



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 551 OF 2014(OS)

**ALI NYASIRI JUMA (Suing in his capacity as the legal and
personal representative of the estate of the late**

JOHN JUMA MUSUNGU (Deceased).....APPLICANT

VERSUS

**GLADYS MUKA MANGO (being sued as the legal and personal
representative of the estate of the late**

MANGO MUKA a.k.a. MUNITSIA (Deceased).....RESPONDENT

RULING

This application is dated 3rd February 2015 and is brought under Section 3,3A of the Civil procedure Rules, Section 76 of the Land Registration Act, Order 40 Rule 1(a) and (b) of the Civil Procedure Rules and seeks the following orders;

1. That service of this application be dispensed with in the first instance.
2. That this application be heard exparte in the first instance.
3. That this application be certified as urgent and the same be heard on priority basis.
4. That pending the hearing and determination of this application the respondent herein by himself, authorized agents, assignees and or any persons claiming through him be restrained by way of a temporary injunction from evicting, demolishing the plaintiff's house, ploughing, cultivating on, planting on, dealing, constructing on, fencing off, alienating, leasing off, surveying, selling, demarcating, wasting or disposing off or in any way interfering with the applicant's portion of 3 acres in land parcel number North Wanga/Mayoni/503.
5. That pending the hearing and determination of this suit the respondent herein by himself, authorized agents, assignees and or any persons claiming through him be restrained by way of a temporary injunction from evicting, demolishing the plaintiff's house, ploughing, cultivating on, planting on, dealing, constructing on, fencing off, alienating, leasing off, surveying, selling, demarcating, wasting or disposing off or in any way interfering with the applicant's portion of 3 acres in land parcel number North Wanga/Mayoni/503.

6. And in the event the respondent or any of his servants disobeys the orders sought in prayer 4 and 5 above the O.C.S. Mumias Police Station or officers serving under him, officers serving under the Provincial Administration Mumias Sub County or any officers under their command or any officers or personnel authorized by law to be ordered to ensure that the orders herein are complied with or executed.

7. That the respondents be compelled to pay the costs of this application.

The application is supported by the annexed affidavit of ALI NYASIRI JUMA the applicant and other grounds and on the following grounds; that this suit which is subject matter of land reference number North Wanga/Mayoni/503 is still pending for hearing and final disposal in this court. That the respondent is intending to dispose off, constructing on, survey, demarcate, alienate, sale off, lease off, plough, plant on and or waste the suit land at the applicant's expense. That the respondent has stopped the applicant from using the said land and his home found on the said land and is attempting to fully evict him and it is proper that the respondent be restrained by way of a temporary injunction from any interference until this application together with the main suit is determined. This application is brought in good faith, timeously and the same shall not prejudice the respondents.

On 21st March 2016 the Defendant/Respondent strongly opposed the plaintiff/applicant's application dated 3rd February 2016 by way of a replying affidavit dated 21st March 2016 and duly filed on 22nd March 2016. The respondent contends that the suit land is jointly registered in her name and those of her younger brother BENARD MUKA MANGO having obtained title of the same on 16th February 2013 upon pursuing and obtaining grant of letters of administration intestate in Kakamega HC Succession Cause No 403 of 2009 in respect of the estate of the respondent's late father MANGO MUKA who died on 9th May 1999.

The respondent states that she is a stranger to the allegations made by the applicant regarding any sale agreement between the late John Juma Musungu and her deceased father having disposed off a portion of land measuring 2.0 acres to the applicant's father vide any written agreement or that the applicant's father purchased an additional one acre during his lifetime from one Hudson Chitayi. The respondent denies that the applicant took possession of the portion of land measuring 3 acres or thereabouts in or about 1993 or 2008 as alleged. It is within the respondent's knowledge that the applicant has never occupied a portion of the suit land for over a period of 12 years and that the applicant herein only attempted to forcibly enter into a portion of the said land measuring less than 1 acre in 2013 when the respondent herein stopped him. The respondent contends that she has been occupying and utilizing the said suit land since her father passed on, exclusively without any objection from the applicant or any other person.

That the applicant's application herein is laced with falsehoods and that at no time has the applicant ever been in actual occupation of the suit land which has ever been peaceful, continuous, open and uninterrupted for over a period of 12 years since 2013 when the applicant herein wanted to forcibly take possession of a portion of the suit land its acreage being uncertain but the respondent herein stopped him nonetheless. The portion of land being claimed by the applicant was sold to JUMA OMOTO IBRAHIM, ABDULAH LUBISIA IBRAHIM and AUBAKAR ABUTI IBRAHIM vide land sale agreement made on 9th September 2012 and that they had already taken possession of the same and proceeded to extensively develop the said portion of land in total exclusion of the applicant herein. The said purchasers have fully taken possession and even constructed their homes thereon and in actual possession and utilization of the suit land. The respondent herein contends that the applicant's application is unmeritorious since the same is overtaken by events as the orders sought are in vain as the position on the ground has since changed completely. The respondent further contends that this Honourable Court cannot issue orders in vain rather the court can only grant an order of status quo pending hearing and final determination of the substantive suit.

The respondent submitted that, the applicant has failed to demonstrate the requirements of granting injunctions and thus the applicant's application dated 3rd March 2015 should be dismissed with costs. The respondent puts it to the applicant that his application dated 3rd February 2015 is not urgent as alleged as

the photographs annexed to the aforesaid application were taken way back on 14th October 2015 a period of more than six months when the purchasers were just about to complete construction of their houses and indeed the original title was changed into the names of the purchasers. The respondent contends that the delay in bringing the instant application is inordinate and inexcusable and that the same ought to be dismissed with costs. The respondent further states that the said purchasers have not been enjoined to the suit herein and that any order made may affect them thus they may be condemned unheard.

This court has considered the applicant's and the respondent's submissions, affidavits and annexures therein. This application 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 plaintiff/applicant herein in his application dated the 3rd February, 2016 is claiming against the defendant several orders as pleaded in his originating summons filed in this court on 8th October, 2014 on land reference number North Wanga/Mayoni/503. In his supporting affidavit filed together with the said main suit/originating summons after purchase of the suit land his father was given consent by the defendant's father to enter and occupy the said land pending the issuance of title document in his father's names and the plaintiff's family was in actual possession and use of the said title until in the year 2013 when interference started to date. The application herein is premised on the grounds and reasons on the face of the said application and supporting affidavit of the applicant dated the 3rd February, 2016. The applicant in his lengthy supporting affidavit states that he is the son, legal and personal representative of the estate of the late John Juma Musungu deceased. He has annexed a copy of a grant of letters of administration ad litem and death certificate. He states that the defendant/respondent is being sued also as the legal personal representative of the estate of the late Mango Munitsia deceased and similarly she was sued as the current registered owner of land parcel number North Wanga/Mayoni/503 which she acquired by virtue of a certificate of a confirmed grant issued to her in Kakamega High Court P & A Succession cause Number 403 of 2009. He annexed copies of a green card and an official search for the suit land in his supporting affidavit as exhibit ANJ 2. It is averred that the suit land herein initial registered person is the father of the respondent the said Mango Munitsia deceased and it measures approximately 7.5 acres or thereabout annexed is an official search to support this fact as exhibit ANJ 3. That after a mutual understanding between his late father and the respondent's late father and by written agreements and undertakings dated the 27th June 1993, 28th August 1993, 22nd December 1993, 22nd May 1994, 12th March 1995 and 9th May 1995 the respondent's father agreed and sold to his father a portion of land measuring 2 acres at an agreed sum of Kshs.43,000.00 which portion was to be created or excised from land parcel number North Wanga/Mayoni/503. A bundle of the said agreements and certificates of transaction from Luhya-Wanga language directly into English have been annexed on his affidavit in support for consideration and marked as ANJ 4. That the applicant's father paid a total sum of Kshs.42,500.00 being the deposit of purchase price whereof the balance of Kshs.500.00 was to be paid to the respondent's father upon signing the relevant documents pursuant to registration and transfer of land in the names of the applicant's father. That the applicant's father was by the consent of the respondent's father given vacant possession of the said 2 acres and during his lifetime the applicant's father and his family members were in peaceful occupation and use uninterrupted continuously for a period of about 20 years until the year 2013 or thereabout when interference started by the respondent.

That further by another agreement in the year 2008 the applicant's father bought another portion of 1 acre

from one Hudson Chitayi Kasanya who had purchased it from the respondent's deceased father on the 15th March 1999 at an agreed sum of Kshs.100,000.00 which was fully paid in full an final payment an agreement dated the 15th March 1999 is annexed as exhibit ANJ 5 of the supporting affidavit dated the 3rd February 2016. During the sale of the said portion the respondent who was well aware that his father had relinquished his interest in said portion which was to be created from the same suit title never made any objection.

The applicant submitted that respondent including her family members were never in use of the suit portion now totaling to 3 acres. This fact is supported by the applicant's exhibit ANJ 6 of the supporting affidavit being the chief's letter dated the 17th September, 2013. At the time the applicant was coming to court, he stated that his father's portion in the title herein was well demarcated on the ground with boundary features and beacons to distinguish the same from other portions adjacent to it in the same title and had farmed various food crops and cash crops on the said farm which included maize, cassava, sweet potatoes and sugarcane. According to the applicant and in his supporting affidavit of the application herein it was within his knowledge and mutual understanding that the respondent who is the daughter had to file succession papers and include his mother Mwanahawa Mola Juma on behalf of his family as beneficiary on behalf of the family of his late father to register and transfer 3 acres to them but unfortunately she also passed on before that could be done. This is an issue supported by her death certificate and the chief's letter dated the 24th December 2010 referred to as exhibits ANJ 7a.

In the month of July, 2013 accordingly the applicant impressed upon the respondent herein to take out letters of administration of his father so that she may transfer the 3 acres to his family as purchasers of value but he found out that the said land had already been administered and transferred and registered in the names of the respondent. The land had been administered and transferred in the names of the respondent via the Kakamega High Court probate and Administration Succession Cause number 403 of 2009.

The applicant was not aware of the going succession cause and when he sought advice he was advised to bring the suit before court in which his application is premised. That in view of the fact that the respondent was aware that the applicant had purchaser's interest started disposing off the same portion to 3rd parties prompting the provincial administration to intervene to protect his interest. The said land is in danger and according to the applicant since the respondent has invaded part of the applicant's portion and is now forcefully constructing and erecting structures on it. Coloured photographs taken at the scene of the disputed portions have been annexed and marked as exhibits ANJ 10. It is the applicant's case that after a mutual understanding between his late father and the respondent's late father and by written agreements and undertakings dated the 27th June 1993, 28th August 1993, 22nd December 1993, 22nd May 1994, 12th March 1995 and 9th May 1995 the respondent's father agreed and sold to his father a portion of land measuring 2 acres at an agreed sum of Kshs.43,000.00 which portion was to be created or excised from land parcel number North Wanga/Mayoni/503.

It is the respondents case that the suit land known as N. WANGA/MAYONI/503 is jointly registered in her name and those of her younger brother BENARD MUKA MANGO having obtained title of the same on 16th February 2012 upon pursuing and obtaining Grant of Letters of Administration Intestate in KAKAMEGA HC. SUCCESSION CAUSE NO. 403 of 2009 in respect of the estate of our late father Mango Muka who died on 9th May 1999. That she a stranger to the allegations made by the Applicant regarding any land sale agreement between the late John Juma Musungu and her deceased father having disposed off a portion of land measuring 2.0 acres to the Applicant's father vide any written agreement of the Applicant's father purchased an additional one acre during his lifetime from one Hudson Chitayi. That the Applicant took possession of the portion of land measuring 3 acres or thereabouts in or about 1993 or 2008 as alleged. That the Applicant herein has never occupied a portion of the suit land for over a period of 12 years and he attempted to forcibly enter into a portion of the said land measuring less than 1 acre in 2013 but they stopped him. They have been occupying and utilizing the said suit and since their father passed on exclusively without any objection from the Applicant or any other person.

Be that as it may, I find that the applicant has produced documentary evidence alleging that respondent

including her family members were never in use of the suit portion now totaling to 3 acres. This fact is supported by the applicant's exhibit ANJ 6 of the supporting affidavit being the chief's letter dated the 17th September, 2013. The applicant has shown that the said land is in danger and according to the applicant since the respondent have invaded part of the applicant's portion and now forcefully constructing and erecting structures on it. Coloured photographs taken at the scene of the disputed portions have been annexed and marked as exhibits ANJ 10. I find that the applicant 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. The application has merit and I grant the following orders;

1. That the status quo – the applicants use/occupation of the portion of land parcel number North Wanga/Mayoni/503 be maintained pending the hearing and determination of this suit.
2. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 13TH DAY OF DECEMBER 2017.

N.A. MATHEKA

JUDGE