



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 244 OF 2016

JONATHAN MAHUGI ODERA (SUING AS THE GRANDSON AND LEGAL REPRESENTATIVE OF

**THE ESTATE OF) ROIDA KIHANGA (DECEASED)
:PLAINTIFF/APPLICANT**

VERSUS

**JOHNSTRONE OGADA VIKIRU :1ST
DEFENDANT/RESPONDENT**

**LAND REGISTRAR VIHIGA COUNTY LANDREGISTRY: 2ND
DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL :3RD
DEFENDANT/RESPONDENT**

RULING

This application is dated 28th November 2016 and seeks the following orders;

1. That for reasons to be recorded at the hearing hereof, this application be certified urgent and be heard ex-parte in the first instance.
2. That an order do issue restraining the 1st defendant by himself, his agents/servants or otherwise whosoever from evicting the plaintiff and Roida Kihanga’s dependants from Title No. KAKAMEGA/BUGONDA/2069 and further from interfering with the suit Title in any manner pending inter-parties hearing of this application.
3. That an order do issue restraining the 1st defendant by himself, his agents agents/servants or otherwise whosoever from evicting the plaintiff and Roida Kihanga’s dependants from Title No. KAKAMEGA/BUGONDA/2069 and further from interfering with the suit Title in any manner pending hearing and determination of this suit.
4. That an inhibition be registered on the suit parcel Kakamega/Bugonda/2069 pending hearing and determination of this suit.

The application is supported by the affidavit of Jonathan Mahugi Odera and based upon the following grounds; that the plaintiff is the grandson and personal and legal representative of the estate of Roida Kihanga(deceased) pursuant to limited grant issued in Kakamega Chief Magistrate’s Succession Cause

No. 14 of 2016. That the late Roida Kihanga before her demise on the 20th June 1975 had 0.6 ha of land adjudicated to her which thereafter was registered in her name on the 17th June 1976 as Kakamega/Bugonda/2069. On the 21st July 1995, one Mathews Vikiru Kihanga (now deceased) and who was the son to Roida Kihanga and father to the 1st defendant fraudulently and in collusion with the defendants caused the suit title to be transferred into his name. That on the 25th March 2009 in furtherance of their fraudulent acts, the 1st defendant, the late Mathews Vikiru Kihanga and 2nd and 3rd defendants caused removal of a restriction that was registered on the suit title on 1st July 1997 in favour of the family of the late Roida Kihanga and thereafter caused the title to be transferred from Mathews Vikiru Kihangato Johnstone Ogada Vikiru (the 1st defendant). That upon discovery of the illegal and unlawful acts by the defendants and the late Mathews Vikiru Kihanga, one Nathan Kaduka Kihanga (the son to the late Roida Kihanga and father to the plaintiff herein) applied for a restriction on the suit parcel which was eventually registered on the 4th November 2009. That the Title No. KAKAMEGA/BUGONDA/2069 was transferred from the deceased Roida Kihangato Mathews Vikiru Kihanga and later to Johnstone Ogada Vikiru without regard to the provisions of the Law of Succession.

That the plaintiff, his family and other dependents of Roida Kihanga are all in occupation to date of Title No. KAKAMEGA/BUGONDA/2069. That the 1st defendant has threatened to evict the plaintiff and his family from the suit land hence this application. That if the orders sought are not granted at this stage, this suit and application will be rendered academic and further that the plaintiff will suffer irreparable harm the suit land being the only known abode of many decades.

Johnstone Ogada Vikiru the 1st respondent submitted that, the subject suit land parcel No. KAKAMEGA/BUNGOMA/2069 is currently registered in the name of Johnstone Ogada Vikiru (Annexed marked J.O.V 1 is the copy of the title deed). The said land was transferred to him on 30th March 2009 by his father Mathews Vikiru Kihanga now deceased. That the application before this court by the applicant was filed way back November, 2016 but to date it has not been served on him. He only learned of the same when he travelled to Bungoma High Court to take a date in Kakamega ELC No. 163 of 2016 that it is being handled before Bungoma Environment Court because of lack of land judges in Kakamega (Annexed marked is a copy HOV 2a, b and c are copies of plaintiff order and ruling). That the application before this court is as a result of the order and the ruling of Kakamega ELC NO. 163 of 2016. That neither the applicant nor his family stays on this land. The applicant went to court and obtained grant letters of administration to the estate of Roida Kihanga without his consent as required in law being a beneficiary too. Roida Kihanga did not leave any estate. That it is true the applicant's father, his father and another were brothers and that they shared the land that belonged to their father before adjudication was done and the applicant's father and his other brother sold theirs and went to settle in south Nyanza and Tanzania respectively (annexed marked 3a and b are their documents indicating their whereabouts.) That there is no fraud or collusion caused by his father nor him to have the second and third respondent transfer land parcel KAKAMEGA/BUGONDA/2069. He legally owns this land in dispute as the same was legally transferred to him by his late father. That he has not at any time tried to evict the applicant from the land in dispute because he does not stay there and further he has not demonstrated to this court how and when the respondent tried to evict him. This application and the suit filed herein by the applicant is an intention to delay hearing and determination of Kakamega ELC No. 163 of 2016 pending before the court.

This court has considered the plaintiff/applicant's and the 1st defendant/respondent's 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 plaintiff/applicant submitted that he is the grandson and personal and legal representative of the estate of Roida Kihanga(deceased) pursuant to limited grant issued in Kakamega Chief Magistrate's Succession Cause No. 14 of 2016. That the late Roida Kihanga before her demise on the 20th June 1975 had 0.6 ha of land adjudicated to her which thereafter was registered in her name on the 17th June 1976 as Kakamega/Bugonda/2069. On the 21st July 1995, one Mathews Vikiru Kihanga(now deceased) and who was the son to Roida Kihanga and father to the 1st defendant fraudulently and in collusion with the defendants caused the suit title to be transferred into his name. That on the 25th March 2009 in furtherance of their fraudulent acts, the 1st defendant, the late Mathews Vikiru Kihanga and 2nd and 3rd defendants caused removal of a restriction that was registered on the suit title on 1st July 1997 in favour of the family of the late Roida Kihanga and thereafter caused the title to be transferred from Mathews Vikiru Kihanga to Johnstone Ogada Vikiru(the 1st defendant). That upon discovery of the illegal and unlawful acts by the defendants and the late Mathews Vikiru Kihanga, one Nathan Kaduka Kihanga (the son to the late Roida Kihanga and father to the plaintiff herein) applied for a restriction on the suit parcel which was eventually registered on the 4th November 2009. That the Title No. KAKAMEGA/BUGONDA/2069 was transferred from the deceased Roida Kihanga to Mathews Vikiru Kihanga and later to Johnstone Ogada Vikiru without regard to the provisions of the Law of Succession.

It is the applicant's submission that, his family and other dependents of Roida Kihanga are all in occupation to date of Title Number KAKAMEGA/BUGONDA/2069. That the 1st defendant has threatened to evict the plaintiff and his family from the suit land hence this application. The 1st defendant/respondent submitted that, the subject matter land parcel No. KAKAMEGA/BUNGOMA/2069 is currently registered in his name. The said land was transferred to him on 30th March 2009 by his father Mathews Vikiru Kihanga now deceased. Roida Kihanga did not leave any estate. There was no fraud in the said transfer. I find that the applicant and the 1st respondent are indeed relatives and both believe there are beneficiaries to this land which was originally owned by their grandmother. The applicant alleges that there was fraud in the said transfer of title and that he resides on the said land with other beneficiaries. The respondent denies ever trying to evict the applicant because he (the applicant) does not reside on the disputed land in the first place. I find that the applicant has shown a prima facie case with a probability of success at the trial. I find that the application has merit and grant the following order;

1. That an inhibition be registered on the suit parcel Kakamega/Bugonda/2069 pending hearing and determination of this suit.
2. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2017.

N.A. MATHEKA

JUDGE