



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT OF KENYA

AT KAKAMEGA

ELC CASE NO. 191 OF 2016

JOHNSON WYCLIFE AMBANI

JOHN OMUYULA M. ODINGA.....PLAINTIFFS/APPLICANTS

VERSUS

HENRY LUBANGA MWIMALI

MICHAEL OTINGA MWIMALI.....DEFENDANTS/RESPONDENTS

RULING

This application is brought under Section 3A and 63 (e) of the Civil Procedure Act Order 40 and Order 51 rule 1 seeking the following orders;

1. That this application be certified urgent, service be dispensed with in the 1st instance and it be heard on priority basis.
2. That pending the hearing and determination of this application interparties, an interim order of injunction e and is hereby issued against the defendants, their family, agent, servants or any other person claiming/acting on their behalf restraining them from trespassing, encroaching onto land parcels E. Wanga/Malaha/1163, 1164 and 1165 and cultivating or use of the same in any manner.
3. That pending the hearing and determination of this suit, an order of temporary injunction be issued directed against the defendants, their family, servants, or other person acting or claiming on their behalf be restrained from trespassing, encroaching onto land parcels LR. E. Wanga/Malaha/1163, 1164 and 1165 and cultivating or use the same in any manner whatsoever.
4. That costs be provided for.

The application is supported by the affidavits of John O.M. Odinga and Johnson W. Ambani. The Applicants submitted that, the plaintiffs/ applicants are the sole absolute registered owners of Land Parcels LR. E.Wanga/Malaha/1163,1164 and 1165. The defendants have their own land parcels – LR. E. Wanga/Malaha/1166 and 1162. The defendants have no beneficiary, purchasers or any other interest or rights in the subject matter. The defendants have trespassed onto, cultivated portions of the subject matters, planted maize on the subject matters. The actions of the defendants are illegal, calculated to prejudice and provoke the plaintiffs. The defendants stand to suffer irreparable loss.

The defendants/respondents were served and failed to attend court. Neither did they file any papers in

opposition hence the matter proceeded unopposed.

This court has considered both the Applicant's and the 3rd and 4th Defendants /Respondents' 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 Applicants submitted that, the plaintiffs/ applicants are the sole absolute registered owners of Land Parcels LR. E.Wanga/Malaha/1163, 1164 and 1165. The defendants have trespassed onto, cultivated portions of the said land, planted maize on the said land. The parties in this suit appear to be siblings. Be that as it may and from perusal of the documents annexed to the pleadings it would appear that the applicants/ plaintiffs are the registered owners of Land Parcels LR. E.Wanga/Malaha/1163, and 1165. No evidence of ownership of Parcels LR. E.Wanga/Malaha/1164 was adduced. The application was not opposed. The defendants have established a prima facie case with the probability of success. I find this application has merit to that extend and grant prayer 3 of the application with the following modifications that;

1. That pending the hearing and determination of this suit, an order of temporary injunction be issued directed against the defendants, their family, servants or other person acting or claiming on their behalf be restrained from trespassing, encroaching onto land parcels LR. E. Wanga/Malaha/1163 and 1165 and cultivating or use the same in any manner whatsoever.
2. Costs of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF MAY 2017.

N.A. MATHEKA

JUDGE