



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC NO. 466 OF 2014

MWANAISHA APIO MASANGA

Suing as the legal representatives of the estate of

ALI OKWANG'A MASANGA :::::::::::::::PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MALALA SAKWA:::::::::::::1ST DEFENDANTS/ APPLICANT

HENRY MAKOKHA OUMA:::::::::::::2ND DEFENDANTS/ APPLICANT

KASSIM WESONGA SHIKUNDU:::::3RD DEFENDANTS/ APPLICANT

BENARD KWEYU:::::::::::::4TH DEFENDANTS/ APPLICANT

RULING

This application is dated 7th October 2015 and is brought under 40 Rule 1 and 2 of the Civil Procedure Rules Section 3 and 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified urgent and service be dispensed with in the first instance.
2. That the plaintiff/respondent, her agents, employees and any other person working under her instructions be restrained jointly and severally from entering or interfering with the applicants peaceful use and occupation of land parcel LR. N. Wanga/Indangalasia/994, 995, 996 and 884 in any manner whatsoever pending the hearing and determination of this application.
3. That the plaintiff/respondent, her agents, employees and any other person working under her instructions be restrained jointly and severally from entering or interfering with the applicants peaceful use and occupation of land parcel LR. N. Wanga/Indangalasia/994, 995, 996 and 884 in any manner whatsoever pending the hearing and determination of this application.
4. That costs be provided for.

The grounds of the application were that, the 4th defendant is the registered owner of land parcels No. LR. N. Wanga/Indangalasia/994, 995 and 996. That the 3rd applicant is the registered owners land parcels N. WANGA/INDANGALASIA/884. That the plaintiff/respondent has encroached into the aforesaid parcels of land and has prevented the applicants from utilizing them. That the plaintiff/respondent has no legal

right over land parcels Nos. LR. N. Wanga/Indangalasia/994, 995, 996 and 884. That the plaintiff/respondent shall suffer no loss if the orders sought are granted. That the applicants shall suffer irreparable loss if the orders sought are not granted.

That 4th defendant/applicant submitted that he bought the land parcel number LR. N. Wanga/Indangalasia/882 from the 1st defendant Joseph Malala Sakwa. He took vacant possession of the said parcels and started developing it. He later subdivided his parcel of land No. LR. N. Wanga/Indangalasia/882 into three parcels namely LR. N. Wanga/Indangalasia/994, 995 and 996 and got registered as the owner of the said parcels. Annexed BK – 1a, b and c are copies of the title deeds. He was in peaceful occupation and use of his parcels of land LR. N. Wanga/Indangalasia/994, 995 and 996 before the commencement of this suit. The plaintiff/respondent has encroached into his parcels of land LR. N. Wanga/Indangalasia/994, 995 and 996 and has prevented him from utilizing them. The plaintiff/respondent has no interest or legal right over land parcels numbers LR. N. Wanga/Indangalasia/994, 995 and 996. Hence applicants are the registered owners of land parcels N. Wanga/Indangalasia/994, 995, 996 and 884, which they bought from the 1st defendant, took vacant possession and started utilizing the same. The plaintiff upon filing this suit started interfering with the defendants' peaceful quite use of the said parcels. The respondent has not demonstrated in their replying affidavit that she has any right or interest in the said parcels of land.

The respondent avers that the applicants are actually in occupation of the said parcels of land and that they have not encroached into the land as claimed. The respondent has raised no issues why the applicant's application should not be allowed since the orders sought will not prejudice them in any way. It is the applicants' submissions that the applicants have met the threshold required by law to warrant an injunction as set out in the case of **Giella VS. Cassman Brown** and that the applications dated 7/10/2015 be allowed as prayed.

The plaintiff/respondent submitted that, the cause of action herein is a perceived trespass as envisaged in defendant's/applicant's prayers (2). The law on injunction is well settled, thanks to the case of **Giella vs. Cassman Brown and Company Limited (1973) E.A.** which sets out the grounds for grant of injunction. Firstly, an applicant must show a prima facie case with probability of success. Secondly the applicant must show that if an injunction is not granted, the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. And thirdly, if the court is in doubt it will decide the application on a balance of convenience. She also relied on the **American Cyanamid Company Case**.

With regard to this application, granting the same would be repugnant to the court order granted by HON. JUSTICE S.J. CHITEMBWE on the 9th of May, 2012; that status quo may be maintained regarding the land in suit of which cannot be revoked by this application.

Given the fraudulent nature used by the defendant/applicant, the honorable court shall be allowing a back-door entry to the defendant/applicant on the use and enjoyment of the land in suit. Based on the grounds (ii), (iii), and (iv) of the application, he relied on the authority set be the case of **Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012**. It is also in record that it was decided upon by the lower court in reference of case No. 482 of 2004, that the land in suit was fraudulently acquired by the 1st defendant, as annexed in the list of documents for purposes of this suit – Judgment of the lower court – proceedings from Mumias SRM CC No. 482 of 2004.

The respondents have been in occupation of the suit land since its purchase by the deceased. There exist no special circumstances warranting granting of such injunction which will only serve to put the parties and even the court in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the restrictions prayed for by the defendant/applicant.

This court has considered both the applicants' and the respondent's submissions. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS**

- 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.

That applicant submitted that he bought the land parcel number LR. N. Wanga/Indangalasia/882 from the 1st defendant Joseph Malala Sakwa. He took vacant possession of the said parcels and started developing it. He later subdivided his parcel of land No. LR. N. Wanga/Indangalasia/882 into three parcels namely LR. LR. N. Wanga/Indangalasia/994, 995 and 996 and got registered as the owner of the said parcels. Annexed BK – 1a, b and c are copies of the title deeds. He was in peaceful occupation and use of his parcels of land LR. N. Wanga/Indangalasia/994, 995 and 996 before the commencement of this suit. The plaintiff/respondent has encroached into his parcels of land LR. N. Wanga/Indangalasia/994, 995 and 996 and has prevented him from utilizing them. The applicant admits that the respondents have been in occupation of the suit land since its purchase by the deceased. The respondent states that there exists no special circumstances warranting granting of such injunction which will only serve to put the parties and even the court in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the restrictions prayed for by the defendant/applicant.

It is not disputed that the respondents are in possession of the suit land and that a there was a court order granted by HON. JUSTICE S.J. CHITEMBWE on the 9th of May, 2012; that status quo may be maintained regarding the land, this order still in existence. I see no reason to grant an injunction in this matter and the applicants have not shown that unless the order is granted, they will suffer loss which cannot be adequately compensated in damages. I find this application has no merit and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 13TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE