



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO. 214 OF 2014

JOEL KARAM EPURET.....PLAINTIFF/APPLICANT

= VERSUS =

KENYA PORTS AUTHORITY.....1ST RESPONDENT/1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT/2ND DEFENDANT

R U L I N G

1. The Plaintiff filed this application under certificate on the 30th of July, 2020 seeking for orders THAT:

(a) The application herein be certified urgent and service be dispensed with in the first instance;

(b) Interim order be and is hereby issued against the 1st Respondent, restraining it, it's agents, servant and those claiming through the 1st Respondent from entering, constructing, developing, cutting down trees or otherwise dealing in any manner with the land parcel number NORTH TESO/KAMURIAI/1191 pending hearing and determination of this application;

(c) Temporary injunction be and is hereby issued against the 1st Respondent restraining it, it's agents', servants and those claiming through the 1st Respondent from entering, constructing, developing, cutting down trees or otherwise dealing in any manner with the land parcel number NORTH TESO/KAMURIAI/1191 pending hearing and determination of this suit;

(d) This order be served upon the OCS Malaba Police Station for compliance and effectual of the order; and

(e) Costs of the application be provided for.

2. The application was supported by the affidavit of JOEL KARAN EPURET dated 30th July, 2020 and the following grounds;

(a) THAT, the Applicant is the registered proprietor of L.R No. NORTH TESO/KAMURIAI/1191 measuring approximately 3.4 hectares after having been gifted the same by his late father Epuret Emaet who died in 1999;

(b) THAT, on or about, 2006, the 1st Respondent, without any colour of right and without my consent encroached into my above mentioned parcel of land and constructed beacons fencing a section of my land thereafter planted trees;

(c) THAT, the Applicant filed this suit in this Honourable Court in the year 2014 and the case is still pending hearing;

(d) THAT, on the 27th of July, 2020, the 1st Respondent's agents or servants entered into the Applicant's suit land and started cutting down trees as they make developments and they have started to construct a house;

(e) THAT, the Applicant's efforts to stop the 1st Respondent's agents or servants from dealing with the land has been in vain and therefore it is only a court order which can stop the 1st Respondent's agents from carrying their mentioned activities;

(f) THAT, the Applicant stands to suffer irreparable loss if the orders sought are not granted since the suit land is his heritage;

(g) No prejudice will be occasioned to the 1st Respondent in any manner if the orders sought are not granted.

3. The 1st Respondent filed his grounds of opposition on the 9th of November, 2020 opposing the application on the grounds that among

others it offends the objective of Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The 1st Respondent argued that the matter is at the pre-trial stage and that all the parties including the Plaintiff were directed by the Honourable Court to comply with the pre-trial requirements on the 8th of July, 2020.

4. The 1st Respondent in paragraph 4 of its grounds of opposition states that the averments in the Plaintiff's application are the same averments in his amended Plaint dated 10th October, 2016 and that inviting this Court to adjudicate over the same is tantamount to sit over the matter prematurely to the detriment of the Defendants thereby incurring grave injustice.

5. The 1st Respondent on Paragraph 6 of his grounds of opposition avers that it is trite principle of law that interim injunction orders as sought are equitable remedies and should only be granted where the party seeking them acts in good faith, without undue delay and is not of unclean hands.

6. That the Plaintiff should be compelled to comply with the pre-trial requirements and directions as given from time to time by this Court to ensure timely and expeditious adjudication over this matter or henceforth withdraw or consider the matter struck out, that the application is mischievous, callous bereft of merit and an abuse of the court process and it should be dismissed with costs.

7. The 1st Respondent also filed a replying affidavit sworn by **Ephantus Waweru Rugethe**, who is their Estate and Ratings Officer on the 11th December, 2020 stating that:

(a) *The Property **NORTH TESO/KAMURIAI/1191**, was previously registered in the name of one Epuret Emaete.*

(b) *That the year 1987 the then Commissioner of Lands, pursuant to section 6(2) of the Land Acquisition Act, Cap 295 Laws of Kenya and on behalf of the 1st Defendant, issued a notice of taking possession and vesting a portion of the suit property being 1.61ha to the Government vide Gazette Notice 4264 and 4265 of the 11th September, 1987 for purposes of constructing the Malaba Inland Depot.*

(c) *That the 1st Defendant duly paid the sum of Kenya Shillings Two Hundred and Nine Thousand, Three Hundred (KShs.209,300/=) to Epuret Emaet being compensation for the compulsory acquisition;*

(d) *That the procedure for the acquisition was followed to the letter of the law leading up to the registration of Grant No. L.R 83052 in favour of the 1st Defendant on 1st March, 2000 for the period of ninety-nine (99) years starting 1st May, 1999.*

(e) *That the restriction placed on the suit property was proper and aimed to have the said title surrendered for revocation and/or cancellation.*

(f) *That all the issues touching on the suit property were properly adjudicated upon prior to the issuance and registration of the grant in favour of the 1st Defendant and that the Application lacks merit and is aimed at wasting precious judicial time.*

(g) *That in all fairness, the property portion subject of the instant application is lawfully owned by the 1st Defendant and as such the 1st Defendant is at liberty to continue developing.*

8. None of the parties filed any submissions and the application was therefore canvassed based on the affidavits filed by the parties.

9. The Plaintiff is under a duty demonstrate that: **he has a prima facie case; if the injunction is not granted he shall suffer irreparable loss** and that **he has the balance of convenience in his favour**. The Plaintiff has deposed that his late dad was never compensated for the acquisition of the land **NORTH TESO/KAMURIAI/1191** and the 1st Respondent should therefore be stopped from dealing in any way with the said parcel of land until the suit is finalized.

10. The 1st Respondent on the other in his replying affidavit annexed documents showing the process of compulsory acquisition undertaken way back in 1987. The copies of gazette notices explain that part of the land the 1st Respondent is developing was bestowed to it by way of compulsory acquisition. The 1st Respondent is right by stating that the issues raised in this application can be canvassed in the amended plaint making the present application a waste of the court's time.

11. Although it is not denied that the 1st Respondent is having dealings on the suit property, the line of defence of compulsory acquisition raised together attaches a value to the suit portion. It follows that the plaintiff rights being infringed as the Proprietor if any can be compensated by way of damages. Secondly, the pleadings filed by both parties the 1st Respondent is already in possession and there is clear demonstration of processes of compulsory acquisition that were done. In view of this, it is my opinion and I so find that the balance of convenience tilts in favour of the 1st Respondent.

12. That being said, I proceed to determine that this application lacks merit and is hereby dismissed with costs to the 1st Respondent.

13. The plaintiff in ELC case No. 213 filed submissions in support of his application dated 30th July 2020. However, the cause of action is similar to this case brought against same defendants. Consequently, the finding/determination herein above shall apply mutatis mutandis Busia ELC Case No. 213 of 2013.

Dated, signed & delivered at BUSIA this 3rd day of March, 2021.

A. OMOLLO

JUDGE