



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KAKAMEGA**  
**ELC CASE NO. 41 OF 2016**

**ALBERT LUSIMBA RAGUE.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**VINCENT MUSUNGU RAGUE.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAKAMEGA)**

**MUSAA STORES.....DEFENDANTS/RESPONDENTS**

**RULING**

This application is dated 24<sup>th</sup> March 2016 and is brought under Section 40 Rule 1 (a) and 2 (1) of The Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent, services thereof be dispensed with and the same be heard exparte in the first instance.
2. That pending the hearing of this application inter parties an order of injunction be issued against the defendants/respondents restraining them either by themselves or through their servants, employees and or agents from alienating, transferring, selling or offering for sale, laying claim to, trespassing onto, developing, constructing on, carrying out any works on, uprooting or destroying the crops and trees on, damaging or demolishing the plaintiffs' buildings and or structures on land parcel No. ISUKHA/SHIRERE/1074 or in any other manner interfering with the plaintiffs/applicants' exclusive and peaceful occupation, possession and or use of the said parcel of land.
3. That pending the hearing and determination of this suit an order of injunction be issued against the defendants/respondents restraining them either by themselves or through their servants, employees and or agents from alienating, transferring, selling or offering for sale, laying claim to, trespassing onto, developing, constructing on, carrying out any works on, uprooting or destroying the crops and trees on, damaging or demolishing the plaintiffs' buildings and or structures on land parcel No. ISUKHA/SHIRERE/1074 or in any other manner interfering with the plaintiffs/applicants' exclusive and peaceful occupation, possession and or use of the said parcel of land.
4. That alternatively the status quo prevailing on the suit land parcel No. ISUKHA/SHIRERE/1074 prior to the institution of this suit be maintained pending the hearing and determination of this suit.

5. That the officer in charge (O.C.S) Kakamega Police Station do supervise, enforce and or oversee the compliance with or enforcement of these orders.

6. Costs of this application be provided for.

The applicants submitted that, the applicants are now over 60 years old. They are the sons of the late Juvenalis Rague (deceased) who died on 27<sup>th</sup> April, 2002. The 1<sup>st</sup> Applicant is also the administrator of the deceased's estate having been granted letters of Administration to the deceased's estate in Nairobi High court succession Cause No. 2971 of 2002 (attach are copies of the Letters of Administration and Certificate of confirmation of Grant marked "ALRI"). At the time the deceased died he was the owner of two pieces of land, ISUKHA/SHIRERE/1073 and ISUKHA/SHIRERE/1074, but ISUKHA/SHIRERE/1074 was still in dispute between the deceased and the defendants (Copies of searches on the two pieces of land are attached and marked "ALR "2a" and "ALR "2b"). The dispute between the deceased and the defendants was handled inter alia before the elders, the office of the President and the Ministry of Lands but by the time the deceased died in 2002, the dispute had not been resolved (Copies of documents related to the dispute are attached and marked "ALR 3"). The applicants were born on these pieces of land and have built their houses on them, raised our children thereon and have buried their kin on the two parcels of land and they still do so. That their father bought land parcel number Isukha/Shirere/1073 from one Nathan Mang'ongo in 1957 before land adjudication. This was a big piece of land and when the process of land adjudication, consolidation and registration was done in the early 1970's, their father was away and a big piece of this land was irregularly and fraudulently hived off and registered in the name of the first defendant for some entity called "MUSAA STORES". However even after registration they have lived on the said land parcel ISUKHA/SHIRERE/1074 and continue to do so. That sometime in March, 2016, certain persons claiming to be officials and agents of the defendants moved into the land and began to demolish houses, crops and other structures thereon with a view to evicting them (Photographs taken of the destruction done are attached and marked "ALR 4"). That they have lived and used this piece of land since they were born and land is theirs. That given that the first defendant is registered as owner of the land for private individuals it is private land to which they have rights of adverse possession because of their very long use and possession of the land without interruption from anyone and they are entitled to be registered as owners of the land in the place of the present registered owners.

The respondents' submitted that, since its first registration in 1973, land parcel No. ISUKHA/SHIRERE/1074 has been the property of its registered owner, the defunct Kakamega County Council and the predecessor to the County Government of Kakamega, and that fact has never been in dispute. Through the first registration, the 1<sup>st</sup> respondent genuinely acquired an indefeasible title incapable of being challenged in a court of law. From the documentary evidence annexed onto the plaintiff/applicants' supporting affidavit, the only disputed issue all along has been the common boundary between land parcel No. ISUKHA/SHIRERE/1073 and land parcel No. ISUKHA/SHIRERE/1074. The office of the president and the Lands Ministry had no jurisdiction to handle land disputes based on allegations of fraudulently acquired titles which may call for cancellation, the same being the preserve of the courts and thus the allegations by the applicants that the dispute over land parcel No. ISUKHA/SHIRERE/1074 was at some point being handled by the elders and the two offices above are unfounded. The applicants have been living on land parcel No. ISUKHA/SHIRERE/1074 unlawfully as trespassers, having declined to give vacant possession to the land's rightful owner and therefore cannot cite their unlawful act of trespass as a basis for laying claim to the land. Both land parcels No. ISUKHA/SHIRERE/1073 and ISUKHA/SHIRERE/1074 have existed as distinct titles registered in distinct names since their simultaneous creation on 4<sup>th</sup> May, 1973 as confirmed by the certificates of official search annexed to the applicants' supporting affidavit and it is not possible that land parcel No. ISUKHA/SHIRERE/1074 was hived from land parcel No. ISUKHA/SHIRERE/1073. Since acquisition and registration of land parcel No. ISUKHA/SHIRERE/1074 in the 1<sup>st</sup> respondent's name in 1973, the applicants have knowingly lived on the land as trespassers and cannot now cry foul when the rightful owner of the land claims it for use as it deems fit. Being the registered owner of land parcel No. ISUKHGA/SHIRERE/1074, the 2<sup>nd</sup> respondent has every right to deal in the land in any manner it considers beneficial to the public in whose trust it holds the land, including the applicants herein.

Despite the applicants living on the suit land since birth, any iota of claim they may have entertained over the land was extinguished upon the land's acquisition and registration in the respondent's name in 1973 and the subsequent unlawful trespass by the applicants on the land cannot confer ownership or proprietary rights upon them as against the registered owner, the 1<sup>st</sup> respondent herein. The applicants have no prima facie case with chances of success as they have nothing to demonstrate that the suit land has ever belonged to them save for their ungrounded allegations that the respondents defrauded them of the land. The court should consider the 1<sup>st</sup> respondent as the absolute and indefeasible owner of land parcel NO. ISUKHA/SHIRERE/1074 as stipulated by section 26 (1) of the Land Registration Act No. 3 of 2012, since the applicants have not demonstrated that the 1<sup>st</sup> respondent acquired the title fraudulently, illegally, unprocedurally or through misrepresentation. The honourable court should therefore decline to grant the applicants the orders sought as the same will serve to delay the 1<sup>st</sup> respondent's plans to develop the land for the benefit of the residents of Kakamega County and the public at large in whose trust the land is held.

This court has considered the Applicant's and the Respondents' submissions and the supporting affidavits therein. The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

*"The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."*

Furthermore, as elaborated in the case of **Mrao Ltd vs. first American Ban of Kenya Ltd & 2 others {2003}** Hon Bosire J.A. held that:

*"So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter ....."*

Further he goes on to state that *"..... a prime 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 the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

The application is supported by the following principal grounds; the plaintiffs live and have lived on land parcel number ISUKHA/SHIRERE/1074 since the 1950's when they were born and have built permanent houses thereon and have tilled and buried and interred their kin and relatives thereon without interruption from anyone. The said land was owned and occupied by the plaintiffs' father, Juvenalis Rague who likewise lived on the land throughout until he died in the year 2002 and was buried thereon. The said land is private land which had previously been purchased by the plaintiffs' said father before land adjudication, consolidation and registration in the year 1973 but the land was fraudulently registered in the first defendant's name as trustee for an entity called MUSAA STORES (the second defendant) in order to defraud the plaintiffs and their father of the land. The subject land has been the subject of disputes between the plaintiffs' father and the first defendant before the elders, the office of the president and the Ministry of Lands but which issue had not been resolved by the time the deceased died in the year 2002. Recently certain persons claiming to be agents and officials of the first defendant moved on the land and started destroying buildings, structures and crops thereon with the intention of evicting the plaintiffs from the land and have vowed to do so. That unless restrained by this court, the defendants and their agents will destroy the plaintiffs' crops and buildings and evict the plaintiffs from the land and possibly in the process a breach of the peace or even death may occur which will occasion the plaintiffs/applicants irreparable loss, hardship and damage and negate this suit.

The respondents' submitted that, since its first registration in 1973, land parcel No. ISUKHA/SHIRERE/1074 has been the property of its registered owner, the defunct Kakamega County Council and the predecessor to the County Government of Kakamega, and that fact has never been in

dispute. The applicants have been living on land parcel No. ISUKHA/SHIRERE/1074 unlawfully as trespassers, having declined to give vacant possession to the land's rightful owner and therefore cannot cite their unlawful act of trespass as a basis for laying claim to the land. Both land parcel No. ISUKHA/SHIRERE/1073 and land parcel No. ISUKHA/SHIRERE/1074 have existed as distinct titles registered in distinct names since their simultaneous creation on 4<sup>th</sup> May, 1973. From the situation on the ground I find the the applicants' have raised a prima facie case with triable issues it is not in dispute that they have lived on the land prior to 1973 and this is not in dispute. I find this application has merit and I grant the following orders;

1. That the status quo prevailing on the suit land parcel No. ISUKHA/SHIRERE/1074 prior to the institution of this suit be maintained pending the hearing and determination of this suit.
2. That the officer in charge (O.C.S) Kakamega Police Station do supervise, enforce and or oversee the compliance with or enforcement of these orders.
3. Costs of this application be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 13<sup>TH</sup> DAY OF DECEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**