



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 16 OF 2019**

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

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

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

**BETWEEN**

VESWA ODUNGA OKUMU.....APPLICANT

= VERSUS =

NICHOLAS EGESA MAYIA.....RESPONDENT

**R U L I N G**

1. The Applicant moved this Court vide a notice of motion application dated 6<sup>th</sup> March 2019 premised under the provisions of Order 40 Rule 1 – 3 seeking the following;

**a. Spent**

**b. That the honourable Court be pleased to issue a temporary and thereafter a permanent injunction restraining the Respondent, his agents, workers, family members and/or persons working under him from invading, trespassing, transferring, ploughing, tilling, destroying the Applicant's crops and trees and/or in any manner whatsoever from using or interfering with the Applicant's peaceful occupation of Land Parcel No. BUKHAYO/MUNDIKA/10621 pending the hearing and final determination of this suit.**

**c. Costs of the application be provided for.**

2. The application is premised on the following grounds *inter alia*;

*i. That the Applicant purchased 0.08ha or thereabouts of land parcel No. BUKHAYO/MUNDIKA/464 which later became BUKHAYO/MUNDIKA/10621 from the Applicant in 1992 and paid consideration in full.*

*ii. That the Applicant contemporaneously purchased 4 other parcels from the Respondent's brothers and combined them to form one parcel on the ground though the title numbers are the same.*

*iii. That upon receipt of a demand letter to be sued for adverse possession, the Respondent and his family members and agents have tried to defeat justice by invading the land and destroying the Applicant's crops and trees.*

*iv. That if not enjoined, the Respondent is hell-bent to change the status quo where the Applicant has been in actual consistent use for a period exceeding 27 years.*

3. The application is supported further by the affidavit of Veswa Okumu who deposed that he bought the parcel of land measuring 0.08ha from the Respondent comprised in the suit title. That on 22/7/2013 the assistant chief for the area called for a peace meeting over the same and the Respondent confirmed selling the land during that meeting.

4. The Applicant states that he has been in possession and use since 1992 to date. He deposed that on 27/2/2019 he issued a demand letter to the Respondent but he became hostile on receipt of the letter, by invading the suit portion and destroying his crops and trees with an aim of altering the status of the land. That if the Respondent is not restrained, the Applicant will suffer irreparable loss.

5. The Respondent filed a replying affidavit on 5<sup>th</sup> July 2019 in opposition to the application. He deposed that he is the registered owner of the suit land Bukhayo/Mundika/10621 measuring 0.08ha. He admitted entering into a sale agreement with the Applicant over the same but added that the Applicant breached the terms by failing to pay the entire purchase price. He deposed that there has been several disputes touching on the purchase process; including criminal cases instigated by the Applicant against him. That the application should be dismissed as it does not disclose any prejudice the Applicant will suffer or that the Applicant is in sole possession of the land.

6. The Applicant submitted that he has demonstrated he has a *prima facie* case as he annexed copies of sale agreements and minutes of peace building meeting which confirm his possession of the suit land. The Applicant went ahead to reproduce the statement of Respondent during the meeting of 22/7/2013 where the Respondent admitted writing the sale agreement and that the whole purchase price was paid. The Applicant supported his motion by citing the Case of *Kenleb Cons. Ltd Vs New Gatitu Service Station Ltd & Ano (1990) KLR 557* where Bosire J (as he then was) held thus;

***“To succeed in an application for injunction an Applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”***

7. The Applicant submitted that the Respondent wants to defeat the rights of the Applicant acquired by way of adverse possession by threatening to invade the land. That on 27/2/2019, he invaded the land and destroyed crops. Further on 1<sup>st</sup> and 2<sup>nd</sup> March the Respondent and his agents destroyed crops and trees worth Kshs.306,600 resulting in their being arrested & charged with Criminal Case No. 1198 of 2019 with the offence of malicious damage to property. That unless the Respondent is restrained, the Applicant will suffer irreparable loss and damage.

8. On his part, the Respondent submitted that the Applicant has failed to demonstrate that;

1. *He has equitable rights over L.R. BUKHAYO/MUNDIKA/10621.*
2. *That in the meeting of 27/7/2019, the respondent rescinded the agreement (see 1<sup>st</sup> page, 2<sup>nd</sup> last paragraph of those minutes).*
3. *That the observation of the meeting on the 2<sup>nd</sup> last page was very telling as to whether the court can uphold such a contract.*
4. *The occupation of the parcel has been tenuous.*
5. *The replying affidavit stated that there have been several disputes over the parcel. a fact not disputed by the Applicant.*

The Respondent concluded that the Applicant wants to abuse the process of the Court by seeking to assert rights which are fragile. He urged the Court to decline the application.

9. From the pleadings, it is not in dispute that the Applicant and the Respondent entered into an agreement of sale. Pursuant to that sale, the Applicant was put in possession of the sold portion. The Respondent deposed that the Applicant breached the terms of the said agreement by failing to pay the price in full. He also stated that the Applicant has not demonstrated that he is the only one in possession. These are issues of facts which require proof during the hearing of the main case.

10. The Applicant only needed to show that he has a *prima facie* case. It is my considered view that he has aptly done so by demonstrating that he bought the land (whether he paid for it in full or not is immaterial at this stage). That he is in possession and whether the possession is quiet or otherwise will await the full determination of the suit. Secondly the Applicant has shown that the Respondent is interfering with his occupation by destroying his crops and trees with intention to alter the status quo of the land to defeat the claim for adverse possession. The Respondent did not deny the invasion or the intent alleged. The Respondent admitted the existence of a Criminal Case against him which he deposed was instigated by the Applicant. The charge is stated to be on malicious damage to property.

11. The Respondent is thus interfering with the Applicant's occupation of suit land before the claim is heard and determined. Unless he is restrained, the status of the subject matter in dispute may be changed. I am therefore persuaded to find that the application has merit. I will allow it by issuing the following orders;

**1. This Court does hereby issue an order of temporary injunction restraining the Respondent, his agents, workers, family members or persons working under him from invading, trespassing, transferring, ploughing, tilling or destroying the Applicant's crops and trees and/or in any manner interfering with the Applicant's occupation of L.R. No. BUKHAYO/MUNDIKA/10621 pending hearing and determination of this suit.**

**2. Costs of the application ordered in the Cause.**

**Dated, signed and delivered at BUSIA this 29<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**