



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 40 OF 2016. (OS)

SAIDI OKANYA ATHUMANI (*suing as the personal representative*

And administrator of Estate of Rukia Osman Okanya on his own

behalf as beneficiary of the said estate)..... **PLAINTIFF/APPLICANT**

VERSUS

BONFACE NYONGESA O. WAWIRE.....**DEFENDANT/RESPONDENT**

RULING

This application is dated 29th May 2017 and is brought under sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and seeks the following orders;

1. This application be certified as urgent and it be heard inter parties on a priority basis.
2. The defendant/respondent be and is hereby restrained by himself, his servants or agents howsoever from trespassing, alienating or any dealing with 0.60 hectares out of L.R. NORTH/WANGA/MATUNGU/1045 in possession of the plaintiff/applicant until the hearing and determination of this suit.
3. The status quo prior to 26/2/2017 be maintained until the hearing and determination of this suit.
4. The costs of this application be granted.

The applicant submitted that, he brought this suit on behalf of the estate of the deceased Rukia Asman Okanya and on his own behalf as the beneficiary of the mentioned estate. Annexed is a copy of limited grant of letters of administration ad litem dated 3rd March, 2016 marked as "SOA – 1". On or about 6th October, 1997 his mother Rukia Asman Okanya bought 0.60 hectares out of L.R. NO. NORTH/WANGA/MATUNGU/1045 from the respondent herein at an agreed consideration of Ksh. 90,000/= which sum was paid in two installments of Ksh. 40,000/= on 6th October, 1997 and Ksh. 50,000/= on 13th November, 1997. The last installment was paid to the respondent when he had been gazette as the administrator of the estate of the deceased Joseph Lutebane Wabwire his father in succession cause at Kakamega No. 411/1997. Annexed is a copy of the sale agreement, a copy of application of land control board and Gazette Notice No. 664 dated 12th November, 1997 respectively marked as "SOA-2A"-2C". The suit land measuring 7.9 hectares was first registered in the names of Joseph Lutebane Wabwire on 13th March, 1991 later it was transferred into the names of the respondent on 24th November 1999 through transmission. Annexed is a copy of the register of the suit land and certificate of official search marked as "SOA-3A' & "SOA-3B". That immediately his deceased mother

Rukia Asman Okanya paid the first instalment on 6th October, 1997 she took possession of the 0.60 hectares out of the suit land and started utilizing the same by growing sugarcane crops and sold them to Mumias Sugar Company Ltd. That during the life of his deceased mother Rukia Asman Okanya she entered into a sugarcane contract with Mumias Sugar Company Ltd where the company identified in its records the 0.60 hectares out of the suit land as plot No. "1045B" with Account No. 72406 where at the time of her death on 29th May, 2005 she received sugarcane proceeds in respect to her account with Mumias Sugar Company Ltd. Annexed is a copy of letters of administration ad litem dated 7th December, 2005 in Mumias SRMC Succession Cause No. 159 of 2005 marked as "SOA-4". That his deceased mother Rukia Asman Okanya passed away on 29th May, 2005 without the respondent transferring the 0.60 hectares out of the suit land to her after having peacefully, openly without any interruption utilized the same portion for a period of over 8 years as on 29th May, 2005. After the demise of his mother Rukia Asman Okaya he took over the said 0.60 Hectares out of the suit land and continued to cultivate sugarcane crop and sold them to Mumias Sugar Company Ltd vide field No. 11504400, old Account No. 72406, plot No. 55 as reflected in the farmer's final statement herein while old account number was registered in the names of her deceased mother aforementioned. Annexed are farmers final statements marked as "SOA-5A", "SOA-5B", "SOA-5C" AND "SOA-5D". That since 29th May 2005 he has been in quiet, peaceful, continuous and uninterrupted occupation and possession of the 0.60 hectares of the suit land till to date a period of over 12 years utilizing the same portion by growing sugarcane which he has been selling to Mumias Sugar Company Ltd. Before the demise of his mother mentioned herein, the respondent gave her the 0.60 hectares out of the suit land which was clearly demarcated on the ground. On or about 24th November, 1999 as evidenced in the land register, the respondent herein got himself registered as the proprietor and administrator of the entire suit land after the death of his father Joseph Lutebane Wabwire through a succession process. On 26th February, 2017 his sugarcane on the 0.60 hectares out of the suit land was cut by the respondent herein, through his agents and servants and a report was made at Harambee police station vide OB No. 10/26/02/2017 at 15:10 hours, further the District Agriculture Officer Matungu Sub County visited the scene and assessed damage caused by the defendant, respondent and his agents. Annexed is a copy of the valuation report of damaged sugarcane crop on 26th February, 2017 issued by the Agricultural Officer Matungu sub county dated 5th April, 2017 marked as "SOA-6".

On 3rd February, 2017 while he was still in preparation to cultivate the 0.60 hectares out of the suit land the respondent through his agents and servants cultivated the same and on the following day of 4th February, 2017 he planted maize crops on the said 0.60 hectare portion out of the suit land. Annexed are copies of photographs as evidence of the respondent's action marked as "SOA-7A", "SOA-7B", & "SOA-7C". The respondent's actions were malicious and were intended to interrupt his peaceful and exclusive possession of the 0.60 hectares out of the suit land with the sole aim of defeating his claim of ownership of the suit land by way of adverse possession and to prejudice this suit. The respondent's trespass to the 0.60 hectares out of the suit land was aimed at the destruction of physical evidence to show in this suit that he has been in possession of the suit land. That he has been in possession and use of the 0.60 hectares out of the suit land for a period of over 12 years and combined with the years his deceased mother Rukia Asman Okanya used the 0.60 hectares portion out of the suit land amounts to a total of 20 years. The respondent, his agents, servants or employees have not been in possession of the 0.60 hectares out of the suit land for a period of over 20 years apart from the brief forceful entry on 4th February, 2017.

This court has considered both the applicant's submissions herein. The respondent was served but filed no grounds of 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.

The grounds of this application is that, the applicant is the administrator of the estate of the deceased Rukia Asman Okanya and brings this suit on his own behalf and as the beneficiary of the estate of the deceased Rukia Asman Okanya. The deceased Rukia Asman Okanya purchased 0.60 hectares from the respondent on or about 6th October, 1997 thereafter started utilizing the 0.60 hectares out of the suit land. The deceased Rukia Asman Okanya passed away on 29th May, 2005 after utilizing the 0.60 hectares out of the suit land for about a period of 8 years and thereafter the applicant continued utilizing the same till on 26th February, 2017 when the respondent cut off the applicant's sugarcane crop and forcefully dug and planted maize. The applicant and his deceased mother Rukia Asman Okanya have both used the suit land for a period of over 20 years. The applicant's claim herein is of adverse possession. These facts have not been challenged by the respondent. 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 which cannot be adequately compensated in damages. I find this application has merit and grant the following orders;

1. The defendant/respondent be and is hereby restrained by himself, his servants or agents howsoever from trespassing, alienating or any dealing with 0.60 hectares out of L.R. NORTH/WANGA/MATUNGU/1045 in possession of the plaintiff/applicant until the hearing and determination of this suit.
2. The status quo prior to 26th February, 2017 be maintained until the hearing and determination of this suit.
3. The costs of this application be in the cause.

It is so ordered.

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

N.A. MATHEKA

JUDGE