



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC CASE NO. 169 OF 2016

JANEPHER NASIMIYU NYONGESA)

FULUMENA NAMENGE NYONGESA)

LUSARIA AMINDE NYONGESA)

LOICE KHAYANGA NYONGESA).....PLAINTIFFS/APPLICANTS

VERSUS

NYONGESA ONYIMBO1ST DEFENDANT/RESPONDENT

ALI WECHULI OMITO2ND DEFENDANT/RESPONDENT

AND

JUSTUS NYONGESARESPONDENT

RULING

This application is dated 28th August 2014 and is brought under order section 1A and 3A of the Civil Procedure Act, Order 40 rule 1. The applicant seeks the following orders;

1. THAT, the applicant herein JUSTUS NYONGESA be substituted in place of NYONGESA ONYIMO the 1st defendant/respondent herein now deceased.
2. THAT this honourable court do issue a temporary injunction restraining the defendants/respondents their agents and/or servants from disposing off, subdividing and/or transferring the suit parcels of land known as BUNYALA/NAMIRAMA/1490 and 1491 to third parties pending the hearing and determination of this application.
3. THAT this honourable court do issue a temporary injunction restraining the defendants/respondents their agents and/or servants from disposing off, subdividing and/or transferring the suit parcels of land known as BUNYALA/NAMIRAMA/1490 and 1491 to third parties pending the hearing and determination of this suit.
4. THAT costs of this application e provided for.

The application is supported by the grounds therein and the affidavit of the first plaintiff/ applicant. The plaintiffs/applicants herein jointly instituted this suit against the 1st and 2nd defendants herein

NYONGESA ONYIMBO and ALI WECHULI OMITO. The plaintiffs/applicants herein made an application to this honourable court to amend their plaint before they could commence the hearing of their suit which orders were granted. That before they could amend their plaint the 1st defendant died. That due to the death of the 1st defendant/respondent it has been difficult for the plaintiffs/applicants to amend and serve the amended plaint. That now the son of the 1st defendant/respondent had obtained Limited Grant then he stands a chance to substitute his late father the 1st defendant herein. That it is the interest of justice that the orders sought e granted as prayed.

The 1st plaintiff/applicant submitted that together with my co-plaintiffs/applicants herein instituted this suit against the 1st and 2nd defendants/respondents herein. That before the same suit could commence, we further made an application to this honourable court to amend the plaint which orders were granted on 23rd July, 2003. That before they could amend the plaint, the 1st defendant/respondent passed on necessitating substitution. That since the death of the 1st defendant/respondent there has been no one from his family who was willing to substitute him, until this year when one JUSTUS NYONGESA who is the son to the 1st defendant/respondent obtained limited grant ad litem to enable him substitute his late father the 1st defendant/respondent herein. Attached and marked JNN-1 is a copy. That it has come to our knowledge that the 2nd defendant is out to dispose off the suit parcels of land known as BUNYALA/NAMIRAMA/1490 and 1491 to third parties in order to render this suit. Due to the acts of the 2nd defendant/respondent the plaintiffs/applicants have moved to the offices of the Ministry of Lands and Environment and lodged a caution on land parcel No. BUNYALA/NAMIRAMA/1491 which caution alone cannot guarantee the safety of the same parcel of land unless they obtain a court injunction to that effect. Attached and marked JNN-2 is a copy of the official search.

The defendant/respondent was served but failed to attend court and the matter proceeded exparte. It was submitted that before the plaintiffs/ applicants could amend the plaint, the 1st defendant/respondent passed on necessitating substitution. That since the death of the 1st defendant/respondent there has been no one from his family who was willing to substitute him, until this year when one JUSTUS NYONGESA who is the son to the 1st defendant/respondent obtained limited grant ad litem to enable him substitute his late father the 1st defendant/respondent herein. Attached and marked JNN-1 is a copy. I therefore grant prayer one of the application which is that THAT, the applicant herein JUSTUS NYONGESA be substituted in place of NYONGESA ONYIMO the 1st defendant/respondent herein now deceased.

The application prayer 2 and 3 are seeking injunctions and therefore 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.

From the plaintiff's applicants' submission I find that none of the principles mentioned above have been established hence the application has no merit as regards prayers 2 and 3 and I dismiss the same. Costs to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21ST DAY OF JUNE 2017.

N. A. MATHEKA

JUDGE