



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 243 OF 2017

TITO MAKARI ATAKA ::::::::::::::::::::::::::::::::::: PLAINTIFF/APPLICANT

VERSUS

MARY WAIRIMU BAHATI ::::::::::::::::::::::::::::::::::: 1ST DEFENDANT

GRACE BAHATI ::::::::::::::::::::::::::::::::::: 2ND DEFENDANT

**(All sued as Administratrix and personal representative of the estate of BENEDICTOR BAHATI
MAKANI (DECEASED))**

RULING

This application is 13th July 2017 and is brought under order 40 rules 1, 2 and 4 of the Civil Procedure Rules and section 68 of the Land Registration Act 2012 seeking the following orders;

1. THAT service of this application be dispensed with, the same be certified urgent and be heard ex parte in the 1st instance.
2. THAT pending the hearing of this application inter parties there be an order restricting and/or inhibiting any registration, dealings with title Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3574.
3. THAT pending the hearing of this application inter partes there be an order of injunction restraining the defendants/respondents, their agents, servants and/or employee from cancelling and/or altering any registration on title numbers BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3574.
4. THAT pending the hearing and determination of this suit there be an order restricting and/or inhibiting any registration, dealing with title numbers BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674.
5. THAT pending the hearing and determination of this suit there be an order of injunction restraining the defendants/respondents, their agents, servants and/or employees from cancelling and/or altering any registration on title numbers BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674.
6. THAT the costs of this application be provided for.

The application is grounded on the annexed affidavit of TITO MAKARI ATAKA and the following

grounds; That the respondents want to sell the suit land which the applicant claims to be interested in his capacity as the administrator of the estate of MARGARET AYOTI ATAKA – Deceased. That the applicant's case has higher chances of success and it is necessary to preserve the subject matter. That it is in the interest of justice if this application is allowed.

The applicant submitted that he is the administrator ad litem of the estate of MARGARET AYOTI ATAKA – deceased (annexed hereto and marked TMA-1 is a copy of the grant of letters of administration). That the defendants are the administrators of the estate of BENEDICTO BAHATI MAKANI – deceased (annexed hereto and marked TMA-2 is a copy of the grant of letters of administration). That land Parcel Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 registered in the names of BENEDICTOR BAHATI MAKANI were created out of land parcel No. BUTSOTSO/SHIKOTI/1046 (annexed and marked TMA-3(c), 3(c) and 3(c) are copies of the respective green card). That vide an agreement made on 19th July, 2004 BENEDICTOR BAHATI MAKANI held land parcel No. BUTSOTSO/SHIKOTI/1046 in trust for MARGARET AYOTI ATAKA, her administrators and personal representatives (annexed hereto and marked TMA-4 is a copy of the agreement). That the mutated parcel No. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 were and are so held in trust. That the defendants/respondents are entitled to land Parcel No. BUTSOTSO/SHIKOTI/1805 pursuant to the agreement made on 19th July, 2004 (annexed hereto and marked TMA-5 is a copy of the register). That neither BENEDICTOR BAHATI MAKANI nor the defendant herein ever occupied, cultivated or used land parcel Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 to-date. That land Parcel No. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 were in the actual possesses of MARGARET AYOTI ATAKA – deceased until her death and they are currently under the actual possession and use by him and other beneficiaries. THAT the suit parcels of land herein are ancestral and the defendants have no interest whatsoever. That the defendants have made several visits to land parcel Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 with several perspective buyers to whom they intend to sell the suit parcels of land. That the estate of MARGARET AYOTI ATAKA – deceased stand to suffer irreparable loss if the suit parcels of land are transferred to the intended purchasers. That it will be in the interest of justice to preserve the land parcels herein pending the hearing and determination of this suit. That the defendants do not stand to suffer any prejudice whatsoever as the orders sought herein are conservatory in nature

The applicant submitted that in the agreement made on 19th July, 2004 (refer to the annexure marked TMA-4) at paragraph 5 of the supporting affidavit, the deceased was to be registered and hold the suit land only until the plaintiff's mother one MARGARET AYOTI ATAKA, obtained title to Land Parcel No. BUTSOTSO/SHIKOTI/1805 and transfer the same to BENEDICTOR BAHATI MAKANI. There was no time limit for this performance. Quite unfortunately the parties died before the performance. What is also important is that both the plaintiff and the 1st defendant were witnesses to this agreement. They are aware of the contents thereof. It is their submissions that this agreement created a trust whereby the deceased BENEDICTOR BAHATI MAKANI held Land Parcel No. BUTSOTSO/SHIKOTI/1046 and the subsequent mutations, BUTSOTSO/SHIKOTI/3673 and 3674 in trust for MARGARET AYOTI ATAKA and her children, heirs, assigns and administrators. It is on this basis that the plaintiff and his family stayed, occupied and tilled the suit land without any complaint, from either BENEDICTO BAHATI MAKANI or the defendants until recently when the defendant showed intention to dispose off the suit land by sending prospective purchasers to inspect the land. The orders sought are harmless to the defendants. In the replying affidavit sworn by the 1st defendant at paragraph 12, it is averred that they have no intention whatsoever of altering or cancelling any registration on the suit land. This means that they will not suffer any prejudice and or loss at all.

On the other hand, any alterations in the register in the face of this suit will seriously prejudice the plaintiff's position as this will interfere with the status quo as at the time of tiling this suit. In fact the application only seeks to maintain the status quo, peace and tranquility and preserve the titles (subject matter of the suit). If any time has lapsed, then it has run against the defendants since the plaintiff has acquired the suit property by adverse possession. In adverse possession, time only runs against the dispossessed and not the possessed. It is their submissions therefore that the orders sought are merited.

The applicant has a prima facie case with high chances of success. The application meets the conditions for the granting of injunction as set out in the case of of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.**

The respondents submitted that in the application dated the 13th day of July, 2017 in which the applicant sought for interim orders restricting any registration or dealings with land title numbers BUTSOTSO/SHIKOTI/373 and 3674. The grounds for the application are that the respondents are in the process of selling the said parcels of land to other people which sale if not inhibited the stand to suffer irreparable loss.

The principles for granting temporary injunction were clearly set down in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others** where the court set down the three principles as:-

- (a) *The applicant must show a prima facie case with a probability of success;*
- (b) *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;*
- (c) *If the court is in doubt, it will decide an application on the balance of convenience.*

This was enunciated in the Mrao case as follows:-

“..... but as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”

This is the same meaning provided by the Halsbury’s Laws of England, Vol. 11 (2009), 5th Edition, para. 385 which provides it as follows:-

“.....On an application for an interlocutory injunction the court must be satisfied that there is a serious question to be tried. The material available to court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial.” (Emphasis mine)

The applicant has his case pegged on an alleged agreement dated the 19th day of June, 2004, that is, 13 years ago. On it they aver that the deceased father of the applicant held the land title number BUTSOTSO/SHIKOTI/1046 on behalf and in trust for her late mother together with her heirs and personal representatives. The agreement presented, however is meant for the land Title No. BUTSOTSO/SHIKOTI/1805 in which the applicant was given Ksh. 300,000 as part payment for the said land. The applicant was to be given the balance of Ksh. 40,000/= upon getting proper title but up to this time they have failed to do so. Looked at properly one cannot fail to discern that BUTSOTSO/SHIKOTI/1046, as at the time of making the agreement was solely owned and registered in the name of Ali Musa Chibole and as such as per the Land Act he was the only one who had the legal capacity to transact on the said land. Therefore, without that legal capacity there was no trust created as none of the parties had the capacity to act on the land which the applicants herein are laying claim on.

Under section 26 of the Land Registration Act, a certificate of title is the prima facie evidence that the person so named in the certificate is the absolute owner of the land. With the title now the owner has all the proprietorship rights on the land except if found that the title was fraudulently acquired or that the right procedure was never followed in acquiring the title. The section provides as follows:-

- (1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate,*

and the title of that proprietor shall not be subject to challenge, except –

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party;
or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The applicants have never had the opportunity at any single time, be it at the time of the agreement or any other time whatsoever, to have registerable interests on the said parcel of land. Similarly, the respondents herein did not have any registerable interests on the property at the time of the agreement dated 19th day of June, 2004.

There was a Succession process in court vide the **ELDORET HC SUCCESSION CAUSE NO. 465 of 2015** with respect to the estate of the husband and father of the 1st and 2nd respondents respectively. In the matter the respondents successfully obtained letters of administration of the estate of the late Benedicto Bahati and at no time whatsoever known to the court did the applicants ever raise any objection. This therefore only shows their ill will intention of reaping where they did not sow. Having failed to file any objection even after the Succession matter had gone to final determination the only option the applicant has, as per the Law of Succession, is to file a matter before the succession court for revocation of the Grant for maybe having been obtained irregularly. The applicants have failed to do that but have instead chosen this irregular manner to have the matter handled. It is therefore our submission that this application has been passed by events as grant has already been confirmed and the only remedy to the applicant herein lies on her filing an application before the Succession Court.

The respondents are the absolute owners of the said parcels of land and there is no evidence to challenge their ownership. It simply means therefore that they are the ones who are to suffer more if anything happens to their land. The applicant is just an owner by innuendos and presumptions with no evidence whatsoever. Therefore, without any registerable interests on the land and no proof of any ownership the applicant has nothing to lose in this land. If anything it is the respondents who will suffer for being denied the usage of their land which they are the absolute owners thereto. The following paragraph in **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** by Justice Mativo can help further explain this second limb.

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in Halsbury's Laws of England is instructive. It reads:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.”

It is the respondent's submissions that, the applicants will not suffer any irreparable harm and even if there is harm that they will suffer it has not been proven that the said harm cannot be compensated by money by the respondents.

As for the balance of convenience, they relied on the words of Justice Mativo in **Paul Gitonga Wanjau case (supra)**

“..... the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies”

The applicants have no strong case with a probability of success. They submitted that considering the facts of this case in totality, the balance of convenience tilts in favour of the respondents. They pray that the status quo be retained until the determination of this case.

This court has considered the applicant's and the respondent's submissions and the supporting affidavits 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 a finding of fact and is not disputed that the land parcel Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 are registered in the name of BENEDICTOR BAHATI MAKANI were created out of land parcel No. BUTSOTSO/SHIKOTI/1046 (annexed and marked TMA-3(c), 3(c) and 3(c) are copies of the respective green card). The applicant submitted that, vide an agreement made on 19th July, 2004 BENEDICTOR BAHATI MAKANI held land parcel No. BUTSOTSO/SHIKOTI/1046 in trust for MARGARET AYOTI ATAKA, her administrators and personal representatives (annexed hereto and marked TMA-4 is a copy of the agreement). That the mutated parcel No. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 were and are so held in trust. That the defendants/respondents are entitled to land Parcel No. BUTSOTSO/SHIKOTI/1805 pursuant to the agreement made on 19th July, 2004 (annexed hereto and marked TMA-5 is a copy of the register). That neither BENEDICTOR BAHATI MAKANI nor the defendant herein ever occupied, cultivated or used land parcel Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 to-date. That land Parcel No. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 were in the actual possesses of MARGARET AYOTI ATAKA – deceased until her death and they are currently under the actual possession and use by him and other beneficiaries. That the suit parcels of land herein are ancestral and the defendants have no interest whatsoever. That the defendants have made several visits according to the applicant to land parcel Nos. BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674 with several perspective buyers to whom they intend to sell the suit parcels of land. I find that the applicants have established a prima facie cases with chances of success. The applicant has shown that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages. It is not disputed that the respondents are the absolute owners of the said parcels of land, however this application only seeks to maintain the status quo, peace and tranquility and preserve the titles (subject matter of the suit). Besides, in the replying affidavit sworn by the 1st defendant at paragraph 12, it is averred that they have no intention whatsoever of altering or cancelling any registration on the suit land. This means that they will not suffer any prejudice and or loss at all if the said orders were granted. I find this application is merited and grant the following orders;

1. THAT pending the hearing and determination of this suit there be an order restricting and/or inhibiting any registration, dealing with title numbers BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674.

2. THAT pending the hearing and determination of this suit there be an order of injunction restraining the defendants/respondents, their agents, servants and/or employees from cancelling and/or altering any registration on title numbers BUTSOTSO/SHIKOTI/3673 and BUTSOTSO/SHIKOTI/3674.

2. 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 14TH DAY OF DECEMBER 2017.

N.A. MATHEKA

JUDGE