



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 31 OF 2018**

**PATRICK OKOTH CHESA.....PLAINTIFF/APPLICANT**

**VERSUS**

**FRANCIS SHIRIMA OKWALO.....DEFENDANT/RESPONDENT**

**RULING**

The application is dated 8<sup>th</sup> July 2016 and is brought under order 51 rule 1 order 40 rule 1, 2, 3 and 9 of the Civil Procedure Rules and Article 75 and 35 of the Constitution of Kenya seeking the following orders;

1. That this application be certified urgent to be heard on priority basis.
2. That pending the hearing of this application inter-parties an injunction do issue against the defendant, his agents, servants, employees and or assigns restraining them from building, constructing, brick laying, cultivating or in any manner interfering with the plaintiff's occupation and use of land parcel number N/WANGA/INDANGALASIA/1113.
3. That pending the hearing and determination of this application an injunction do issue against the defendant, his agents, servants, employees and or assigns restraining them from building, constructing, brick laying, cultivating or in any manner interfering with the plaintiff's occupation and use of land parcel number N/WANGA/INDANGALASIA/1113.
4. That pending the hearing and determination of this suit an injunction do issue against the defendant, his agents, servants, employees and or assigns restraining them from building, constructing, brick laying, cultivating or in any manner interfering with the plaintiff's occupation and use of land parcel number N/WANGA/INDANGALASIA/1113.
5. That the costs of this application be provided for.

It is premised on the annexed sworn affidavit of Patrick Okoth Chesa and on the following principal grounds that, the plaintiff is the registered owner of land parcel number N/WANGA/INDANGALASIA/1113. That the respondent in a forceful and violent manner is trespassing and entering into the portion of the suit land under occupation and use by the applicant. That the defendant and his sons have constructed semi-permanent and temporary structures on the suit land and also crying out brick laying/making thereon without the consent of the plaintiff. That some of the houses have been constructed right at the doorstep of the applicant which actions are provocative and are meant to spur animosity as between the parties. That the defendant is also threatening to demolish the applicant's house. That the applicant has therefore been deprived of his proprietary rights guaranteed to him under the Constitution of Kenya and other various land laws of the Republic of Kenya. That the applicant stands to suffer irreparably if the defendant's actions are not stopped.

The respondent submitted that, though the plaintiff is the registered owner of the suit land, the registration and ownership is challenged as he claims trust over the said land. That the suit land initially belonged to his father now deceased and during the adjudication his father caused it to be registered in the name of the plaintiff to hold in trust for him as he was still young. That the plaintiff is not his relative, as his mother came with him to his father when she got married and his father brought him up in their home. That during adjudication his father caused whole of Land parcel NO. E. WANGA/INDANGALASIA/309 which was their ancestral land to be registered in the names of the plaintiff to hold in trust for him since he was still a minor and incapable of owning property. That the intention of registering title in the name of the plaintiff was not to disinherit him since together with his siblings they continued living and utilizing the suit land from then to date. That when it became difficult for the plaintiff to transfer title into his name, he made a reference to Matungu Land Dispute Tribunal Case No. 26 of 2000 and the Tribunal ruled in his favour (Annexed herewith marked "FSO 1" is a copy of the proceedings and ruling). That he later filed a suit in Kakamega High Court Civil suit No. 65 of 2005 (originating summons) which is still pending (Annexed herewith marked "FSO 2" are copies of the said originating summons and replying affidavit by the plaintiff). That during the pendency of the aforesaid suit, the plaintiff sold a portion of the suit land to a third party and occasioned subdivision thereof necessitating his amendment of the originating summons aforementioned which is annex and mark as "FSO 3". That the suit land is therefore a subject of the aforementioned case which is yet to be determined and the applicant avoided to file this application in the suit aforesaid to hide the truth from the court. That his family members did not evade the suit land in 2013 as alleged by the plaintiff but they have lived and utilized the suit land since birth to date for over sixty (60) years. That his children constructed their homes on the suit land as soon as they became of age and it is not in 2013 as the plaintiff states. That

the suit land is situated in Kakamega County and the plaintiff ought to give sufficient reasons why he avoided filing a fresh suit in Kakamega County or filing an application in the Kakamega High court Case No. 65 of 2005 which relates to the same subject matter and same parties.

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 that the plaintiff is the registered owner of land parcel number N/WANGA/INDANGALASIA/1113. That the respondent in a forceful and violent manner is trespassing and entering into the portion of the suit land under occupation and use by the applicant. 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 21<sup>ST</sup> DAY OF NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**