



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 129 OF 2015**

**PATRICK OPIYO ODIYA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN WANDERA ODIYA .....DEFENDANT/RESPONDENT**

**RULING**

1. For determination is the notice of motion application dated 26/11/2019 brought by the plaintiff/applicant under the provisions of Order 40 and Order 51 of the Civil Procedure Rules. The applicant seeks to be granted Orders;

**1) Spent**

**2) That this Honourable Court be pleased to issue a temporary injunction and thereafter a permanent injunction restraining the defendant/respondent from stopping the applicant and his family members, his workers, agents or anybody working under him from using, occupying and literary doing all that t he has been doing in occupation of his clearly demarcated portion on land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/190 pending the hearing and final determination of this suit.**

**3) That in the alternative, but entirely without prejudice to the foregoing, let this Honourable Court be pleased to order that the status quo on land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/190 as exists on the ground be maintained and each party to utilize their portions as they have always done without interference from either party or their agents.**

**4) That costs of this application be provided for.**

2. The application is supported by the following grounds;

*(i) That the Applicant was born and raised on the land.*

*(ii) That though the Respondent is the registered proprietor, he is registered as such by fraud or in trust for himself and in trust for the applicant who is his younger brother.*

*(iii) That from the time of the applicant's birth todote, he has been in occupation of part of the land consistently todote and his portion and that of the respondent are clearly marked on the ground.*

*(iv) That upon the applicant amending his plaint to claim ownership by customary trust, the respondent reported him to police and police tried to intimidate him not to use the land.*

*(v) That the applicant stand to staff irreparable loss since I stay and rely on the land.*

3. The application is further supported by the affidavit sworn on 26/11/2019 in which the applicant reiterated the facts on the face of the application. He added that their portions on the land is clearly separated by an unofficial footpath. He deposed that he has previously lost a son and a daughter and had them buried in his homestead on the suit land. That of late, the respondent and the police are hot on his heels intimidating him to leave and if he does not they will demolish his home. That he is apprehensive because of these threats which may render him homeless. He urged the Court to grant him the orders prayed for.

4. The application is opposed by the respondent's replying affidavit sworn on 20<sup>th</sup> January 2020. He deposed that he was registered as owner of the suit land during adjudication on 2/4/1977 while the applicant got registered as owner of land Samia/Luchululo-Bukhulungu/459 as shown in the copy of register marked **JW-3**. The respondent said that the plaintiff is his brother and their father Odiya Gaunya died in 1959

long before adjudication and registration of land in the area. He denied holding the suit land in trust for the plaintiff or any other person. That the plaintiff has his distinct parcel which he can use as he deems fit. He deposed that the applicant has not fulfilled the principles for granting injunctions thus he urged the Court to dismiss the application.

5. The application was argued by filing of written submissions. The applicant's submissions however extended to issues touching on the main suit which suit is yet to be heard. I will therefore not deal with them at this interlocutory stage. On *prima facie* case which the applicant submitted on as issue No. 40, he refers to the facts set forth by the plaintiff before fortified by his witnesses written statements. That is not how a *prima facie* is shown. In any event at this stage he only need to demonstrate not prove that he has a *prima facie* Case. In my view he has not.

6. On the principle of irreparable loss, the applicant stated that he would be rendered destitute and homeless by the actions of the defendant. The defendant in his replying affidavit deposed that the applicant does not live on the suit land. The respondent also demonstrated that the applicant has an alternative land registered in his name. The applicant's averment that he lives on the suit land is therefore put in doubt. He cannot be rendered destitute when he has a title bearing his name. Consequently, he has not demonstrated that he will suffer irreparable loss. If he has any houses on the suit land, he has not demonstrated that their values cannot be quantified.

7. The balance of convenience definitely does not tilt in his favour as he relied on the irreparable loss to argue the balance of convenience. The holding in the Case of *Joel Kipkuriu Koech Vs Alice Wambui Maganda (2018) eKLR* that;

***“It is clear that the plaintiff has shown his right over the suit property. As regards irreparable damage, I take the view that should the suit land be alienated, the plaintiff will have lost what he regards as his land and which may not be quantified in damage. The balance of convenience would tilt in favour of the plaintiff in order to safeguard the subject matter of the suit pending hearing and determination.”***

Does not support his case as he did not show that the respondent is intending to alienate / dispose the suit land.

8. In conclusion, I make a finding that the motion dated 26/11/2019 lacks merit and is hereby dismissed with costs in the Cause.

**Dated, signed and delivered at BUSIA this 30<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**