



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC CASE NO. 18 OF 2015

RESTUTA FLORA KHAVERE SHIRAMBA)

TITUS LUSESO SHIRAMBA):..... PLAINTIFF/APPLICANT

VERSUS

WELLINGTON EKHUYA ODWOGO)

PATRICK LUMUMBA ODWOGO)::: DEFENDANT/REONDENT

RULING

This application is dated 16th day of November 2015 and is brought under order 40 Rule 1, 2 & 3 of The Civil Procedure Rule and Section 1A & 3A of the Civil Procedure Act, and seeks the following orders;

1. THAT this application e certified as urgent and be heard exparte in the 1st instance with service upon the defendants/respondents being dispensed with.
2. THAT pending the hearing and final determination of this application, the defendants either by themselves, through their agents, employees, servants, workers and/or any other person acting under their direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, digging trenches, and/or foundation, constructing any structures depositing building materials or/on any manner whatsoever from interfering with the plaintiff's quite and/or peaceful occupation, possession and/or use of their parcel of land No. BUTSOTSO/SHIKOTI/15827.
3. THAT pending the hearing and final determination of this suit, the defendants either by themselves, through their agents, employees, servants, workers and/or any other person acting under their direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, digging trenches, and/or foundation, constructing any structures depositing building materials or/on any manner whatsoever from interfering with the plaintiff's quite and/or peaceful occupation, possession and/or use of their parcel of land No. BUTSOTSO/SHIKOTI/15827.
4. THAT any other order that shall meet the end of justice be granted in the circumstances.
5. THAT the cost of this application be provided for.

The grounds of the application are that, the defendants/respondents have moved on to the plaintiff plot laid claim, deposited building materials, changed, interfered and are constructing therein illegal structures. The defendants/respondents are using force to usurp the power of the owners (plaintiffs) in respect of the suit plot. That the suit land shall be put to waste if the defendants/respondents are not

restrained from interfering with the same. That the plaintiffs/applicants will suffer irreparable loss and damages unless the defendants/respondents are restrained by a court order. The balance of convenience tilts in favour of the plaintiffs/applicants who are the proprietors of the suit plot.

The applicant's submitted that, they were the joint proprietors of parcel of Land No. BUTSOTSO/SHIKOTI/15827 which they bought from the defendant's grandmother and uncle vide an agreement made on 17th April, 2012. Annexed hereto is a copy of the said sale agreement and a copy of title deed marked "R.F.K.S. – 1a & 1b". That the sellers gave them vacant possession upon which they commenced substantial developments. That out of blues and without any permission and approval the defendants'/respondents' his agents, representatives and/or employee came to her said plot and deposited building material and have started constructing therein their own structure. Annexed is a copy of picture of the said structure marked "R.F.K.S-2a". That her efforts to talk to the defendants and their agents informing them to stop what they were doing as the same was her plot did not heed any fruits thereby forcing her to seek assistance from this court. The defendants have vowed to continue with their illegal activities on their plot thereby subjecting them to irreparable loss and damage as they cannot utilize their lawfully acquired property.

The respondents submitted that the application is intended to give the honourable court the impression that the two defendants/respondents moved into the applicants'/respondents' parcel of land No. BUTSOTSO/SHIKOTI/15827 after they bought it from CALEB TEMBA ODWOGO vide land sale agreement dated 17th April, 2012. That the truth of the matter is that the parcel of land No. BUTSOTSO/SHIKOTI/15827 came into being after the defendants' brother CALEB TEMA ODWOGO effected illegal sub-divisions upon the parcel of land known as No. BUTSOTSO/SHIKOTI/2835, the others being No. BUTSOTSO/SHIKOTI/15823, 15824, 15825, 15826 and 15828. That this parcel of land No. BUTSOTSO/SHIKOTI/2835 was originally registered in the name of his father DANIEL ODWOGO AMAHOLO, who died on the 8th August, 2000. (Annexed are copies of (a) Title Deed issued on 9th December, 1992 and (b) Certificate of Death No. B600837 issued on 13th July, 2001 marked M.F.I.W.E.O 1a and 1b). That during the year 2010 a petition for succession over the estate of the late DANIEL ODWOGO AMAHOLO was filed by CALEB TEMBA ODWOGO using forged certificate of Death No. C 358163 purportedly issued on 7th May, 2010. (Annexed is a copy of the said forged Certificate of Death marked W.E.O. 2). That his brother CALEB TEMBA ODWOGO presented a letter dated 11/10/2007 from the chief, Shieywe location, Kakamega Municipality addressed to the Deputy Registrar, High Court of Kenya, Kakamega indicating that the only legal dependants of the late DANIEL ODWOGO AMAHOLO were ELIZABETH IMALI ODWOGO and himself thus excluding all the other beneficiaries of the estate including the applicant. (Annexed is a copy of the Chief's letter marked W.E.O. 4). That although the petition was filed secretly the respondent came to learn of it after the said CALEB TEMBA ODWOGO started fraudulently disposing off portions of the estate through fraud a matter which is still under investigations by police. (Annexed is a copy of a letter addressed to the District Land Registrar, kakamega from the D.C.I.O , Kakamega dated 10/11/2009 marked W.E.O. 4). That he is concerned about the events taking place because as far as this estate is concerned he is the eldest son of the late DANIEL ODWOGO AMAHOLO and will not sit back when their inheritance is being wasted and or dispose off by CALEB TEMBA ODWOGO who is the last born son. That he filed a summons for revocation of grant on 12th July, 2011 in Kakamega High Court Succession Cause No. 358 of 2010 challenging the Grant issued to CALEB TEMBA ODWOGO. This application is still pending in court. (Annexed is a copy of the said summons for Revocation and Annulment of Grant marked M.F.I.W.E.O. 5). That the plaintiffs/applicants entered into a sale of land agreement with CALEB TEMBA ODWOGO without making any inquiries as to whether the piece of land had any dispute. That this application cannot be sustained because when the plaintiffs/applicants bought this piece of land they found people already settled and effected developments thereon. It is his submissions that this piece of land has always been occupied by the family of the late DANIEL ODWOGO AMAHOLO as clearly indicated by a letter dated 14/11/2009 where the chief, Shieywe location indicated how plot No. BUTSOTSO/SHIKOTI/2835 was to be shared amongst the family members of the late DANIEL ODWOGO AMAHOLO (Annexed is a copy of the letter dated 14/11/2009 from the chief reiterated in another letter dated 16/6/2011 from the Assistant marked W.E.O 6a and 6b).

This court has carefully considered the Applicants' 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.

The applicant's submitted that, they were the joint proprietors of parcel of Land No. BUTSOTSO/SHIKOTI/15827 which they bought from the defendant's grandmother and uncle vide an agreement made on 17th April, 2012. Annexed is a copy of the said sale agreement and a copy of title deed marked "R.F.K.S. – 1a & 1b". That the sellers gave them vacant possession upon which they commenced substantial developments. That out of the blues and without any permission and approval the defendants/respondents, his agents, representatives and/or employee came to their said plot and deposited building material and have started constructing therein their own structure. I find that the applicants have shown a prima facie case with a probability of success at the trial. They have adduced documentary evidence to prove ownership. The applicants have also shown that unless the order is granted, they will suffer loss which cannot be adequately compensated in damages. I find this application has merit and grant a temporary injunction in the following terms;

THAT pending the hearing and final determination of this suit, the defendants either by themselves, through their agents, employees, servants, workers and/or any other person acting under their direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing, digging trenches, and/or foundation, constructing any structures depositing building materials or/on any manner whatsoever from interfering with the plaintiff's quiet and/or peaceful occupation, possession and/or use of their parcel of land No. BUTSOTSO/SHIKOTI/15827. Cost of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF JUNE 2017.

N.A. MATHEKA

JUDGE