



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 32 OF 2017

BENEAH KETA:::PLAINTIFF/RESPONDENT

VERSUS

BENARD O. ONGERI:::DEFENDANT/APPLICANT

RULING

This application is dated 25th July 2017 and is brought under Order 40 rule 1, 2 and 3, Order 8 rules 3 (1) and 5 (1) and Order 51 rule 1 of the Civil Procedure rules 2010 and Sections 1A, 3 and 3A of the Civil procedure Act Cap 21 Laws of Kenya and seeks the following orders;

1. THAT this matter be certified as urgent.
2. THAT pending hearing and determination of this suit, the defendant/applicant be granted leave to amend his defence in terms of the annexed draft which shall be deemed filed upon payment of the requisite court fees.
3. THAT pending hearing and determination of this application, this honourable court be pleased to issue an order of injunction restraining the plaintiff/respondent, either by himself, his agents, servants or assigns from dealing in any manner including selling Land Parcel No. NORTH WANGA/KHOLERA/4070 or any part thereof.
4. THAT pending hearing and determination of this suit, this honourable court be pleased to issue an order of injunction restraining the plaintiff/respondent, either by himself, his agents, servants or assigns from dealing in any manner including selling Land Parcel No. NORTH WANGA/KHOLERA/4070 or any part thereof.
5. THAT costs be provided for.

The defendant/applicant submitted that, L.R. NO. NORTH WANGA/KHOLERA/810 was separate land which also belonged to his late father JACOB KETA ODUORI and which land he gave the applicant by way of executing transfer forms in his favour during his lifetime and should not form the basis of the respondent/plaintiff's claim herein. Upon the demise of their late father on 5th May 2001, his other brother THOMAS WESONGA KETA filed a succession cause and as administrator of LR. NO. NORTH WANGA/KHOLERA/753 which was registered in his late fathers' name, he willfully transferred to him L.R. NO. NORTH WANGA/KHOLERA/4070 as the absolute registered proprietor hereof and transferred L.R. NO. NORTH WANGA/KHOLERA/4071 to SOFIA AUMA NABONWE as a reward for financing the succession cause. During the succession proceedings, the plaintiff/respondent did not raise any objection as to the mode of distribution and did not pursue the administrator to point out his share for him

only to come over 12 years later to claim what was legally and lawfully awarded to him by the administrator. The respondent/plaintiff it is submitted, has engaged third parties whom he brought over to the suit land and was given some unknown down payment which he is using to finance this suit. The respondent/plaintiff and the buyers have proceeded to unlawfully cultivate a suit land registered in his names in total disregard of his several warnings and those of the officer in charge, Harambee Police Post to desist from their conduct (Annexed is a copy of a photograph taken of the suit land Marked "BON 2"). The Applicant states that, he has a prima facie case against the plaintiff and that the balance of convenience tilts in his favour.

The respondent/plaintiff submitted that, the defendant /applicant is his brother being the sons of the late of Jacob Keta Oduor. The late Jacob Keta Oduor was the proprietor of L.R. NO. N/W/Kholera/753 which was sub-divided into L.P. N./W/Kholera/4070, 4071, 4072 and 4073 respectively. The applicant/defendant exhausted the deceased estate by selling N/W/Kholera/4071, 4072 and 4073 to third parties without other estate beneficiaries consent and/or knowledge and currently exclusively enjoys the fruits of L.R. NO. N/W/Kholera/810 which was given to him in good faith after demise of 2 brothers. Besides being the bonafide beneficiary of L.P. NO. N/W/Kholera/4070 and the applicant holding in trust the title deed has the applicant has refused, neglected and/or ignored to surrender the same to him for cancellation in his favour thus his intention is to embarrass and frustrate him.

This court has considered the applicant/defendant's and the respondent/plaintiff'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, defendant/applicant is the sole proprietor of LR. NO. NORTH WANGA/KHOLERA/4070 as the absolute owner thereof. Four other parcels apart from the applicant's emanated from the original NORTH WANGA/KHOLERA/753 which was subdivided upon completion of the succession cause relating to the parties' deceased father. The applicant submitted that, the plaintiff/respondent did not object or appeal the distribution in the said succession cause and cannot therefore institute these proceedings after condoning the succession proceedings. The respondent immediately after filing this suit was spotted in the company of a surveyor stationed at Mumias and other persons who were later on established as prospective buyers of either the whole of or part of the suit property. The plaintiff /respondent has since institution of this suit proceeded to cultivate the land either through himself or the buyers and are on the verge of harvesting maize and unless the orders sought are granted the respondent and he is likely to continue. I find that the applicant must show a prima facie case with a probability of success at the trial and grant the following orders;

1. THAT pending hearing and determination of this suit, this court be pleased to issue an order of injunction restraining the plaintiff/respondent, either by himself, his agents, servants or assigns from dealing in any manner including selling Land Parcel No. NORTH WANGA/KHOLERA/4070 or any part thereof.
2. THAT costs be application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF
NOVEMBER 2017.**

N. A. MATHEKA

JUDGE