

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 139 OF 2016

JOHN P. OMUKUBA.....PLAINTIFF/RESPONDENT

VERSUS

ALI CHIBOLE MMBWANA.....DEFENDANT/APPLICANT

RULING

This application is brought under order 40 rule 1 (a) of the Civil Procedure Rules seeking the following orders;

1. THAT the honourable court be pleased to order a mandatory temporary injunction restraining the plaintiff from trespassing to land parcel number BUTSOTSO/SHIKOTI/1872 till this case is heard and determined.
2. THAT the plaintiff be confined to the area he was occupying as at 29th July, 2016 when this claim was filed.
3. THAT costs be provided.

The grounds of the application are that, the matter herein is res-judicata and was settled by a competent court. The plaintiff/respondent has no case capable of succeeding. The plaintiff has put up the structures after failing in a case to claim adverse possession. The applicant/defendant is the registered proprietor of land parcel number BUTSOTSO/SHIKOTI/933. In the year 2002 the plaintiff/respondent started interfering with the boundary between his land parcel number BUTSOTSO/SHIKOTI/1872. Annexed and marked AC1 is a copy of search of his land marked AC2. He filed a case at the Lurambi Disputes Tribunal whereby his claim was upheld and a surveyor was sent to the site and planted the boundary. Annexed and marked AC3 is a copy of the judgment. The plaintiff/respondent made an appeal to the provincial committee and his appeal was not allowed. Annexed and marked AC4 is a copy of the ruling. The plaintiff/respondent again appealed to the High Court Appeal number 106 of 2003. Annexed and marked AC5 are copies of the appeal and its ruling. That the ruling of Lurambi Disputes Tribunal had been adopted and the order adopting it in the CMCC Misc. Award No. 253 of 2002 still stands. Annexed and marked AC6 is a copy of the order. The land registrar visited the land and fixed the boundary. Annexed and marked AC7 is a copy of the land registrar's report. On 25th November 2016, the plaintiff/respondent invaded the applicant/defendant's land with many workers and erected two houses and a latrine on the land. He reported to the Chief of Central Butso to help him stop the invaders but the Chief was reluctant to assist and advised him to go for a court order. Annexed and marked AC8 a-c are photographs of the new buildings. The plaintiff has put up these buildings to build his case that he has been using the land which is not true. The plaintiff has an established home which he had constructed on this land, many years ago. Annexed hereto and marked AC9 a-b are photographs of the old home where he has been staying all that period when he was a neighbor. Given that this matter was heard and finalized at the High Court on 8th November, 2007, this case is res-judicata and has no chances of success. Annexed hereto and marked AC10 is a copy of the judgment.

The respondent submitted that he is the absolute registered owner of land parcel number BUTSOTSO/SHIKOTI/1872 and already in occupation and using the same since 1977 when he bought it. That if any orders can be granted by this court in the interest of justice then they should be of status quo to be maintained as he was already in occupation and in actual use of the disputed area comprised in land

parcel number BUTSOTSO/SHIKOTI/933 for a period in excess of 12 years as at the time of commencement of all proceedings referred to in the application dated 19th December 2016 with its supporting affidavit. The application has been brought in bad faith geared towards defeating his claim of adverse possession in the substantive suit herein by attempting to discontinue his continuous occupation and use of a portion of land measuring 1.31 HA comprised in land parcel number BUTSOTSO/SHIKOTI/933 and this will amount to miscarriage of justice.

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.

This court has carefully considered the instant notice of motion and the court record in totality. The Court has also considered the relevant provisions of law, the submissions therein. It is not in dispute that applicant/defendant is the registered proprietor of land parcel number BUTSOTSO/SHIKOTI/933 and the plaintiff/respondent is the registered proprietor of land parcel number BUTSOTSO/SHIKOTI/1872. The issue seems to be one of boundaries and the dispute has existed since 2002. I find that the defendant/applicant has failed to show that unless the order is granted, the applicant will suffer loss which cannot be adequately compensated in damages. I find this application is not merited and dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF JULY 2017.

N. A. MATHEKA

JUDGE