



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 28 OF 2015**

**LUCAS OUMA MABACHI.....1<sup>ST</sup> PLAINTIFF**

**HENRY GABRIEL MABACHI.....2<sup>ND</sup> PLAINTIFF**

**MASIGA OKUMU JAMES LEMMY ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**THE LAND REGISTRAR .....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**BENJAMIN OKELLO SEMBE..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 29/1/2018 filed in court on the same date, the Applicant – **BENJAMIN OKELLO SEMBE** – seeks restraining orders against the Respondents – **LUCAS OUMA MABACHI, HENRY GABRIEL MABACHI** and **MASIGA OKUMU JAMES LEMMY** – all of whom he accuses of interfering with his land parcel L.R. No. SAMIA/LUCHULULO-BUKHULUNGU/225 (hereafter “disputed land”). The Applicant is the 3<sup>rd</sup> Defendant in the suit while the Respondents are the Plaintiffs.

2. The application is brought under Order 40 of Civil Procedure Rules and Section 3A of Civil Procedure Act (cap 21). It has four (4) prayers but prayers 1 and 2 are now moot, having been dealt with at the ex parte stage. For consideration at this stage therefore are prayers 3 and 4, which are as follows:

Prayer 3: That a temporary injunction do issue restraining the Respondent whether by himself, agents, and/or any other persons acting through him from constructing a house or any structure, cutting trees and/or in any other manner interfering with the Applicant’s peaceful occupation of L.R. No. SAMIA/LUCHULULO-BUKHULUNGU/225 pending hearing and determination of the suit.

Prayer 4: That the costs of the application be provided for.

3. The Applicant averred that he is the registered owner of the land and said the Respondents are constructing on it. He alleged that he will suffer irreparable injury. And in the supporting affidavit that came with the application, the Applicant deponed, *inter alia*, that the Respondents invaded the disputed land on 27/1/2018 and started clearing ground for construction. Thereafter, they brought construction materials and commenced construction.

4. The Respondents replied vide a replying affidavit filed on 1/3/2018. To the Respondents, the disputed land has not always been 3<sup>rd</sup> Defendant’s land. It was first and foremost their own father’s land and, upon death of the father, became their very own entitlement by inheritance. According to the Respondents, the Applicant became registered owner of the disputed land illegally and/or fraudulently.

5. The deposition shows too that there have been various other disputes concerning the disputed land. And there was no invasion of land as alleged, the Respondents having lived on the land all along. There was, it was deponed, an application like this one in PMCC No. 318 of 2008, which was heard and dismissed.

6. The application was canvassed by way of written submissions. The Applicant’s submissions were filed on 24/5/2018. According to the Applicant, the strength of his application is that he is the registered owner of the disputed land. The Respondents’ submissions were filed on

8/5/2018. It was reiterated that the disputed land belonged to the Respondents' father. The 1<sup>st</sup> Respondent was born on it and he lives there still with his mother.

7. Further, it was submitted that the orders sought are unmaintainable, defective, hinged on nothing, and are hanging in the air. It was submitted that it is the Respondent who sued. The Applicant is merely defending the suit. He therefore has no *prima facie* case to demonstrate. This court was urged to take a similar position as it took in the case of **JARED ANYIKA ETYAKORO & 6 others Vs CHRISTINAN WAFULA OMUSOLO & 3 others: ELC No. 35 of 2016, BUSIA**, where the court dismissed an application for restraining orders for reasons, *inter alia*, that the Applicant could not demonstrate a *prima facie* case as he was the one sued and therefore had no suit with a probability of success.

8. The Applicant was also said to have failed to establish the other requirements set by the celebrated case of **GIELA VS CASSMAN BROWN & CO. LTD: [1973] EA 358**. The two other requirements involve demonstration of likelihood to suffer irreparable harm and, if necessary, consideration of balance of convenience. The case of **PAUL GITONGA WANJAU Vs GATHUTHI TEA FACTORY COMPANY LTD & others [2016] eKLR** was cited for the proposition that the onus is on the Applicant to satisfy the court that it should grant an injunction.

9. I have considered the suit as filed, the application, response made, and rival submissions. When this application came before me *ex parte* on 30/1/2018, I granted a temporary restraining order. At the time, and as it is manifest in the proceedings leading to the grant of the order, the main consideration was that the respondents had just invaded the land and started some construction. I had no benefit at all of the information later availed by the Respondents in response to the application. It now turns out that there was no such invasion. The Respondents had all along been on the land. That is where they live and that is where they derive a living from.

10. It appears clear that the allegation of recent invasion was a ruse or a dishonest stratagem meant to persuade the court to grant the order. Well, the stratagem worked at the time but the dishonesty that now emerges deals a fatal blow to the application. In **THATHY Vs MIDDLE EAST BANK (K) LTD & Anor [2002] IKLR 595**, Ringera J. (as he then was) held, *inter alia*, that an injunction is an equitable remedy and the court may decline to grant the same if it is shown that the Applicant's conduct pertinent to the subject matter of the suit does not meet approval of a court of equity.

11. And in **B Vs Attorney General [2004] IKLR 431**, Ojwang J (as he then was) held, *inter alia*, that once a court is satisfied that an Applicant had obtained an order by concealing other relevant material, the court is entitled not to consider the applicant's application any further for courts must be able to protect themselves from parties who are prepared to deceive. In the application at hand, the Respondents averred that they live on the land. They also mentioned various other cases they have had with the Applicant concerning the disputed land. One such case is PMCC No. 318/2008 where the Applicant testified as PW1. In the Applicant's testimony in the case, he is shown saying, *inter alia*, that the 1<sup>st</sup> Respondent herein – LUCAS OUMA MABACHI – was born on the land. When the said Lucas therefore says that he lives on the land with his mother, that sounds credible. But when the Applicant alleges that the same Lucas had invaded the land in January 2018, that sounds outright dishonest. On this score alone therefore, the court would be justified to dismiss the application.

12. But I think it is also necessary to respond to the Applicant's averment that he is entitled to injunction because he is the registered owner of the land. This much should be known by the Applicant: Registered ownership is only as good as the legality of the process that attended its procurement. Stated differently, if the process leading to registration of ownership does not meet the threshold of legality, such ownership would not automatically entitle you to injunctive relief.

13. In this particular case, the Applicant's title is under challenge. Yet that is the very title he brandishes as instrument of conclusive ownership. In **MUNYU MAINA Vs HIRAM GATHIMA [2013] eKLR**, the Court of Appeal held, *inter alia*, that where a registered proprietor's title is under challenge, it is not enough to dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances. In this case itself, the crux of the matter revolves around the acquisition of title by the Applicant. It is therefore fallacious for the Applicant to assume that possession of the title *per se* carries with it overriding merits entitling him to the remedy of injunction.

14. I think it is also useful to add that the Respondents responded to the application rather well. The response contains a factual premise and a legal exposition that easily displaces the Applicant's arguments. For instance, it was easily shown that the Applicant had made a similar application in PMCC No. 318/2008, BUSIA which was dismissed. He has now come up again with this application. AND WITH LIES.

15. The upshot is that the application herein is found unmeritorious and the same is hereby dismissed with costs.

**Dated, signed and delivered at Busia this 26<sup>th</sup> day of July, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff: .....

2<sup>nd</sup> Plaintiff: .....

3<sup>rd</sup> Plaintiff: .....

1<sup>st</sup> Defendant: .....

2<sup>nd</sup> Defendant: .....

3<sup>rd</sup> Defendant: .....

Counsel of Plaintiffs.....

Counsel of Defendants.....