammy Likuyi Adiema, the applicant and the following grounds; that the plaintiff/applicant is the absolute registered proprietor of that parcels of land designated as S/KABRAS/SHAMBERERE/3855 and 3856. That the 1st defendant/respondent has without any colour of right or justification encroached on the plaintiff/applicant’s land parcels No. S/KABRAS/SHAMBERERE/3855 and 3856 and proceeded farming activities thereon which actions are denying the applicant his right of peaceful use of his land. That the 1st defendant’s actions are illegal and if allowed to proceed will occasion irreparable loss and harm to the applicant herein. That it is in the interest of justice that the orders sought be granted.

I have carefully perused the court file and find that there is indeed as similar suit Kisumu High Court Civil Appeal No. 3 of 2014 involving the same parties and the same subject matter where judgement was given on 9th December 2014.

Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

I therefore find this application is frivolous and vexatious and I dismiss it with no orders as to costs. I also find that the entire suit is res judicata and I strike it out the plaint and the counterclaim with no orders as to costs

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE