



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 279 OF 2017

AMOS SHIKOMERA NDAKWA :::::::::::::::::::: PLAINTIFF

VERSUS

SAMUEL ODHIAMBO LUMBASI :::::::::::::::::::: DEFENDANT

RULING

This application is 26th July 2017 and is brought under Sections 1, 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 40 rules 1 (a) (b) 2 (1) & 4 and order 51 rule 1 of the Civil Procedure Rules, 2010) seeking the following orders;

1. THAT the application herein be certified as extremely urgent and be heard ex parte in the first instance.
2. THAT pending inter parties hearing of the application herein an order of temporary injunction do issue restraining defendant/respondent whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/KABRAS/SHAMBERERE/3609.
3. THAT pending hearing and final determination of the main suit herein an order of temporary injunction do issue restraining defendant/respondent whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/KABRAS/SHAMBERERE/3609.
4. THAT the costs of this application be awarded to the applicant.

The applicant submitted that, he is the registered proprietor of parcel of land known as S/KABRAS/SHAMBERERE/3609. Annexed and marked "ASN 1" is a copy of the said title Deed in respect of land parcel known as S/KABRAS/SHAMBERERE/3609. He took immediate possession of the suit land on 12th July, 2006 and utilized the same for growing and harvesting cane thereon to date. The defendant/respondent on 15th June 2017 or thereabouts illegally and unlawfully without any colour of right or justification in law trespassed onto the suit land herein known as S/KABRAS/SHAMBERERE/3609 forcibly uprooted cane and proceeded to plough and plant thereon sweet potatoes and graze his cattle on the said suit land which action has deprived him use and peaceful enjoyment of the said parcel of land thereby causing him loss and damage. Annexed and marked "ASN 2" is a copy of the letter from the Area Chief. The defendant/respondent does not have any registrable interest over the suit land herein. He acquired and obtained title of the suit land legally and procedurally

from LUKA MUZAMI SACHITA on 12th July, 2006 for a valuable consideration and since 2006 or thereabouts he has been growing cane delivered to West Kenya Sugar Company Ltd. The damage done to his crops was assessed and report dated 27th June, 2017 by the Malava sub county Agricultural Officer. Annexed and marked "ASN 3" is a copy of the said Crop Damage Assessment Report dated 27th June, 2017 from Malava Sub County Agricultural Officer. That LUKA MUZAMI SACHITA and himself successfully lodged a complaint against the defendant before the then Malava Land disputes Tribunal which was later challenged by the defendant/respondent herein in the then Western Provincial land Disputes Committee which upheld the decision of the then Malava Land Disputes Tribunal and was adopted in KAKAMEGA CMCC AWARD NO. 87 OF 2007 as the judgment of the court. Annexed hereto marked "ASN 4" is a copy of proceedings. The defendant/respondent herein appealed against the said judgment in KAKAMEGA HCCA NO. 25 OF 2008 which was on 20th April, 2015 was dismissed for want of prosecution. Annexed and marked "ASN 5" is a copy of the decree. The defendant/respondent continues to trespass onto the suit land despite having been warned by the area chief to desist from his illegal activities.

This court has considered the applicant's submissions herein. The respondent was served but failed to attend court or file any grounds in opposition. 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.

This application is based on the grounds the plaintiff/applicant is the registered owner of land parcel known as S/KABRAS/SHAMBERERE/3609 (Annexed and marked "ASN 1" is a copy of the said title Deed in respect of land parcel known as S/KABRAS/SHAMBERERE/3609). On 15th June, 2017 or thereabouts the defendant/respondent illegally and unlawfully without any colour of right or justification in law trespassed onto the suit land herein known as S/KABRAS/SHAMBERERE/3609 forcibly uprooted cane and proceeded to plough and plant thereon sweet potatoes and graze his cattle on the said suit land which action has deprived the plaintiff/applicant use and peaceful enjoyment of the said parcel of land thereby causing him loss and damage. The plaintiff/applicant stands to suffer irreparable loss and damage if the orders sought are not granted. I find that the applicant is the current registered owner of the said parcel of land known as S/KABRAS/SHAMBERERE/3609. 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 which cannot be adequately compensated in damages. This application has merit and I grant the following orders;

1. THAT pending hearing and final determination of the main suit herein an order of temporary injunction do issue restraining defendant/respondent whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/KABRAS/SHAMBERERE/3609.
2. THAT the costs of this application be to the applicant.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE