



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC. NO. 164 OF 2017**

**MICHAEL OKUMARUTI OTABAKWA.....PLAINTIFF**

**VERSUS**

**BONIFACE WECHULI ATEYA.....DEFENDANT**

**RULING**

This application is dated 16<sup>th</sup> May 2017 and is brought under sec. 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Under order 40 rules 1, 2, 3 and 4 and order 51 Rule 1 of the Civil Procedure rules and seeks the following orders;

1. THAT this application be certified urgent.
2. THAT an order of temporary injunction be and is hereby issued against the defendant herein, his agents, servants and or relatives restraining him from entering, trespassing on, occupying, utilizing, developing, alienating, subdividing and or dealing in any manner whatsoever with L.R. NORTH WANGA/KHALABA/2187 (0.65 Ha) pending the hearing of this application interparties.
3. THAT an order of temporary injunction be and is hereby issued against the defendant herein, his agents, servants and or relatives restraining him from entering, trespassing on, occupying, utilizing, developing, alienating, subdividing and or dealing in any manner whatsoever with L.R. NOROTH WANGA/KHALABA/2187 (0.65 Ha) pending the hearing of this suit
4. THAT an order be and is hereby issued directing the land registrar and district surveyor, Kakamega County to visit, survey and establish actual acreages and boundaries of L.R. NO. NORTH WANGA/KHALABA/2187 (0.65Ha) and plant beacons and open the access road drawn on the map to the plaintiff's land and file their report in this honourable court pending the hearing and determination of this suit.
5. THAT an order be and is hereby issued directing the Land Registrar and district Surveyor, kakamega county to visit, survey and establish actual acreages and boundaries of L.R. NO. NORTH WANGA/KHALABA/2187 (0.65 Ha) and plant beacons and open the access road drawn on the map to the plaintiff's land and file their report in this honourable court pending the hearing and determination of this suit.
6. THAT costs be provided.

The applicant submitted that, he is the registered owner of L.R. NO. NORTH WANGA/KHALABA/2187

(0.65 Ha). (annexture marked MOO – 1) The respondent herein has without any colour of right trespassed onto his said land, occupied and is cultivating, utilizing and is intending to develop, sell, subdivide and alienate the same and is continuing with such actions despite his numerous protests. The respondents said actions have denied him and are continuing to deny him his rights of user the said land and he stands to suffer substantial losses if the respondent's said actions are not restrained. The defendant herein has blocked the access road drawn on the map to his said land. That the Land Registrar and district Surveyor, Kakamega County be directed by an order of this court to visit, surveyor and establish the actual acreages and boundaries on his said land and plant beacons and open the access road drawn on the map to his land and file their report in this honourable court.

The respondent submitted that, it's clear on the face of the record that by an agreement dated 11<sup>th</sup> July 2011 the applicant alleged to have bought 1 ½ acres but his pleadings and the title deed reads 0.65 Ha which is over and above 1 ½ acres. That the applicant claim is misdirected, unsustainable as the purported vendor Calisto Echesa Ateya is still alive and of sound mind and can sue and be sued. The applicant's application is belated and an afterthought as the applicant is concealing material facts to this suit behind the curtains of justice. That he was charged at Mumias Law Court vide Cri. No. 697/013 but later acquitted under section 215 of the CPC after each party alongside his witnesses were accorded enough time to tender their evidence. (copy of the proceedings annexed BWA 1). That their father was a polygamous man but they are yet to be given a share of the purported land. The purported title deed does not have any merit in law as no consent was sought from either of the family member. That it is in the interest of justice that litigation ought to be decided on merit and not on technicalities and the applicant only remedy is to set down this matter to be heard expeditiously.

This court has considered both the applicant's and the respondent's submissions herein. 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 premised upon the grounds that the applicant is registered owner of L.R. NO. NORTH WANGA/KHALABA/2187 (0.65 Ha). The defendant/respondent herein, his agents, servants and or relatives have without any colour of right entered, trespassed on, occupied and are utilizing, developing, subdividing and alienating a portion over ½ an acre of the applicants said land and is continuing with such actions despite numerous protests from the applicant herein. The defendant has blocked the access road drawn on the map to the plaintiff's land. The applicant has suffered substantial loss since he has been unable to exercise his rights of user in respect of the said portion of land hitherto. He prays for an order to issue directing the Land Registrar and District Surveyor, Kakamega County to visit, survey and establish acreages and boundaries on his said Land and plant beacons and open the access road drawn on the map to the plaintiff's land. I find that 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. I find that he is currently the registered proprietor of the land in dispute and grant the following orders;

- 1. THAT an order of temporary injunction be and is hereby issued against the defendant herein, his agents, servants and or relatives restraining him from entering, trespassing on, occupying, utilizing, developing, alienating, subdividing and or dealing in any manner whatsoever with L.R. NORTH WANGA/KHALABA/2187 (0.65 Ha) pending the hearing of this suit**

2. THAT an order be and is hereby issued directing the Land Registrar and district Surveyor, kakamega county to visit, survey and establish actual acreages and boundaries of L.R. NO. NORTH WANGA/KHALABA/2187 (0.65 Ha) and plant beacons to the plaintiff's land and file their report in this honourable court pending the hearing and determination of this suit.

3. That the costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**