



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 233 OF 2016**

**KENNETH NANDI MATIVA.....PLAINTIFF / APPLICANT**

**- VERSUS -**

**ALEX ANGUDU.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**PERRY SENNELWA MATIVA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The application is dated 23<sup>rd</sup> November 2016 by the plaintiffs praying for the following orders;

1. That pending the hearing and determination of this suit, the honorable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant\Respondent whether acting by himself, his agents, servants, employees or any other person from coming into, remaining upon or carrying out or continuing to carry out any work on the suit parcel of land herein being LAND PARCEL NO. KAKAMEGA/LUGOVO/1016
2. That pending the hearing and determination of this application, the honorable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant\Respondent whether acting by himself, his agents, servants, employees or any other person from coming into, remaining upon or carrying out or continuing to carry out any work on the suit parcel of land herein being LAND PARCEL NO. KAKAMEGA/LUGOVO/1016
3. That pending the hearing and determination of this suit, the honorable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant\Respondent whether acting by himself, his agents, servants, employees or any other person from purporting to sell and/transfer to the first defendant/Respondent or anybody else, any portion of the suit parcel of land.
4. That pending the hearing and determination of this application, the honorable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant\Respondent whether acting by himself, his agents, servants, employees or any other person from purporting to sell and/transfer to the first defendant/Respondent or anybody else, any portion of the suit parcel of land.
5. That the cost of this application be provided for.

The Plaintiff/ Applicant submitted that the plaintiff and the applicants are the registered owners of the suit premises LAND PARCEL NO. KAKAMEGA/LUGOVO/1016, as per the official search annexed to the

application. That in total disregard and input of the applicant as a co-owner of the said parcel of land, the 2<sup>nd</sup> defendant/Respondent acting unilaterally has purported to excise a portion of the land and claim to sell in to the 1<sup>st</sup> Defendant/ Respondent. The Parcel has not been surveyed in the presence of all parties and the mode of subdivision and distribution has not been agreed upon with the result that the 1<sup>st</sup> Defendant is occupying the portion of land that touches the river to the total exclusion of the plaintiff/Applicant.

It was submitted that the 1<sup>st</sup> Defendant/Respondent has gone to the extent of doing an access road without any reference to the applicant. The consent of the land control Board to subdivide the parcel and transfer the portion to the 1<sup>st</sup> Defendant/ Respondent has not been obtained. This is a case of joint ownership and all joint owners have a right to possess and use the entire property. Any other action amounts to an ouster. A joint owner has a duty no to deal with the property in a manner that is inimical to the rights of a co-owner as long as the parcel of land is still in their joint names. The Applicant/ Plaintiff relied on the case of MOSES BII VS KERICHO DISTRICT LAND REGISTRAR & ANOTHER, KERICHO HCCC NO. 8 OF 2018.

He also relied on the case of ORAWO & ANOTHER VS MISTRI & ANOTHER HCCC NO. 27766 OF 1987, which referred to the case of GIELLA VS CASSMAN BROWN (1973) EA of 358, which stated the principals of granting an injunction. The Plaintiff's Advocate hence prays for the orders stated above.

The 1<sup>st</sup> Defendant/ Respondent appearing in person in his submissions, confirms that said parcel of land in dispute is owned by the Plaintiff/Applicant and the 2<sup>nd</sup> Defendant/Respondent who are brothers. Nevertheless he bought a portion of the same from the 2<sup>nd</sup> Defendant/Respondent. He is now waiting for the 1<sup>st</sup> Defendant/Respondent to sign the mutation and transfer forms.

The 2<sup>nd</sup> Defendant/ Respondent appearing in person in his submissions, confirms that said parcel of land in dispute is owned by him and the 2<sup>nd</sup> Defendant/Respondent who is his brother. He sold his portion to the 1<sup>st</sup> Defendant/ Respondent and the title deed is in joint names. He now asks the court to assist him get separate titles for the land.

This court has considered both the Applicant's and the Respondents' submissions. The application being one that seeks injunctions, has to be considered within the principles set out in the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358 and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial**
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,**
- 3. If in doubt, the Court will decide the application on a balance of convenience.**

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

It is a finding of fact the suit parcel of land in this matter, namely LAND PARCEL NO. KAKAMEGA/LUGOVO/1016 is jointly owned by the Plaintiff/ Applicant and his brother the 2<sup>nd</sup> Defendant/ Respondent. It is also true that the 2<sup>nd</sup> Defendant/Respondent has gone ahead and purported to sell the suit premises to the 1<sup>st</sup> Defendant/ Respondent without the consent of the Plaintiff/Applicant. No survey for the purposes of sub division and no partition has taken place on the said parcel. However, the 1<sup>st</sup> Defendant/Respondent has altered and continues to alter the physical structure and state of the land to the detriment of the Plaintiff/Applicant causing him irreparable harm. I concur with the Plaintiff/Applicants submissions that, this is a case of joint ownership and all joint owners have a right to

possess and use the entire property. For these reasons I find that the Plaintiff/Applicant has established a prima facie case against the Defendants/Respondents and I grant prayers 1 and 3 of the Application dated 23<sup>rd</sup> November 2016. Costs be in the cause.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 1<sup>ST</sup> DAY OF MARCH 2017.**

**N.A. MATHEKA**

**JUDGE**