REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 176 OF 2014 (OS)

PATRICK OJIAMBO WANYAMA..... 1ST APPLICANT

EDWIN OJIAMBO OCHOLA ..... 2ND APPLICANT

SIMON OCHOLA OJIAMBO ..... 3RD APPLICANT

= VERSUS =

DENNIS HARRISON ONGENGE..... RESPONDENT

R U L I N G

1. This ruling is on a motion on notice filed here by the Applicants **– PATRICK OJIAMBO WANYAMA, EDWIN OJIAMBO OCHOLA** and **SIMON OCHOLA OJIAMBO** – on 19/9/2017. The motion is dated 5/4/2017 and is brought under sections 3A and 63(e) of the Civil Procedure Act (cap 21) and Orders 40 Rules 1, 2 and 3 and 51 of the Civil Procedure Rules. The Applicants are the Defendants in the suit. The application is against the Respondent **– DENNIS HARRISON ONGENGE –** who is the Plaintiff.

2. There are five prayers in the application but prayers 1 and 2 are now moot, having been meant for consideration at an earlier stage. The prayers for consideration now are 3, 4, and 5 asked for as follows:

> Prayer 3: That pending the hearing and determination of this case, a temporary order of injunction do issue restraining Dennis Harrison Ongenge, the Plaintiff herein, his family, servants, agents or any other person on his behalf from trespassing, entering cultivating, cutting down trees, making bricks or in any other manner whatsoever interfering with the Defendant's possession and use of Land Parcel No. L.R. SAMIA/LUANDA-MUDOMA/2299.
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> Prayer 4: That in the alternative this suit be dismissed for want of prosecution.
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> Prayer 5: That costs be provided for.

3. The application is anchored on grounds, *interalia*, that the 3rd Defendant is the sole absolute registered owner of L.R. SAMIA/LUANDA-MUDOMA/2299; that the Plaintiff has never occupied and used the land save for the making of bricks agreed on to recover the down payment he had made; that after the ruling of 22/2/2017 the Plaintiff forcefully cut a number of trees and the Defendants crops on the land; that after the said ruling the Plaintiff has set in motion a sustained series of violent acts to use the land; that the Plaintiff is determined to change the Status Quo; that over one year has gone without the Plaintiff taking action to move the matter forward; and that the Defendants stand to suffer irreparable loss.

4. The application came with a supporting affidavit which generally amplified the grounds already stated. In particular, it was emphasised that the Plaintiff has not listed the matter for hearing or trial since it was filed in 2014; that the Plaintiff ran amok and rampaged on the land cutting down trees and crops shortly after this court delivered its ruling on 22/2/2017; and that the Plaintiff is indeed determined to change the Status Quo.

5. The Respondent responded to the application vide a replying affidavit filed on 17/1/2017. He emphasised his right to own the portion of land he purchased and averred that he is in occupation and has his home thereon. He commenced paying for the land in 1992 and finished paying in 1998. And, said he, even if the period of adverse possession were to be deemed to have started running in 1998 when he finished paying, he would still be an adverse possessor as it would be about 15 years from that time to the time of filing this suit. The Applicants were said to live on another parcel of land and stand to suffer no prejudice if their application is disallowed. The Respondent availed some photographs (DHO-1) showing his home on the land.

6. The application was canvassed by way of written submissions. The Applicants submissions were filed on 23/3/2018. The submissions gave a snapshot of the application and made reference to the outcome of an earlier application of restraining orders made by the Respondent and which the court dismissed on 22/2/2017. It was reiterated that after the dismissal of that application the Respondent embarked on a mission to change the Status Quo on the ground to make it appear as if he occupies the land. His response to this application was said to contain falsehoods calculated to mislead the court. He was also accused of not being interested in the hearing of the suit. The court was asked to allow the application with costs.

7. The Respondent filed his submissions on 10/4/2018. He submitted, *interalia*, that the application has no merit as it is not based on any viable claim by the Applicants. He further submitted that the application is vindictive as it seeks orders to punish the Respondent who has been in exclusive possession of the land since 1992 and has extensively developed it. The orders, it was submitted, would complicate the Respondent's life if issued as they would render him destitute. And this would happen because the Respondent has his home there and he derives his livelihood from cultivating the land. The Respondent wondered loudly how he can be restrained from making bricks which he is not making at all.

8. According to the Respondent, the Applicants have not disclosed a *primafacie* case with a probability of success. He said that it is he himself, rather than the Applicants, who will suffer irreparable loss if the application is allowed. He further said that the balance of convenience favours him as the Applicants will suffer nothing if the application is declined. It was pointed out too that the application mentions the 3rd Respondent – SIMON OCHOLA OJIAMBO – as the one to swear a supporting affidavit sworn by the 2nd Respondent – EDWIN OJIAMBO OCHOLA. It was further pointed out that it is Simon, not Edwin, who is seized of the authority to steer this case and that is clear from the authority filed on 27/1/2015.

9. On the issue of dismissal of the case for want of prosecution, the respondent submitted that the court gave its ruling on 22/2/2017 while the Applicants filed this application on 19/9/2017. The period between is 7 months, not one year as required by law, and this therefore makes the suit ineligible for dismissal for want of prosecution.

10. The rest of the substance of the Respondent's submissions seems more convenient for the suit itself rather than the application. If I were to make definite findings on them, I would teetering on the brink of premature determination of the case. I dare not move in that direction and will not therefore make reference to them.

11. I have considered the application, the response made, rival submissions, and the general history of the suit. This matter has had two applications for restraining orders. The first one was by the Respondent which was dismissed on 22/2/2017 vide a ruling of even date. The other one is this application which was filed by the other side after the dismissal of the other application. In a sense therefore, one would be excused for seeing it as a counter-application.

12. The need to bring this application was explained to consist in the alleged fact that the Respondent herein engaged in acts of destroying crops and trees when his application was dismissed. He was also said to be intent on changing the Status Quo on the ground to advance his cause for adverse possession. In applications of this kind, the court looks at all the prevailing circumstances but even as it does so, the threshold set in the *Locus classicus* case of **Giela vs Cassman Brown & Co. Ltd [1973] EA 358** remain the guiding light. And the threshold requires the Applicant to establish a *primafacie* case with a probability of success; showing the likelihood of suffering irreparable loss not likely to be adequately compensated in damages; and, where doubts arise, courts always opt to consider the balance of convenience.

13. In this matter, the Applicants have not filed any case. They are merely defending. And although they are title owners, I am not so sure about their defence becoming the basis of establishing a *primafacie* case. That then leaves us with the issue of irreparable loss that damages cannot compensate and/or balance of convenience.

14. Injunctive relief is an equitable remedy. When one is considering it, the first consideration is whether damages, which are a remedy in common law, would be an adequate compensation. The Respondent herein is said to have destroyed some trees and crops. True, he was also said to have been violent. But he was not alleged to have hurt anybody. The Applicants didn't show how a loss comprised in loss of trees and crops cannot be adequately compensated in damages. In my view, calling an agricultural officer to quantify the damage done is very possible in such situation. I really do not see how damages would not suffice in this case.

15. There is then the balance of convenience. And in this, I have to consider who between the Respondent and the Applicants would suffer greater harm in the event that the order sought is granted or declined. When I delivered my ruling on the earlier application filed by the Respondent herein, one of the reasons for its dismissals was that the Respondent, who was the applicant, had not done a good job of convincing the court that he was in occupation of the land. I pointed out that some pictorial evidence or something else convincing would have been useful.

16. In this application, the Respondent has become wiser. I am not saying that the Respondent was foolish in the earlier application. To say that is bad. And it is bad because it is not good. For every adult man who is sane should be presumed to be wise until proved stupid. The Respondent was therefore wise. What he did was to choose to become wiser. He seems to have been taken cue from my earlier ruling and became minded in this regard to provide photographs (DHO-1) showing his home on the land. On balance therefore, it now appears to me more likely that the Respondent is in occupation of the land. The Applicants may well prove otherwise at the trial but this is the reasonable position I deem necessary to take now.

17. The Respondent also seems to have addressed another weakness noted in the earlier ruling. In that ruling, the court had observed that it was not possible to establish when time started running in favour of the Respondent as an adverse possessor. In his response and submissions here he seems to believe that that time started running immediately he went into possession of the land in 1992 but even if that turns out not to be the case, 1998, the year he finished paying the purchase price, would just be fine with him. In essence therefore, it is clear that the Respondent tried to address some of the shortcomings noted earlier.

18. Given that the Respondent most likely lives on the land, and noting that the application seeks to restrain trespassing into and even

entering the land, what would I be doing if I grant the restraining order? Very possibly, I would be telling the Respondent not to access his home. In effect, I would be making life unbearable for him. I therefore need to act with abundant caution when the issue of balance of convenience is considered, the Respondent seems to be the one likely to suffer greater harm.

19. As regards dismissal of the case for want of prosecution, it is plain to me that the Applicants didn't demonstrate that this matter has been dormant and/or inactive. In contrast, the observations made by the Respondent show that the matter has been reasonably active. Dismissal of a matter for want of prosecution requires proof that a matter has been dormant or inactive for at least one year. My scrutiny of the court records does not show that this position applies here. I therefore agree with the submissions of the Respondent. The matter is not ripe for dismissal.

20. But there is also something else. And it was pointed out by the Respondent. It is this: When this matter was filed, the applicants donated authority to one of their own – SIMON OJIAMBO – to handle the case for them. In this application itself, the said SIMON is clearly mentioned as the one swearing the supporting affidavit. But the supporting affidavit was not sworn by him; Edwin Ojiambo Ochola swore it instead. The same Simon is mentioned in the grounds on the face of the application as the registered owner of the disputed land. But the supporting affidavit shows Edwin Ojiambo Ogolla as the registered owner, with even a copy of the title availed to prove it. It seems to me that this self-inflicted confusion by the Applicants make their application dysfunctional. They caused it and it counts against them.

21. The upshot therefore is that the application is for dismissal and I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 15th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant Absent

2nd Applicant Absent

3rd Applicant Absent

Respondent: Absent

Counsel for the Applicants: Present

Counsel for the Respondent: Absent

Court Assistant: Nelson Odame