



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC CASE NO. 72 OF 2017

JEREMIAH INDUSWE:.....:PLAINTIFF

VERSUS

JUMA HANNINGTON ONZEE:.....:DEFENDANT

RULING

This application is dated 20th December 2016 and is brought under Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 3A and 80 of the Civil Procedure Act, Cap 21. The Applicant is seeking the following orders;

1. THAT, the application be certified as urgent and that the same be heard ex parte in the first instance.
2. THAT, this honourable court be pleased to grant an interim injunction restraining the respondent either by himself, his agents, representatives or employees from entering upon, interfering, transferring or in any other manner dealing with all that property known as N. LR No. N/WANGA/MATUNGU/2619 pending the hearing and determination of this application.
3. THAT, this honourable court be pleased to grant an interim injunction restraining the respondents either by themselves, their agents, representatives or employees from entering upon, interfering, transferring or in any other manner dealing with all that property known as LR NO. N/WANGA/MATUNGU/2619 pending the hearing and determination of this suit.
4. THAT, in the absence of a sitting judge at the Environment and Land Court at Kakamega, this honourable court be pleased to transfer this matter to the Environment and Land Court sitting in Bungoma or elsewhere as the court deems reasonable and expeditious.
5. THAT this honourable court be deemed to issue such further orders as it deems fit.
6. THAT the costs of this application be provided for.

That the applicant/plaintiff submitted that he is the registered proprietor of all that parcel of land known as LR No. N/WANGA/MATUNGU/2619. The applicant was bequeathed the parcel of land by his deceased father. The said parcel was hived off from LR. No. N/WANGA/MATUNGU/1842. The respondent is the biological brother to the applicant. The respondent has and continues to interfere with the applicant's quiet possession of all that parcel of land known as LR No. N/WANGA/MATUNGU/2619. The respondent is the main complainant in a criminal case No. 774/2016 at Mumias where the applicant has been accused of forgery contrary to section 350 of the Penal Code Act. The planting season is forthcoming and the applicant being a contracted cane farmer is desirous of

preparing his land in readiness of cultivation of sugarcane but is apprehensive that the respondent will interfere and destroy his sugarcane plantation as he has done previously. That the respondent has and continues to take advantage of the ongoing criminal case to interfere with the applicant's quiet possession of the suit property. That it is a cannon principle under the Kenyan laws that a person is innocent until proved guilty hence unless the allegations of forgery are proved and the title deed recalled, the applicant remains the absolute owner of the said parcel of land. In the disclosed circumstances, the applicant stands to suffer irreparable loss if the interim orders sought are not granted.

The defendant/respondent submitted that the applicant has based his injunction on land parcel No. N/Wanga/Matungu/2619 which as he has demonstrated is registered in his names which is not disputed. However on his own admission he admit the land is a subject of a criminal case and a charge sheet has been annexed and what is in issue on how the applicant obtained the title. Hence he has been charged with forgery and obtaining by false pretence. The matter is pending before court. What he obtained and forged is the title in question land parcel No. N/Wanga/Matungu/2619.

In his replying affidavit the respondent vide annexure marked JH 1, the deceased father of the applicant who is also the father of the respondent died on 29th December, 2005 leaving land parcel No. N/Wanga/Matungu/1842 intact. However vide the annexure marked JH 3 (a), JH 3 (b), JH 4 and JH 5 the land was later subdivided by the alleged deceased person and title No. N/Wanga/Matungu/2618, 2619, 2620 and 2621 were created on 20th July, 2014 and the same deceased person on 20th July, 2014 transferred land parcel No. N/Wanga/Matungu/2619 to the applicant i.e. 9 years after his death. The respondent has deponed that after reporting the matter to the police all the documents which led to the sub-division and subsequent transfer were found to have been forged and the applicant was subsequently charged. This court therefore, cannot allow and/or be party to a forgery and allow the applicant to proceed and benefit from a forgery. Hence on the face of it and looking at the counter claim filled by the respondent/defendant, the applicant has not established a prima facie case. Hence an order of an injunction will not succeed. On Irreparable harm; It is clear from the replying affidavit and from the subsequent affidavit that both the applicant and the respondent are brothers and stay on the same piece of land. The respondent has stated that no sub-division has been done on the land. Hence no harm will be suffered by the applicant or any anticipated harm, will be suffered which may not be compensated by way of costs. Hence equally on this the application must fail.

On the balance of convenience; both the respondent and the applicant live and stay on the same piece of land and the respondent stated that no sub-division is on the ground. Hence the applicant also should not favoured alone on the balance of convenience.

This court has considered both the Applicant's and the Respondent's submissions and the supporting affidavits therein. 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.

The applicant/plaintiff submitted that he is the registered proprietor of all that parcel of land known as LR No. N/WANGA/MATUNGU/2619. The applicant was bequeathed the parcel of land by his deceased father. The said parcel was hived off from LR. No. N/WANGA/MATUNGU/1842. The respondent is the biological brother to the applicant. The respondent has and continues to interfere with the applicant's

quiet possession of all that parcel of land known as LR No. N/WANGA/MATUNGU/2619. The respondent is the main complainant in a criminal case No. 774/2016 at Mumias where the applicant has been accused of forgery contrary to section 350 of the Penal Code Act. The planting season is forthcoming and the applicant being a contracted cane farmer is desirous of preparing his land in readiness of cultivation of sugarcane but is apprehensive that the respondent will interfere and destroy his sugarcane plantation as he has done previously. That the respondent has and continues to take advantage of the ongoing criminal case to interfere with the applicant's quiet possession of the suit property. The defendant/respondent submitted that the applicant has based his injunction on land parcel No. N/Wanga/Matungu/2619 which as he has demonstrated is registered in his names which is not disputed. However on his own admission he admits the land is a subject of a criminal case and a charge sheet has been annexed and what is in issue on how the applicant obtained the title. Hence he has been charged with forgery and obtaining by false pretences. The matter is pending before court. What he obtained and forged is the title in question land parcel No. N/Wanga/Matungu/2619 and should not get the orders sought.

It is clear that the parties in this matter are siblings and the land was bequeathed to them by their father. However, there are allegations of forgery on the part of the applicant and the matter is pending in court in a criminal case No. 774/2016 at Mumias where the applicant has been accused of forgery contrary to section 350 of the Penal Code Act. As things stand the applicant/plaintiff is the registered proprietor of all that parcel of land known as LR No. N/WANGA/MATUNGU/2619. He is in occupation of the said land and one is innocent until proven guilty. The applicant has shown a prima facie case with a probability of success at the trial. The applicant has shown that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages as he is a cane farmer and, he is in occupation of the said land hence the balance of convenience tilts in his favour. I find this application has merit to that extend and grant prayer 3 of the application as follows;

1. THAT, this honourable court be pleased to grant an interim injunction restraining the respondents either by themselves, their agents, representatives or employees from entering upon, interfering, transferring or in any other manner dealing with all that property known as LR NO. N/WANGA/MATUNGU/2619 pending the hearing and determination of this suit.

2. Costs of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10TH DAY OF MAY 2017.

N.A. MATHEKA

JUDGE