



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 99 OF 2017

NICHOLAS CHIMOMA IMBUKWA ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

BEATRICE MMBOGA MAGALASIA ::::::::::::::::::::::::::::::: RESPONDENT

RULING

This application is dated 15th March 2017 and is brought under Section 3A of the Civil Procedure Act and order 4D rule 1, 2, 3 and order 4 & order rule 51 rule (1) & (41) of the Civil Procedure Rule Act Cap 21 Laws of Kenya and seeks the following orders;

1. THAT this application be heard ex-parte in the instance.
2. THAT the honourable court be pleased to grant temporarily injunction orders restraining the defendants, their agents, servants or any other person from trespassing, interfering destroying, wasting or alienating parcel of land NO. ISUKHA/MUKULUSU/1107 pending the hearing and determination of this application.
3. THAT the honourable court be pleased to grant temporarily injunction orders restraining the defendants, their agents, servants or any other person from trespassing, interfering destroying, wasting or alienating parcel of land NO. ISUKHA/MUKULUSU/1107 pending the hearing and the determination of this suit.
4. THAT the OCS Kakamega/Shinyalu Police Station be ordered to enforce and ensure the compliance of the court orders.
5. THAT cost of this application be in the cause.

The application is based on the following ground that an injunction order is sought for preservative and protective for the said parcel of land. The applicant submitted that he bought the said land from the respondent's husband who is now deceased. The respondent was a witness as per annexure NCI - 1. Since the death of her husband the respondent has not transferred the land to the applicant's name and has filed a succession cause in court annexure NCI - 2. The respondent has now trespassed on the said land and uprooted crops, broke window glasses and molded bricks illegally causing damage to the applicant's property.

The respondent submitted that she is not the administrator of the estate of the deceased. The alleged transaction of sale of land is null and void for there is no consent to transfer as prescribed by the law. The agreement of sale of land annexed by the plaintiff/applicant as having been made between her late husband and the applicant has mentioned a parcel of land that does not exist in the name of the deceased.

The annexed documents are all forged and altered to suit the interest of the applicant who is bent to frustrate the family of the deceased. That she did initiate and file succession to the estate of her husband who had clearly demarcated the land and transferred it to the other purchasers and never sold any parcel to the applicant herein. That her co-wife who is listed in the succession as a beneficiary of the estate has her own parcel of land which is ISUKHA/MUKHULU/67 where she is settled which is also a subject to succession cause which is not yet concluded. That the applicant is actually the one who keeps harassing and threatening her wanting her dead, where she has reported him to police on several occasions.

This court has considered the plaintiff/applicant's and the defendant/respondent's submissions, supporting affidavits and annexures 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 applicant submitted that he bought the said land from the respondent's husband who is now deceased. The respondent was a witness as per annexure NCI – 1 which is a sale agreement. Since the death of her husband the respondent has not transferred the land to the applicant's name and has filed a succession cause in court annexure NCI - 2. The respondent has now trespassed on the said land and uprooted crops, broke window glasses and molded bricks illegally causing damage to the applicant's property. I find that the applicant has shown a prima facie case with a probability of success at the trial. The applicant has also shown that unless the order is granted, he will suffer loss. I therefore grant the following orders;

1. THAT the honourable court be pleased to grant temporarily injunction orders restraining the defendants, their agents, servants or any other person from trespassing, interfering destroying, wasting or alienating parcel of land NO. ISUKHA/MUKULUSU/1107 pending the hearing and the determination of this suit.
2. THAT cost of this application 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