Mosbey & 6 others v Busienei & 2 others (Enviromental and Land Originating Summons E019 of 2022) [2023] KEELC 18560 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18560 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2022

EO OBAGA, J

JULY 6, 2023

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND KNOWN AS MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1472,1473 AND 1474

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS BASED ON ADVERSE POSSESSION

BETWEEN

PIUS KIMAIYO MOSBEY ..... 1ST APPLICANT

PHILIP KIPKORIR LAMAI ..... 2ND APPLICANT

PHILIP KIPKEMEBOI MUTAI ..... 3RD APPLICANT

JOSEPH KINYOR MAHINDI ..... 4TH APPLICANT

SELLY JEPTOO TANUI ..... 5TH APPLICANT

ROSA JEPKEMBEOI KEBENEI ..... 6TH APPLICANT

WILSON KIPNGETICH SANG ..... 7TH APPLICANT

AND

PAULO KIPLAGAT BUSIENEI ..... 1ST RESPONDENT

BENJAMIN KIPKOSGEI LAGAT ..... 2ND RESPONDENT

ELIAS CHERUIYOT LAGAT ..... 3RD RESPONDENT

RULING

1. This is a ruling in respect of a notice of motion dated March 13, 2023 in which the respondent/ applicants seek injunctive orders restraining the applicants/respondents from interfering with LR No Moiben/Moiben Block 2 (Segero) 1472, 1473 and 1474 (suit properties) until the hearing and determination of the suit.

2. The suit properties arose form a subdivision of LR No Moiben/Moiben Block 2 (Segero)/154 which was registered in the name of the 1st applicant who is a father to the 2nd and 3rd applicants. The 1st applicant subdivided his land in 2021 and gave two portions to the 2nd and 3rd applicants and retained a portion for himself.

3. Prior to the subdivision, the 1st applicant had sold various portions to the respondents between 1994 and 2018. when the respondents filed an originating summons claiming to have acquired their respective portions through adverse possession, the 1st applicant filed a replying affidavit in which he admitted that he had sold portions to the applicants and was willing to give them title. He claimed that he was misled by his sons the 2nd and 3rd respondents into subdividing his land before giving titles to the respondents.

4. The 1st applicant later changed his mind and filed another affidavit in which he claims that he never sold land to the respondents. He however states that he sold land to some people whom he does not name only claiming that the respondents invaded his land and that his plea to them to move out had fallen on deaf ears.

5. The supporting affidavit to the application for injunction was sworn by the 2nd applicant with authority of the 1st and 3rd applicants. He states that on the March 9, 2023, the 1st respondent entered his portion of land and ploughed it; that he has been in possession of his portion since he was given by his father. The 2nd applicant's portion upon subdivision is LR No Moiben/Moiben Block 2 (Segero)/1473.

6. The respondents opposed the applicants' application based on a replying affidavit sworn by the 1st respondent on March 24, 2023. The respondents contend that the applicants application is an abuse of the process of court in that the applicants have admitted that the respondents are occupying their respective portions where they have built houses. The sale has been admitted and that to grant an injunction will amount to constructive eviction.

7. I have considered the applicants' application as well as the opposition thereto by the respondents. I have also considered the submissions filed. The principles for grant of injunction are well known. I need not repeat the well-known cases which have set out principle for grant of an injunction. I also need not overemphasize the well-known principle in law that an injunction must be based on a suit and that an injunction cannot be granted where the applicant has come to court with unclean hands.

8. In the instant case, the applicants have not raised any counter-claim in the affidavit in reply to the originating summons. There is therefore no suit upon which the applicants can base their application for injunction. The applicants and particularly the 1st applicant has admitted to selling portions to the respondents. It is the height of dishonesty when he turns around and swears another affidavit which is in direct contradiction of an earlier one.

9. For the reasons given above, I find that the applicants' application is an abuse of the process of court. It has no merit and is brought in bad faith. The same is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Cheptarus for Defendants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

6TH JULY, 2023