



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 161 OF 2016

ROBERT MAANDE EKIRAPA.....PLAINTIFF

VERSUS

JOSEPHINE OMUSE OUJO.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 29/11/2017 filed here on the same date. It is expressed to be brought under Section 3A and 80 of the Civil Procedure Act (cap 21) and Order 40 Rule 7 of the Civil Procedure Rules, 2010. The Plaintiff – **ROBERT MAANDE EKIRAPA** – is seeking various orders against the Defendant – **JOSEPHINE OMUSE OUJO**. The bone of contention between the parties relates to intended burial of one **ROSELYNE MAKOKHA OUJO** on land parcel No. S.TESO/ANGOROMO/7775 (“suit land” hereafter). The Plaintiff is the registered owner of the suit land. The Defendant claims to own a portion of it through purchase and/or adverse possession.

2. The application has five (5) prayers but prayers 1 and 2 are now moot, having been considered at the ex parte stage. For consideration therefore are prayers 3, 4, and 5, which are as follows:

Prayer 3: That pending the hearing and determination of this suit, the Defendant, his family or any other person claiming on behalf of his late mother-in-law **ROSELYNE MAKOKHA OUJO** be and is hereby restrained from burying the remains of Roselyne Makokha Oujo on land parcel No. S.TESO/ANGOROMO/7775.

Prayer 4: That the O.C.S Adungosi Police Station to ensure compliance.

Prayer 5: That costs be provided for.

3. The application is anchored on grounds, *inter alia*, that the Plaintiff is the registered owner of the suit land; that the Defendant lacks purchaser’s or other interest in the subject matter; that the Defendant and her other family members intend to bury the deceased on the land; that the Plaintiff will suffer irreparable loss; and that it is in the interests of justice to grant the orders sought.

4. The supporting affidavit that came together with the application amplified the grounds, with some depositions stating that the Defendant and her family intend to bury the deceased forcefully on the suit land and that it is in the interests of justice that the subject matter be preserved before the hearing and determination of the suit.

5. The Respondent responded vide a replying affidavit dated 11/12/2017 filed here on the same date. She stated, *inter alia*, that the suit land was created from land parcel No. SOUTH TESO/ANGOROMO/801. She said that she has lived on the land for over 21 years and that her late husband is buried there. That is also the place where her father-in-law is buried. From her response, it becomes apparent that her late husband had bought a portion of about 1½ acres from the deceased owner of the then SOUTH TESO/ANGOROMO/801. A survey was thereafter done and the Respondent’s late husband was allocated his 1½ acres. The process of transfer never got completed, as the parties involved passed on before completion.

6. The Plaintiff is said to have surreptitiously caused subdivision of the original parcel of land and created new land parcels Nos SOUTH TESO/ANGOROMO/7775, 7776 and 7777. The 1½ acres bought by the Defendant’s late husband falls on parcel No. 7775. Neither the Defendant’s nor her mother-in-law now deceased was involved in the subdivision. And her purchaser’s or possessor’s interest got lost or was overlooked in the subdivision. That is why she is contesting both the suit and this application.

7. The application was canvassed by way of written submissions. The Plaintiff’s submissions were filed on 23/2/2018. It was emphasized that the Plaintiff is entitled to enjoy all the rights of a registered owner. Such rights are said to be free from all other interests and claims, including those made by the Defendant herein. Both the Defendant and the deceased person she intends to bury on the suit land are said to

be trespassers.

8. The Defendant’s submissions were filed on 8/3/2018. It was reiterated that the Defendant’s late husband purchased the land and the Defendant has been residing on the land. From the submissions, it would appear to be the Defendant’s position that the Plaintiff does not enjoy exclusive ownership of the suit land as he has charged it to a bank. She submitted further that as an order of injunction is not sought in the suit, a temporary injunction cannot be granted in the interlocutory stage.

9. I have considered the application, the response made to it, and the rival submissions. I have had a look too into the other pleadings on record. It seems clear that the Defendant is intent on staking her claim to the suit land through adverse possession. And in her response to the application, she averred that her late husband and her late father-in-law are both buried on the suit land. The person whose burial on the suit land is now opposed is her mother-in-law.

10. When this application first came to court *ex parte*, an interim restraining orders was granted. At the time, the basis on which the Defendant was on the suit land was not very apparent or clear. In her response to this application, things become clearer. There was a sale agreement availed. There were also other documents. One gets the impression at this stage that her story is not cooked-up. And her averment that the repose of the remains of both her father-in-law and her late husband is on the suit land did not get a response from the Plaintiff.

11. The Plaintiff alleged he will suffer irreparable loss. He however did not specify what kind of loss that would be. It would have been interesting to get from him what kind of irreparable loss he has suffered, or is suffering, because of interment of the remains of other family members of the Defendant on the suit land.

12. The fact of the matter is that burial *per se* does not give the Defendant any proprietary interests in the suit land if she does not already have any. To me, it seems clear that there are competing rights of ownership which require judicial scrutiny. In other words, the ownership of the Plaintiff is open to challenge by the Defendant. She is already saying she is an adverse possessor.

13. In **MUNYU MAINA Vs HIRAM GATHIMA [2013] eKLR**, the Court of Appeal held, *inter alia*, that where a registered proprietor’s title is under challenge, it is not enough to dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances. Given the holding in this case, and considering the circumstances obtaining here, I would be reluctant to ascribe to the Plaintiff all the rights and privileges that go with registered ownership. I would be reluctant too to hold that a *prima facie* case is made.

14. And on a balance of convenience, I think there is greater hardship to be experienced by the Defendant particularly when the possibility is considered that the suit land is a place she has been calling home for over 21 years. I do not agree with the Defendant’s position regarding the legal consequences of charging of the suit land to the bank by the Plaintiff or even the failure or omission to seek a permanent injunction first in the suit itself. But when the sum total of all the circumstances is considered, the court is persuaded that it should not allow the application herein.

15. I therefore hold, in light of the foregoing, that the application herein is unmeritorious. I dismiss the same with costs.

Dated, signed and delivered at Busia this 18th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:.....

Counsel of Defendant: