



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

E.L.C NO 50 OF 2018

WILHEMINA KALANDE RABALLA.....1ST APPLICANT/PLAINTIFF

EVANS KALANDE.....2ND APPLICANT/PLAINTIFF

BERNADETTE JULIET ACHIENG.....3RD APPLICANT/PLAINTIFF

VERSUS

PETER OKUMU ABUYA.....RESPONDENT/DEFENDANT

RULING

1. The application for determination before me is a Notice of Motion dated 29th May, 2018 and filed on 7th June, 2018. It is expressed to be brought under Sections 3, 3A and 63 (e) of the Civil Procedure Act (Cap 21), Sections 76 and 77 of the Land Registration Act, 2012, and all other enabling provisions of law. The applicants – **WILHEMINA KALANDE RABALLA, EVANS KALANDE** and **BERNADETTE JULIET ACHIENG** – are plaintiffs in the suit herein filed contemporaneously with the application while the respondent – **PETER OKUMU ABUYA** – is the defendant. The bone of contention between the parties is ownership of land parcel **NO SAMIA/BUDONGO/249**. The applicants claim the respondent is trying to exclude them from ownership while the respondent avers that he is the sole and exclusive owner by right.

2. The application has five (5) prayers but some of them - specifically prayers 1,2, and 4 – are already spent as they were for consideration and/or were considered at an earlier stage. The prayers for consideration are now 3 and 5. They are as follows:

Prayer 3: That an order of Restriction be issued prohibiting any dealings involving the suit land until the hearing and determination of the suit.

Prayer 5: That costs of the application be in the cause.

3. The application is anchored on the grounds, inter alia, that the respondent may transfer the land to third parties yet the applicants are in occupation of a portion and that may defeat their claim. The applicants said that it is only just and fair that the land be preserved until the determination of the suit.

4. The supporting affidavit that came with the application suit generally amplified the grounds, and in particular emphasized that the applicants are resident on the land; that the respondent has moved to subdivide the land intending to transfer the portion occupied by the applicants to third parties; and that this will occasion loss, and hence the need for the order to protect the applicants interests.

5. The respondent responded to the suit vide an affidavit erroneously stated as “*supporting*” instead of “*replying*” filed on 2nd July, 2018 and dated 27th June, 2018. He deposed, inter alia, that the 1st applicant gifted him the land and transferred it to him. He appreciated the 1st applicant’s gesture by paying 200,000/= to her. The problem between the parties seems to have arisen much earlier and had even been ventilated elsewhere, with the respondent emerging faultless. The respondent denied that he owns the land, or a portion of it, as a trustee. The suit herein was said to be an afterthought on the part of the applicants.

6. The application was canvassed by way of written submissions. The applicants’ submissions were filed on 26th February, 2019. According to the applicants, “...*an order of restriction would be in order and would not be prejudicial to the respondent whose occupied portion is not in contention.*” It was further submitted that the “...*Respondent had signalled that he intends to partition the land and transfer a section of it to third parties.*” The order sought was therefore said to be intended “*to safeguard the applicants’ interests and in the interest of justice.*”

7. The respondent’s submissions were filed on 29th March, 2019 and urge, inter alia, that the orders sought should not be granted, there being no trust as alleged by the applicants, and with the 1st applicant having “*knowingly transferred*” the land to the respondent.

8. I have considered the application, the response made, rival submissions, and the pleadings so far on record. The necessity for issuing the order sought was premised on the ground that the respondent is intent on subdividing the land and transferring a portion to third parties. The respondent has not denied this in his response to the application and/or in his submissions. That allegation therefore assumes the weight of a fact as it is not controverted.

9. It is clear that some of the applicants, if not all, reside on the land and any transaction that brings new parties on board is bound to complicate matters more for the applicants. The respondent himself does not stand prejudiced at all if the orders sought are granted. He still remains the registered owner of the land and the portion he occupies is not threatened at all. I consider that it is the applicant who will be hard done-by if the threat of sale or transfer of the land to third parties is let to continue hanging on their neck like an albatross.

10. Ideally, the applicants should have applied for an order of inhibition, this being the order that the court is mandated to issue under Sections 68,69 and 70 of the Land Registration Act, 2012, while the order of Restriction (Sections 76 77, and 78 of the same Act) or even that of Caution (Sections 71,72,73,74 and 75 of the same statute) should come from other sources. Be that as it may however, all these legal devices are meant to serve the same general purpose. The simple error of not invoking the correct one therefore should not be allowed to run athwart the interests of justice.

11. It is apprehended in this matter that the disputed land is possibly at risk of being alienated or transferred to the detriment of the applicants and refusal to grant the order sought may render the suit nugatory should the applicants ultimately succeed. In my view too, the submissions filed by the applicants and their pleadings regarding the suit seem to show reasonably well that they have an arguable case. All these in my view are the vital considerations necessary in deciding whether to grant an order of inhibition or even a restriction.

12. The order sought is one of restriction and I find it merited. I will not however fall into the error of issuing it as an order of restriction. It is the Land Registrar who is supposed to grant such an order. I therefore issue an order of inhibition instead. The order should serve the same purpose and is to run for the same period as the restriction being sought. As regards costs of the application, my considered view is that parties are close relatives. Each side should therefore bear its own costs.

Dated and signed at Kericho this 10th day of March, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 10th day of March, 2020.

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A. OMOLLO

JUDGE