



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 30 OF 2020**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF LR. NO. SAMIA/LUANDA/MUDOA/4446**

**AND**

**SAMIA/LUANDA/MUDOMA/4447 SUBDIVISION OF LR. NO. SAMIA/MUDOMA/96**

**AND**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION**

**BETWEEN**

**BISHOP FRANKLIN WERE OMODO.....1<sup>ST</sup> APPLICANT**

**PASTOR JOSEPHAT OUMA OSIGE.....2<sup>ND</sup> APPLICANT**

**MARY OTENYO OTWOMA as the registered officials and trustees of**

**THE FELLOWSHIP CHURCH OF CHRIST IN KENYA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**GILBERT OMONDI OSINYA alias ALBERT OMONDI OSINYA.....1<sup>ST</sup> RESPONDENT**

**MICHAEL ODUORI EGESA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicants brought this application under Certificate of Urgency dated 27<sup>th</sup> July 2020 and premised on the provisions of order 40 rule 1 and order 51 rule 1 seeking the following orders;

a) Spent.

b) Spent.

c) An order of temporary injunction be issued against the Respondents restraining them, their family members, servants, agents and those claiming through them from transferring, sub-dividing, disposing of, constructing on and or dealing in any manner with land parcel numbers SAMIA/LUANDA/MUDOMA/4446 and SAMIA/LUANDA/MUDOMA/4447 being subdivisions of land parcel number SAMIA/LUANDA/MUDOMA/96 until the hearing and final determination of this suit.

d) Costs of this application be provided for.

2. The Respondents filed Replying Affidavits to the application deposing that they are the absolute and registered owners of SAMIA/LUANDA/MUDOMA/4446 AND 4447 respectively. To support this deposition, the Respondents annexed copies of the two titles to their respective affidavits. They further stated that the applicant cannot prevent them from using their parcels of land and that the applicant cannot claim to have owned the said parcels of land by adverse possession if she had acquired the same by way of a sale agreement. They urged the Court to dismiss the application with costs.

3. The respondents subsequently filed another application dated 8/9/2020 under the provisions of sections 3A, 80 & 63 of the Civil Procedure Act and order 45 of the Rules asking for the following orders;

i. Spent.

ii. Spent.

iii. *That the orders made by this Court on 30<sup>th</sup> July 2020 by way of temporary orders of injunction pending inter partes hearing be reviewed and set aside.*

iv. *That the Honourable Court to vacate its orders of 30/7/2020 to the extent that the Respondents are enjoined from entering and or using their registered parcels of land No. SAMIA/LUANDA/MUDOMA/4446 and 4447.*

v. *That the costs of this application be provided for.*

4. The parties agreed to canvass both applications together by way of written submissions. The respective submissions were duly filed and which submissions this court has taken into consideration. It is well settled in law in the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358** and reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR** where the Court of Appeal held that;

*“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.*

*These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”*

5. The Plaintiff/applicant pleaded that they bought a parcel of land from the 1<sup>st</sup> Respondent measuring 0.16HA comprised in title No. SAMIA/LUANDA/MUDOMA/96 for the consideration of Kshs.22,000/= on 4/3/2001 and thereafter put up church structures on the purchased portion. They further pleaded that they have been in continuous occupation for a period of 19 years. It is the applicant's case that recently she discovered that the 1<sup>st</sup> Respondent has unlawfully caused the subdivision and registration of the said parcel of land when the 2<sup>nd</sup> Respondent fenced off part the Applicant's portion of land with the intent of constructing a permanent house thereon. The 1<sup>st</sup> Respondent has denied that the Applicant has been in possession of the suit land stating that the applicants occupation was by way of a sale agreement. The 1<sup>st</sup> Respondent further stated that the church is not a legal entity that can own and possess land.

6. The Defendants/Respondents contended in their application dated 8/9/2020 that the orders issued by this court on 30/7/2020 were issued erroneously as they were not afforded an opportunity to defend themselves. They have pleaded that the orders issued are unfair and prejudicial to them as they are denied access and use of their parcels of land where they have been undertaking construction work.

7. It is known practice that applications filed under certificate of urgency are heard exparte in the first instance wherein the Court is allowed to exercises its discretion whether or not to grant any orders. In an instance where a party feels that the discretion was not exercised judicially, then he/she takes up the question for determination by lodging an appeal to the respective Court. In my opinion and I so hold, that challenging the exercise of discretion of a court is not available through an application for review provided under section 80 of the Civil Procedure Rules and or order 45 of the Civil Procedure Act. Consequently, this application fails. In any event, the defendants are not without recourse as they responded to the initial application now being determined on its merits.

8. The Plaintiff annexed copies of sale agreement dated the year 2001 executed between the 1<sup>st</sup> Respondent and herself in respect of sale of a portion of land comprised in Samia/Luanda Mudoma/96. The 1<sup>st</sup> Respondent does not deny subdividing L.R. No. 96 to create the amongst others the suit parcel. The Respondents deposed that the Applicant has never occupied the suit titles Nos 4446 & 4447. The 1<sup>st</sup> Respondent does not however disclose the parcel number that constitutes the portion he sold to the Plaintiff.

9. Adverse possession is a question to be proved by evidence. Therefore, whether the Plaintiff's claim is premised on a sale agreement or not cannot be determined at this interlocutory stage. Similarly, occupation can only be ascertained by evidence and the Plaintiff is yet to present her case. On the basis that the Plaintiff has presented evidence of purchase and which transaction took place over twelve years ago persuades me that the Plaintiff has demonstrated that they have a prima facie evidence capable of success.

10. On irreparable loss, the applicant contends that they have developed the suit land by building permanent structures on it and that if the injunction is not issued they would be evicted. The 2<sup>nd</sup> Respondent has indeed confirmed that he is currently in the process of fencing his plot so that he can proceed with construction. This is pleaded in ground (e) of the motion dated 8/9/2020 thus, *“That the respondents never clarified which of the two pieces of land belonged to them thus stopping the 2<sup>nd</sup> applicant from working on his parcel, whereas none of their stake is on land parcels No. SAMIA/LUANDA/MUDOMO/4446.”*

11. The pleadings raise a dispute on whether the plaintiff is in occupation of a portion of each of the two suit parcels. It is therefore not possible to determine at this stage whether or not The plaintiff is entitled to the portion fenced off by the 2<sup>nd</sup> Respondent. To allow development to go on by either of the parties on the disputed portion will definitely result into irreparable loss if an injunction is not issued. The balance of convenience is in favour of maintaining the statusquo i.e. the Plaintiff who was the first in time.

12. In view of the above, I find that the Applicants have satisfied the threshold for the issuance of a temporary order of injunction as pleaded in paragraph 3 of the prayers in the motion. In the interest of justice, I direct the Plaintiff to file an undertaking to pay damages to the 2<sup>nd</sup> Respondent in the event the suit as against the 2<sup>nd</sup> Respondent does not succeed. The costs of this application to abide the winner of the suit once concluded.

**Dated, signed & Delivered at Busia this 21<sup>st</sup> Day of April, 2021**

**A. OMOLLO**

**JUDGE**