



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 55 OF 2015

SYLVESTER OKUMU.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

AND

EDWARD OSALO2ND DEFENDANT

CAROLINE AKINYI KHAGONDI (Being the Personal Representative of

ERYA KHANGODI (Deceased).....3RD DEFENDANT

JOHN JUMA OGALE AND FLORENCE AUMA JUMA (Being the

Personal Representatives of JUMA OGALE (Deceased)....4TH DEFENDANT

BENJAMIN OGALE (Being the Personal Representative of

DONATI OGALE (Deceased) 5TH DEFENDANT

JONAY OJIAMBO 6TH DEFENDANT

LAND REGISTRAR, BUSIA7TH DEFENDANT

THE BOARD OF TRUSTEES OF ST. MARKS

BUKIRI MIXED SECONDARY SCHOOL8TH DEFENDANT

STANLEY OMALA NASOGA9TH DEFENDANT

R U L I N G

1. The application before me is a Notice of Motion dated 28/4/2017 filed here on the same date. The

application is brought under Section 3A of Civil Procedure Rules (sic) (should be Civil Procedure Act) and the Applicant – **STANLEY NASONGA OMALA** – is seeking the following orders against the Respondent – **SYLVESTER OKUMU**.

Prayer 1: Spent

Prayer 2: The entries in the register made on 7/2/2000 on land parcel

No. **SAMIA/BUDONGO/1790** be revoked and/or annulled.

Prayer 3: Costs of this application be provided for.

2. According to the Applicant, the Respondent is in the process of transferring the land to third parties. It is alleged too that the orders leading to that entry have since been set aside and that the entry prejudices the Applicant and has, in any case, been overtaken by events.

3. The Applicant alleged that the transfer of the land to the Respondent was done pursuant to orders issued in HCCC No.6695/92, Nairobi, but that was done in error because the order related to parcel Nos SAMIA/BUDONGO/241, 244, 245, 246 and 1684 and not SAMIA/BUDONGO/1790. It was alleged too that that order was at any rate set aside by the court on 6/5/2014.

4. The Respondent replied vide a replying affidavit dated 15/5/2017 and filed on 17/5/2017. According to the Respondent, the transfer was done legally and pursuant to the right procedure. And that happened before the orders were set aside.

5. The Respondent further averred that the setting aside of the orders was not done at the instance of the Applicant and he cannot therefore seek to enjoy its benefits. The Respondent denied that he intends to transfer the land to third parties. He faulted the Applicant for failing to provide evidence to that effect. Ultimately, the Respondent expressed the position that what the Applicant is seeking for via his application needs to be granted, if at all, after full hearing and determination of the suit.

6. On 3/10/2017, it was agreed that the application be canvassed by way of written submission. This is a matter with one Plaintiff, who is Respondent, and about 9 Defendants. The application herein was filed by the Applicant who is the 9th Defendant. It is perhaps because of this that the only submissions filed are by the Applicant (9th Defendant) and the Respondent (Plaintiff).

7. The Applicant's submissions were filed on 7/11/2017. The submissions give a highlight of the background to the matter and also some history. The rest of the submissions consists of a rendition of what is contained in the application.

8. The Respondent's submissions were filed on 3/11/2017. According to the Respondent, the nature of the orders sought, the approach taken to secure the orders, and the law invoked to anchor the application, were all wrong. He reiterated that the orders sought require canvassing of evidence in a suit. In a large measure, the Respondent's submissions restate what the replying affidavit contain. The Respondent asked the court to be guided by the decision of the court in **IDDI IBRAHIM & Another vs AINSLEY LEVERATAIT DOPWELL & 2 Others [2016] eKLR** where the court expressed the view that the type of orders sought in that case, which were generally similar to the ones sought herein, require the filing, hearing and determination of a full suit.

9. I have considered the application, the response made, and the rival submissions. The suit herein is essentially about ownership of various parcels of land and is still unheard and undetermined. The order sought in the application is essentially about that ownership. The Applicant would argue that parcel No. 1790 was not part of the parcels in the suit as earlier filed but it needs to be appreciated that parcel No. 1684 was, and parcel No. 1790 was a latter subdivision of parcel No. 1684.

10. It is not possible to grant the order sought without upsetting the Status Quo. I agree with the

respondent that the nature of the order requires the hearing and determination of the suit. The court would be rash to rush to issue an order touching on ownership when the main suit is still pending hearing. I agree with the position of the court in IDDI's case (Supra). There are simply some kind of orders that a competent court of law should not issue on the basis of an interlocutory application. The order sought herein is one such order. In my view, a caution, inhibition, or an order of restriction are, if merited, appropriate to address the Applicant's fears.

11. But the Applicant seems to think that the court can sanction a reversal of existing ownership on the basis of a simple application. How wrong he is!

12. It is in light of the foregoing that I find the application herein unmeritorious and dismiss it with costs.

Dated, signed and delivered at Busia this 24th day of January, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendants:

Counsel of Plaintiff:

Counsel of Defendants: