



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 181 OF 2017

CHRISTOPHER OMUSE DINDI.....1ST PLAINTIFF

BEATRICE NAFULA OMUSE.....2ND PLAINTIFF

VERSUS

QUINTO ESIKE OJALA.....DEFENDANT

RULING

1. The focus of this ruling is on two applications viz:

- (1) The Notice of Motion dated 6/11/2017 filed here on 7/11/2017 (hereafter called “1st application”)
- (2) The Notice of Motion dated 19/12/2017 filed on the same date (“2nd application” hereafter).

The 1st application is essentially an application for restraining orders against the Defendant – **QUINTO ESIKE OJALA** – while the 2nd application was brought by the Defendant seeking to review restraining orders issued in the 1st application against him. The order sought to be reviewed was issued EXPARTE.

2. The two applications are essentially interlocutory processes coming after the filing of the suit herein by the two Plaintiffs - **CHRISTOPHER OMUSE DINDI and BEATRICE NAFULA OMUSE** - on 7/11/2017. The suit is seeking to stop or prevent burial of one EMILLY OCHEMA OTWANI on land parcel No. BUKHAYO/LUPIDA/2289 by the Defendant or others connected or related to him. The Plaintiffs are the registered owners of the land. To the Defendant, that ownership is unlawful or fraudulent.

3. The 1st application was filed contemporaneously with the suit. The court entertained it EXPARTE on 7/11/2017 and granted a restraining order to run for the duration of the application. The application has five (5) prayers on the face of it but prayers 1 and 2 are now spent, having been considered at the exparte stage. The prayers now for consideration are 3, 4 and 5. The prayers are as follows:

Prayer 3: That this honourable court be pleased to issue an order for temporary injunction restraining the Defendant himself, his agents and/or assignees from burying the body of EMILLY OCHEMA OTWANI on L.R. No. BUKHAYO/LUPIDA/2289 pending final hearing and determination of the main suit.

Prayer 4: That the assistant-chief, Kapina sub-location be served for compliance.

Prayer 5: That costs be provided for.

4. The 1st application is anchored on grounds, *inter alia*, that the Plaintiffs are the registered owners of the land; that the Defendant has put up a house on it; and that the Defendant intends to bury one EMILLY OCHEMA OTWANI on it.

5. The supporting affidavit accompanying the application states, *inter alia*, that the person whose remains are intended to be interred on the land is the wife of the Defendant; that the Plaintiffs own the land, having bought it from one PHILIMONA MAINA BUSHURU; that the said PHILIMONA MAINA BUSHURU had obtained an eviction order against the Defendant; and that the Defendant and his family members wanted to bury the deceased on the land secretly.

6. The Defendant responded to 1st application on 15/11/2017. He did so vide a replying affidavit dated 13/11/2017. According to the

Defendant, the Plaintiffs obtained title to the land fraudulently. The Defendant said he had bought a portion of 3 acres when the land was parcel No. BUKHAYO/LUPIDA/50. He did so in 1997 and paid the full price. The Plaintiffs ownership of the land is allegedly not reflected or shown in the records at the lands office.

7. The 2nd application has two prayers for consideration at this stage. The prayers are as follows:

Prayer 2: That the orders made by this honourable court on 22/11/2017 scheduled for hearing on 25/1/2018 be reviewed.

Prayer 3: That costs of this application be in the cause.

According to the Defendant, the ownership by the Plaintiff of the land was obtained fraudulently. The Defendant said he owns the land and is entitled to vacant possession. He said further that he has stayed on the land since 1997.

8. The Plaintiff responded to 2nd application vide a replying affidavit filed on 13/2/2015. He stated, *inter alia*, that the 2nd application is defective as the law relied on is not stated. According to the Plaintiff, land parcel No. 50 stated by the Defendant does not exist as the parcel has already been subdivided into several other parcels. The Plaintiff said that the previous owner of land parcel No. 2289 had already obtained an eviction order against the Defendant in a different case. The Defendant was said not to have challenged that order.

9. To the Plaintiffs, the late PHILIMONA MAINA BUSHURU was the legal and rightful owner of parcel No. 2289 and he sold it to them after acquiring ownership through a court process. The late PHILIMONA was himself a purchaser but the seller had shown reluctance or refusal to transfer the purchased land to him. This led PHILIMONA to resort to court process. Through that process, he ultimately got the land and later sold it to the Plaintiffs.

10. The two applications were canvassed by way of written submissions. The Plaintiffs submissions were filed on 15/3/2018. According to the Plaintiff, a *prima facie* case is established. He has, he submitted, shown he is the registered owner and he has shown too that the Defendant is on the land illegally as there is already an eviction order against him issued in a different case. All this was submitted in regard to the 1st application. It was submitted further that the balance of convenience also tilts in Plaintiffs' favour as he is the registered owner of the land.

11. As regards the 2nd application, the Plaintiff submitted, *inter alia*, that the Defendant failed to cite the law he is relying on and that makes the application defective. It was pointed further that the Defendant should have extracted the order he wanted reviewed but did not. In this regard, the holding of the court in **JOSEPH KAMAU GATERI Vs NAIROBI CITY COUNCIL & Another: HCC No. 439 of 2004** was said to be against him. In that case, an application for review was dismissed for reasons, *inter alia*, that the Applicant had not extracted the order to be reviewed.

12. The Defendants submissions were filed on 15/3/2018. The Defendant reiterated that the land is his own through purchase and/or long occupation. He also said the Plaintiff acquired it illegally. His position is that he owns the land and should therefore be allowed to bury the deceased on it. As regards the 1st Application, the Defendant submitted that the Plaintiff has not established a *prima facie* case. And this is so because the Plaintiffs title is allegedly not clean and the physical location of the land indicated on the title cannot also be shown. According to the Defendant, the Plaintiff also needed to avail a map and mutation form. These two, said the Defendant, would help in showing the physical location of the land.

13. The Plaintiff was also accused of bad faith. He was said to be aware that the Defendant bought the land. Yet he turns around and purports to evict him on the basis of a non-existent title. The thrust of this argument is that the Plaintiffs are without clean hands and therefore undeserving of the equitable remedy of injunction.

14. As regards the 2nd application, the Defendants arguments are actually extrapolated from arguments raised in opposition to the 1st application. One of the arguments is that as the Defendant has demonstrated that the Plaintiff does not have a clean title, then the restraining order issued earlier *ex parte* was a mistake. It should therefore be reviewed.

15. I have considered the two applications, the responses made to them by each side, rival submissions, and the suit generally as filed. If I delve too much into the details availed by each side, there is a risk of seeming to determine some issues conclusively before trial is conducted. To obviate such risk, I choose to be guided by the wisdom of the court in the case of **SHITAKHA Vs MWAMODO & 4 OTHERS: [1986] KLR 445** where it was held, *inter alia*, that the court should not decide substantive issues at the interlocutory application stage. That ought to be left for the trial. I am here referring to the 1st application.

16. Further, and regarding the same application, it was held in the case of **MBUTHIA Vs JIMBA CREDIT FINANCE CORPORATION & Another: [1988] KLR 1**, that the correct approach in application for injunctions is not to decide issues of fact, but rather weigh up the relevant strengths of each side's proposition. Infact this was a Court of Appeal decision and the lower court judge was faulted for going far beyond his proper duties by making final findings of fact.

17. In this matter the Defendant's claim to the land is through purchase and long occupation. The purchase however did not lead to transfer and registration as owner. It is curious too that though the Defendant refers to long occupation as the other aspect of his ownership, he is not claiming the land as adverse possessor. Compare this with the Plaintiffs claim to ownership. They showed that they have the title. They explained that they bought the land from one PHILIMONA MAINA BUSHURU. And though the Defendant claims that PHILIMONA never owned the land, a copy of green card availed by him in the second application shows PHILIMONA having placed a caution on the original parcel of land claiming purchaser's interest.

18. PHILIMONA himself is shown to have purchased the land from one ADWERY EMALA OKISAI who later reneged on the deal thus

prompting Philimona to sue him. Philimona ultimately became the registered owner through a concluded court process. It is crucial to note that the alleged seller to Philimona is shown to have been the owner of the original parcel of land in the green card (Q.E.O.I) availed by the Defendant himself.

19. And the Defendant is shown to have been faced with eviction from the same parcel of land in a case between him and PHILIMONA. It was explained that PHILIMONA passed on before eviction could be carried out. It seems therefore clear that the Plaintiffs explanation seems to carry more weight at this stage. It could well be that the Defendant will ultimately explain his ownership better during trial but at this stage, the Plaintiff certainly has done a better job than him.

20. It seems clear therefore that when the Defendant says that the land claimed by the Plaintiff does not exist on the ground, he is less than convincing. It is clear that the land the Plaintiff owns is the one on which the Defendant intends to inter the remains of his wife. It seems clear too that it is the land from which the late PHILIMONA wanted to evict the Defendant from. And it seems clear also that it is that same land that PHILIMONA sold to the Plaintiff.

21. I think the Defendant should have appreciated that the Plaintiff holds the title to the land. In this regard, the Defendant should have offered to pay damages. He did not. As things stand, I make a finding that the Plaintiff is entitled to the orders he is seeking in the 1st application. I feel persuaded that the rights and privileges that go with legal ownership of land should be presumed or construed in favour of the Plaintiff at this stage. I therefore allow the 1st application in terms of prayers 3 and 4. Costs of the application – prayer 5 – to be in the cause.

22. There is the second application. This one seeks review of the restraining order granted in the 1st application at the exparte stage. As granted, the prayer was meant to last until hearing of that application interparties. The filing of written submissions by both sides was done in lieu of that hearing. The application seems to be overtaken by events. But it is necessary to consider whether the application has merits. As pointed out elsewhere in this ruling, the Defendant hinged the outcome of the second application on arguments he proffered in opposition to the 1st application by the Plaintiff. The court has already considered the arguments and found them wanting. What this means in effect is that the court was right to grant a restraining order exparte.

23. The ultimate result then is that the 2nd application cannot be said to have merits. I therefore reject the application first, because it would be pointless to allow it at this stage, and second, because had it even been considered earlier, it lacked the merits that would outweigh the Plaintiffs arguments.

24. The upshot, when all is considered, is that the 1st application by the Plaintiff is allowed, while the 2nd application by the Defendant is dismissed with costs.

Dated, signed and delivered at Busia this 9th day of May, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: