REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ELC. NO. 54 OF 2015 (O.S)

IN THE MATTER OF THE SECTIONS 37 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA AND IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVILPROCEDURE RULES

GEORGE ODUYA NACHIBWETE.....PLAINTIFF/APPLICANT

VERSUS

PROTUS OGOLA SITAWA.....1ST DEFENDANT/RESPONDENT

CHARLES OMONDI ONYANGO.....2ND DEFENDANT/RESPONDENT

MATHEW ODUORI SIMALI.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff herein – **GEORGE ODUYA NACHIBWETE** – filed an originating summons here against the three defendant – **PROTUS OGOLA SITAWA, CHARLES OMONDI ONYANGO** and **MATHEW ODUORI SIMALI** – on 22nd May, 2015 claiming land parcels Nos. L.R. NO. MARACHI/KINGADOLE/1395 and 1490 by or through adverse possession.

2. Together with the originating summons was also filed a Notice of motion seeking, interlia, some temporary restraining orders. The application has four (4) prayers but prayers 1 and 2 are moot at this state, having been meant for consideration at an earlier stage. For consideration therefore are prayers 3 and 4. The said prayers are as follows:

> Prayer 3: That this honourable court be pleased to restrain the defendants/Respondents from evicting the plaintiff/Applicant and/or interfering either by themselves, their agents, servants, employees, representatives and/or assignees with plaintiffs peaceful possession and occupation of the suit property known as L.R. NO. MARACHI/KINGADOLE 1395 MARACHI/KINGADOLE 1490 pending hearing and determination of this suit.
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> Prayer 4: That the costs of this application be provided for.

3. The narrative that emerges from the application is that the plaintiff bought suit property way back 1987. He bought the properties from the late Francis Oduori. The process of transferring the properties to

the plaintiff seems to have started but the seller died when the process was still incomplete.

4. Later, the plaintiff tried to follow up on the issue of the registration. He discovered that 1st and 2nd defendants, who are the administrators of the seller's estate, had transferred parcel NO. 1490 to 3rd defendant. Parcel NO. 1395 had also been transferred to 1st defendant. The plaintiff says he has been in possession of the portions sold to him for a long time and fears that the defendants may now evict him.

5. The 1st defendant responded to the application vide replying affidavit filed on 9th July, 2015. He deponed, interlia, that the parcels of land were never sold to the plaintiff and the plaintiff does not use and has not occupied the properties. The 2nd and 3rd respondents responded vide replying affidavit filed on 13th October, 2015. They, too, denied that the properties were ever sold to the plaintiff. They also averred that the plaintiff does not use or occupy the land.

6. Both sides filed written submissions to dispose of the application. The plaintiffs submissions were filed on the 4th November, 2015. According to the plaintiff the threshold set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD [1073] E.A358** has been met. In other words, the plaintiff has established a prima facie case with probability of success and also shown the likelihood of suffering irreparable loss. The balance of convenience is also said to be in favour of plaintiff.

7. The defendant's submissions were filed on 8th October, 2015. It was reiterated that there was no sale and that the plaintiff does not use or occupy the land. It was denied too that the plaintiff has met the conditions necessary for granting restraining orders.

8. I have considered the application, the responses made and the rival submissions. The defendants submit that the plaintiff has not shown any sale agreements. That is not correct. The plaintiff annexed sale agreements marked "GON 1". They were agreements written in vernacular and duly translated in English. The response of the defendants seems actually to acknowledge existence of the agreements, with the defendants terming them as forgeries.

9. At this stage the only reasonable position to take that there was such sale. And this must remain so until defendants show otherwise. I think I should also assume that since there is no allegation that the plaintiff was buying the land for speculative purposes, he must have been buying for use and possibly went into such use. I therefore find it more likely than unlikely that the plaintiff is using the properties as he alleges.

10. In **OTIENO VS OUGO & Another (NO.2) [1987] KLR 400,** the court held, interalia, that the established rule is that an injunction is granted to preserve the subject matter pending hearing and determination of the action. My considered view is that a restraining order is in this matter. It is necessary to preserve the disputed land. Accordingly, prayer 3 in the application is granted. Costs will be in the cause.

A.K. KANIARU

JUDGE

DATED AND DELIVERED ON 31ST DAY OF MARCH, 2016.

IN THE PRESENCE OF;

PLAINTIFF……

1ST DEFENDANT……

2ND DEFENDANT……

3RD DEFENDANT……

COUNSEL……

JUDGE.