



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 248 OF 2015

HERBERT NYABERA MUSEMBE ::::::::::: PLAINTIFF/APPLICANT

VERSUS

NEBBERT OYOYA ::::::::::: DEFENDANT/RESPONDENT

RULING

This application is dated 31st August 2015 and is brought under order 40 Rule 1 of the Civil Procedure Rules, Section 3 and 3A of the Civil procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. THAT pending hearing of this application inter-parties the defendant/respondent through its agents and servants be and is hereby restrained by temporary injunction from trespassing, encroaching, interfering, destroying, planting any crops and or stepping on land parcel registration KAKAMEGA/VIYALO/718 and or in any manner whatsoever interfering with applicants land parcel registration No. KAKAMEGA/VIYALO/718.
2. THAT this honourable court does confirm the orders in prayer (a) pending hearing of this suit.
3. THAT O.C.S. Kilingili police station do enforce the orders herein.
4. THAT costs of this application be provided for.

The applicant submitted that, he is the registered owner of land parcel registration number KAKAMEGA/VIYALO/718. (Annexed and marked HNM 1 is a copy of the title deed). That sometimes in the year 2007 he realized that the defendant herein was trespassing into his land parcel NO. KAKAMEGA/VIYALO/718 without his consent and or any colour of right. That he has since then used administration offices to stop him but he claims to have bought the land in suit from a stranger who had no authority to sell his land. That on or about the 20th May, 2015 the defendant forcefully entered into his land and began to cut trees thereto claiming to be his property. That he stands to suffer irreparable loss and damage as the defendant has encroached on his parcel of land and even cut down trees. That it is in the interest of justice that the orders sought be granted.

The respondent submitted that, the applicant/plaintiff herein got the land parcel designated as KAKAMEGA/VIYALO/718 fraudulently registered into his names as the absolute proprietor, the land being transferred from Jedidah Gulanya (since deceased). That due to the above mentioned fraudulent registration, Jedidah Gulanya took the plaintiff herein to court to seek for orders for eviction against the plaintiff herein. That the orders were granted to Jedidah Gulanya evicting the plaintiff herein vide case number CMCC 125 of 1994 in Kakamega Law Courts but the said orders are since lost and cannot be found in the archived court file since the plaintiff has caused for the misplacement of the same hence the

decree could not be executed. That upon the issuance of the above mentioned orders, Jedidah Gulanya sold the whole of the suit parcel to him, which purchase price he was paying by installments. (Attached and marked NN 1 is a copy of the sale agreement). That he began utilizing the suit parcel without any disturbance either from the plaintiff or anyone else. That upon the death of Jedidah Gulanya, the plaintiff came to him complaining that he was trespassing into his land parcel. That the said Jedidah Gulanya died before transferring the whole of the land parcel to him. That the plaintiff/applicant application to have this honourable court grant him orders of temporary injunction are a sham, premature and malicious in nature hence should be dismissed with costs.

This court has considered the applicant/plaintiff's and the respondent/ defendant'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.

It is evident that the applicant herein is the registered owner of land parcel registration KAKAMEGA/VIYALO/718 (Annexed and marked HNM 1 is a copy of the title deed). The applicant is apprehensive that his property will be lost as a result of the malicious acts of the respondent. That the applicant stands to suffer irreparably if the orders sought will not be granted. Be that as it may, it is a fact that the respondent/defendant has been occupying the suit parcel of land for a number of years (since 2007 according to the applicant). The respondent/defendant maintains that one Jedidah Gulanya sold the whole of the suit parcel to him, which purchase price he was paying by installments. (Attached and marked NN 1 is a copy of the sale agreement). That he began utilizing the suit parcel without any disturbance either from the applicant/plaintiff or anyone else. That upon the death of Jedidah Gulanya, the plaintiff came to him complaining that he was trespassing into his land parcel. That the said Jedidah Gulanya died before transferring the whole of the land parcel to him. That the applicant/plaintiff herein got the land parcel designated as KAKAMEGA/VIYALO/718 fraudulently registered into his names as the absolute proprietor, the land being transferred from Jedidah Gulanya (since deceased). I find that the applicant has failed to show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and, since is doubt the Court will decide the application on a balance of convenience and hereby I grant the following orders;

1. THAT pending hearing and determination of this this suit the status quo be maintained on land parcel registration KAKAMEGA/VIYALO/718.
2. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE