



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
CIVIL CASE NO. 93 OF 2018 (O.S)
IN THE MATTER OF LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF L.R. NO. BUKHAYO/BUGENG'I/13184
AND
IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION
BETWEEN
PIUS OSUDO OKISO.....APPLICANT/RESPONDENT
= VERSUS =
PATRICK OWIRE ORAMISI.....1ST RESPONDENT/APPLICANT
PETER SIKUKU WESONGA.....2ND RESPONDENT
R U L I N G

1. For hearing is the chamber summons application brought under Order 40 of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act seeking orders;

(a) Spent

(b) Spent

(c) That an injunction be and is hereby granted restraining the Applicant/Respondent PIUS OSUDO OKISO either by himself or through his agents/servants from selling, ploughing or in anyway interfering with L.R. No. Bukhayo/Bugeng'i/13184 pending the hearing and determination of this suit.

(d) That cost be provided for.

2. The application is supported by the following grounds;

(i) That the 1st applicant is the registered owner of the suit land.

(ii) The respondent has been and continues to interfere with the land without the 1st applicant's permission.

(iii) That the respondent has encroached on the land.

(iv) When a surveyor was availed in November 2018 for subdivision, the respondent turned hostile.

3. The application is further supported by the affidavit of Patrick Owire Oramisi who deposed that the respondent is taking advantage of his illiteracy. That Peter Sikuku Wesonga's name was included in the suit title to protect his interest in the land as he was away in Uganda. That

his brother Oswai Oramisi sold a portion of the suit land to the plaintiff/respondent measuring approximately half acre which is well fenced with dwelling house. That no Land Control Board consent was obtained as is required. Mr. Owire deposed further that he has noticed that the respondent persists in encroaching on the suit land beyond the half acre he occupies hence it is necessary that injunctive orders be issued to restrain him from causing further harm.

4. The respondent challenged the application by filing a replying affidavit on 20th January 2020. He deposed that the application is devoid of merits, is scandalous, frivolous and an abuse of the Court process. That he is in occupation of the suit parcel and it is inconceivable how you can injunct a party in possession. That it will be against public policy to be injuncted from ploughing or planting the suit parcel he has been in possession of for a period of over 12 years without interruption. He denied altering any boundaries or encroaching beyond the portion he purchased. He stated that the applicant has not satisfied the conditions for granting injunctions as set out in *Giella Vs Cassman Brown* and urged the Court to dismiss the application with costs.

5. The parties filed written submissions which I have read and considered. The applicant submits that the agreement exhibited by the respondent does not show the land he was buying and that by 1982, the land was still registered in the applicant's father's name who was deceased. That instead of occupying the half portion he purchased, the respondent has encroached on the applicant's portion to his detriment. That the respondent is a trespasser and should be treated as such.

6. The respondent on his part submitted that he concedes the applicant is the registered owner of L.R. No. Bukhayo/Bugeng'i/13184 which the respondent has been in occupation of and continues to. That Section 7 of the Limitation of Actions Act prohibits a registered owner to bring a claim to recover land after the end of 12 years from the date when the right of action accrued to him. In stating that the applicant has no *prima facie* Case, the respondent cited the Case of *Mrao Vs First Community Bank & 2 others (2003) eKLR*. On irreparable loss, the respondent relied in the holding of *Elisha Kuria Kariguh and 2 others Vs John Kimani Mwangi & Ano (2018) eKLR* that;

'On the second limb of whether they will suffer irreparable loss which cannot be adequately compensated by an award of damages, the Court finds that the plaintiffs/applicants have in no way demonstrated that they have ever been in possession of the suit property. The assertions that they intend to use the same as their family home again remain mere allegations and the fact that they have never been in possession of the suit land there would be certainly no injury or damages that would be occasioned to them if injunctive orders are not granted ...'

7. The applicant pleaded that the respondent is encroaching beyond the half acre of land he bought. He therefore wants the respondent restrained from ploughing, planting and or in any interfering with L.R. No. Bukhayo/Bugengi/13184. For these orders to issue, the applicant must demonstrate that he has a *prima facie* Case and/or a tight defence to the respondent's claim. The order as framed requires that the respondent be prohibited from using the entire parcel of land parcel No. Bukhayo/Bugengi/13184. However, on the grounds in support of the motion the applicant states that the respondent is entitled to half acre portion which he concedes the respondent is in possession of.

8. The respondent on his part deposed that he had purchased 3 acres. He annexed a sale agreement to support this averment. The applicant did not specify the extent of the encroachment made by the respondent. He went ahead to question the authenticity of the sale agreement exhibited by the respondent yet this case is still at interlocutory stage thus it is inappropriate for either party to question the authenticity or otherwise of a document.

9. Further the applicant submitted that he will suffer irreparable loss because his family would be rendered destitute were they to be evicted and the possible violence ensuing. This in my interpretation is anticipatory loss (eviction) likely to be suffered if the plaintiff/respondent's claim was to succeed. I say so because no basis was laid by the applicant how eviction would happen without an order of the Court. The source of the possible violence was also not disclosed. If the respondent is exposing him to any form of violence, he should report immediately to the police to take action on any criminal acts visited upon him.

10. A look at the pleadings as filed, I find that the application does not meet the threshold for granting injunction because;

(i) *No prima facie case has been demonstrated.*

(ii) *There is no proof of the applicant suffering irreparable loss before the conclusion of this case.*

(iii) *The balance of convenience tilts in having this matter heard and being determined on merits.*

11. Consequently, I dismiss the application with costs awarded to the plaintiff/respondent in the cause.

Dated, signed and delivered at BUSIA this 15th day of April, 2020.

A. OMOLLO

JUDGE