



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 264 OF 2017**

**ROSILAN AMISI ATWOLI )**

**WILSON MUKHWANA ATWOLI ):::PLAINTIFFS/APPLICANTS**

**VERSUS**

**ALFESTUS MULWALE MATIKA:::DEFENDANT/RESPONDENT**

**RULING**

This application is dated 24<sup>th</sup> July 2017 and is brought under Section 1A, 1B, 3A and 5 of the Civil Procedure Act Cap 21, and under Order 51 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified as urgent and be heard ex parte in the first instance.
2. THAT an order of temporary injunction do issue restraining the defendant by himself, his agents, servants or any other person acting through the defendant's instructions from trespassing, re-surveying, transferring and disposing/selling all that parcel of land known as W/BUNYORE/EMUSIRE/998 all situated at Luanda within Vihiga County pending the hearing and determination of this application.
3. THAT an order of temporary injunction do issue restraining the defendant by himself, his agents, servants or any other person acting through the defendant's instructions from trespassing, re-surveying, transferring and disposing/selling all that parcel of land known as W/BUNYORE/EMUSIRE/998 all situated at Luanda within Vihiga County pending the hearing and determination of this suit.
4. Any other relief that this honourable court deems fit.
5. THAT the costs of this application be borne by the respondents.

The applicants submitted that, they are the legally appointed administrators of the deceased's estate. The said deceased's estate in particular comprises of a portion of land that is consolidated and encroached in all that parcel of land known as W/BUNYORE/EMUSIRE/998 belonging to the defendant and the deceased in equal halves but wholly registered in the defendant's name. Annexed and marked RAA1 is a copy of the limited grant issued to them. That there were proceedings before the Luanda Land Disputes' Tribunal and at the Principal Magistrate's Court at Vihiga all instituted by the deceased reclaiming his portion of land that is consolidated in the defendant's parcel of land known as W/BUNYORE/EMUSIRE/998 and registered in his (defendant's) name (Annexed and marked RAA2 are certified copies of the proceedings at Luanda Land Dispute's Tribunal). The deceased's interests in a portion of all that parcel of land known as W/BUNYORE/EMUSIRE/998 existed courtesy of him having

lived and used it before the Land Adjudication and Registration of 1964 a verdict heard and upheld by the Luanda Land Dispute's Tribunal. That the defendant later, arbitrarily, maliciously, fraudulently and without any justification in law proceeded to register the subject suit parcel of land entirely in his name which provoked the abovementioned proceedings above but the deceased passed on before anything had materialized (Annexed and marked RAA3 are certified copies of death certificate, a current search of the land and certified typed proceedings at the Principal Magistrates' Court at Vihiga).

The actions by the defendant to register the whole portion in his name were purely unwarranted and fraudulent and must have included non disclosure of facts to the registrar as he well knew of the tribunal's decision to have the parcel in dispute surveyed and subdivided into two equal halves between the deceased and himself. It is not worthy that he even discounted the true measurements of the whole parcel of land I question. That the beneficiaries of the deceased's estate are likely to lose our portion encroached and is consolidated in the defendant's parcel of land as the defendant has also violently chased them from it and has threatened to harm anybody who steps in it contrary to the decision arrived at the Luanda Land Disputes' Tribunal of sub-dividing it into two, unless this honourable court intervenes.

That unless the defendant/respondent is restrained by this honourable court's injunction order, he may proceed to transfer and/or sale the suit parcel of land and the beneficiaries of the deceased's estate will suffer irreparable loss and damages as a result as we will lose our portion of land to a third party. That no prejudice whatsoever or at all shall be visited upon the defendant/respondent if the orders sought are granted save that the issue shall be determined once and for all before this honourable court. That it is in the wider interest of justice and all fairness that my application herein be allowed.

This court has carefully considered the applicants' submissions and the annexures therein. The respondent was served but failed to attend court or file any papers in opposition. 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 plaintiffs/applicants' application is based on the grounds that the plaintiffs/applicants are the legally appointed administrators of the deceased whose portion of land is consolidated and encroached in all that parcel of land known as W/BUNYORE/EMUSIRE/998 partly belonging to the defendant but wholly registered in his (defendant) name. That there were proceedings before the Luanda Land disputes' Tribunal and at the principal magistrate's Court at Vihiga all instituted by the deceased reclaiming his portion of land that is consolidated in the defendant's parcel of land known as W/BUNYORE/EMUSIRE/998 and registered in his name. That the defendant later, arbitrarily, maliciously, fraudulently and without any justification in law proceeded to register the subject suit parcel of land entirely in his name which provoked the abovementioned proceedings but the deceased passed on before anything had materialized. I find that the applicants/plaintiffs and the beneficiaries of the

deceased's estate are likely to lose their portion encroached and is consolidated in the defendant's parcel of land as the defendant has also violently chased the deceased heirs from it and has threatened to harm anybody who steps in it contrary to the decision arrived at the Luanda Land disputes' Tribunal of subdividing it into two, unless this honourable court intervenes. That unless the defendant is restrained by this honourable court's injunction order, he may proceed to transfer and/or sale the suit parcel of land and the applicants together with the other beneficiaries of the deceased's estate will suffer irreparable loss and damages as a result as they will lose their portion to a third party. This application is not opposed. I find that the applicants have shown a prima facie case with a probability of success. I find the application has merit and grant the following orders;

1. THAT an order of temporary injunction do issue restraining the defendant by himself, his agents, servants or any other person acting through the defendant's instructions from trespassing, re-surveying, transferring and disposing/selling all that parcel of land known as W/BUNYORE/EMUSIRE/998 all situated at Luanda within Vihiga County pending the hearing and determination of this suit.

2. THAT the costs of this application be borne by the respondents.

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**