



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 152 OF 2017

ELIZABETH ADIKINYI ODABA

FAUSTINE AUMA ODABA APPLICANTS

= VERSUS =

TITUS ODABA

CHRISTOPHER MAIKO WESONGA.....RESPONDENTS

R U L I N G

1. What is before me for determination is a Motion of Notice dated 12/9/2017 and filed on the same date. The Applicants – **ELIZABETH ADIKINYI ODABA** and **FAUSTINE AUMA ODABA** – are Plaintiffs in the suit herein filed vide plaint dated 23/8/2017 and filed on 25/8/2017. The Respondents – **TITUS ODABA** and **CHRISTOPHER MAIKO WESONGA** – are Defendants in the same suit. The bone of contention is ownership of land parcel No. BUKHAYO/MATAYOS/256, which the Applicants claim to own as beneficiaries of the estate of their late husband – **JOHN KASIRIFU ODABA** – said to be the registered owner. It is a claim that the two Defendants contest.

2. The application filed is meant to secure a temporary injunctive relief against the Respondents who have allegedly interfered with the land. More specifically, the restraining order is meant to restrain the Respondents, whether by themselves, agents, relatives or any one claiming through them from entering, tilling, cultivating, constructing on or dealing in any manner whatsoever with the land or any portion of it until hearing and determination of the suit. The area OCS is required to enforce the order and the Respondents are supposed to pay the costs of the application.

3. According to the Applicants, the Respondents are busy subdividing and disposing of some portions of the land. They are said to be doing so illegally and the restraining order is meant to stop them.

4. The Respondents responded vide two replying affidavits, both filed on the same date. From Titus Odaba, we gather that the Applicants late husband was his own brother and was registered as the owner of the land in trust for his other brothers, himself included. From CHRISTOPHER MAIKO WESONGA, it is clear that he purchased a portion of the land not from TITUS ODABA but from two daughters of TITUS' deceased brother – VINCENT ODABA. The two daughters were KAMILITA NAITI ODABA and JOSEPHINE AKINYI ODUORI and the portion they sold belonged to their late father.

5. It also emerged that the two Respondents live on clearly demarcated portions of the land and each has carried out extensive developments. Before filing the replying affidavits, the two Respondents filed a defence and counter-claimed.

6. The application was canvassed by way of written submissions. Okutta for the Applicants filed brief submissions on 12/7/2018. He reiterated that the Respondents are illegally interfering with the land. According to counsel, the order of injunction is merited.

7. The Respondents submissions had been filed earlier on 27/6/2018. It was submitted that the two respondents have legitimate interests in the land and restraining them would amount to violation of those interests. According to Otanga for the Respondents, the Respondents interests are protected under Article 40 of the Constitution of Kenya, 2010, and Sections 25 and 28 of Land Registration Act. Further, the Respondents claim, which is under trust, was said not to be capable of being extinguished by the fact of registration of ownership and the case of **KANYI Vs MTHIORA [1984] KLR 713** was cited to support this position.

8. I have had a look at the suit as filed, the defence and counter-claim on record, the application, responses made, and the rival submissions. In my view, the connection of the two Respondents with the land is reasonably well shown on the face of it. It is similarly shown too that they live on the land. The restraining order seeks to stop them from “entering, tiling, cultivating, constructing on or dealing in any manner whatsoever ...” with the land. I do not know how the court is expected to do this to people who are in possession of their respective portions

and are already deriving their livelihoods from them.

9. The Applicants counsel alleged compliance with the threshold set in the case of **GIELA Vs CASSMAN BROWN & CO. LTD [1973] EA 358**. The truth however is that such compliance was never demonstrated. It was not demonstrated, for instance, that there is a prima facie case with a probability of success and/or that the Applicants might suffer irreparable loss which would not adequately be compensated with damages. Even the requirement of consideration of balance of convenience was merely mentioned without being substantiated.

10. The court is not persuaded at all that the Applicants deserve the relief they are seeking. The application herein is therefore found unmeritorious and the same is dismissed with costs.

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

A. K. KANIARU

JUDGE

In the Presence of:

Applicants:

Respondents:

Counsel of Applicants:

Counsel of Respondents: