



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC NO. 93 OF 2017**

**WYCLIFFE LUVEMBE SHIKOTO :::::::::::::::PLAINTIFF/APPLICANT**

**VERSUS**

**ANNE GATHONI MWAI :::::::::::::::DEFENDANT/RESPONDENT**

**RULING**

This application is dated 13th March 2017 and seeks the following orders;

1. That this application be certified urgent in the 1st instance.
2. That pending hearing and determination of this application this court do issue a temporary injunction against the defendant/her servant/employer or whosoever from transacting, entering, developing and or interfering with land parcel no. ISUKHA/SHIRERE/6625.
3. That this court do issue an injunction against the respondent on land parcel No. ISUKHA/SHIRERE/6625 that there shall be no dealings including, accessing, digging, building, transacting and or whatsoever by the defendant/respondent/her agents/ servants/employee or whosoever until this suit is heard and determined.
4. That the defendants' title Deed issued therefore as ISUKHA/SHIRERE/6625 and mutation thereof be deemed cancelled and reverted to its original as ISUKHA/SHIRERE/5524 pending hearing and determination of this suit.
5. That the costs of this application be provided for

The application is based on the following grounds, that the applicant was the original owner of land known as ISUKHA/SHIRERE/5524 that created land parcel No. ISUKHA/SHIRERE/6625 after upon subdivision. That the applicant obtained a consent for sub-division of the original land into five portions but the respondent used her surveyor and made sub-division into three portions on her mutation thereby causing serious discrepancy on the other applicants land thereby encroaching an area measuring 0.05 of a hectare on the ground and 0.027 hectare on the other side hence tempering with the remaining land including a road of access. That the applicant disputed a consent for transfer which was obtained fraudulently by the respondent but the respondent remained adamant and proceeded to process the transactions and has obtained title deed by crooked means. That the bone of contention as to why the applicant disputed the consent was due to the fact that the respondent used police to force the applicant sign transfer and removal of a restriction from the land records an act that was against article 25 sub-rule (b) of the Constitution of Kenya after the applicant had realized a hitch in the transaction between them. That the transaction was unfairly done as it was done by malice since the respondent moved ex-parte without involving the applicant.

The applicant submitted that, he sold a portion of land measuring 0.07 of a hectare from land parcel no. ISUKHA/SHIRERE/5524 by various agreements as per the annexed copies marked W.L.S.1. He gave out a consent for sub-division of land into five (5) portions but the respondent through her surveyor created sub-division into three portions (3) portions thereby affecting the entire land and encroached a 0.05 and 0.027 of a hectare into the remaining other land. (annexed are copies thereof marked W.L.S. 2). The respondent proceeded to obtain a consent for transfer by special board an act that was disbanded way back by Ministry of Land and without his knowledge. He noticed the said consent after it had been obtained and blocked it by placing a restriction at the lands office but the respondent used police to force him to remove the said restriction and forced the transfer thereof (annexed is a copy of his hand written letter to remove a restriction marked W.L.S. 3). He wrote letter to the Chairman of the Land Control Board to hold her horses not to give a consent in the month of October, until November when he was to be available to air his grievances. That the said letter was served to the Secretary of the Deputy County Commissioner one Mrs. Lutta as per the annexed hand written copy marked W.L.S. 4 with her mobile No. 0718825707 overleaf. He went to lands to obtain the official search in respect of the said land parcel no. ISUKHA/SHIRERE/6625 as per the annexed copy of official receipt and realized that a title deed had been issued to the respondent. (annexed W.L.S.5) and green cards could then not be traced today. That further he had engaged the respondent into negotiation as to whether or not she was to accept a refund of purchase price with interest upon realizing her shoddy acts and indeed the communications were still underway as per the annexed copy of letters from M/s. D.J. MANGO ADVOCATE and her letter M/S ATULO ADVOCATES between the month of July and August, 2016 (Annexed are letters marked W.L.S. 6) but she overturned the table and proceeded to register a fake letter of consent. That he has not attended Land Control Board but the respondent obtained the consent for transfer and Title Deed in her names which is an act of fraud and unlawful. That in any event, the consent issued to the respondent was and should be deemed null and void as he did not consent to it. That indeed if she got the consent then she used his past documents including identification card and passport size photo that he transacted land with her husband since he personally never gave the defendant his documents. That it is therefore necessary that the transaction herein be deemed cancelled and the Title Deed together with mutation thereof be cancelled pending hearing as determination of this suit as an element of fraud has been realized and the parcel be referred to its original No. ISUKHA/SHIRERE/5524 awaiting the court's further orders.

The respondent was served with the hearing date but failed to attend court nor file any papers in opposition. This court has considered the Applicant's submissions and the supporting affidavit 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 sold a portion of land measuring 0.07 of a hectare from land parcel no. ISUKHA/SHIRERE/5524 by various agreements as per the annexed copies marked W.L.S.1. He gave out a consent for sub-division of land into five (5) portions but the respondent through her surveyor created sub-division into three portions (3) portions thereby affecting the entire land and encroached a 0.05 and 0.027 of a hectare into the remaining other land. (annexed are copies thereof marked W.L.S. 2). I have perused these documents (marked W.L.S. 2) which is one agreement and a document on acknowledgment which talks of a final payment for the sale agreements dated 11th September, 2014 and 20th February, 2015. The latter agreement of 20th February, 2015 is not annexed and hence there is no way of determining what exactly the plaintiff/applicant sold. The applicant has not shown a prima facie case with a probability of success at the trial. This application is not merited and I dismiss it with costs.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10<sup>TH</sup> DAY OF OCTOBER 2017.**

**N.A. MATHEKA**

**JUDGE**