



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

ELC CASE NO.27 OF 2016

BETWEEN

PETER CHEGE

MONICA NYAMBURA.....PLAINTIFFS

VERSUS

ADIT AGOT AMBROSS

AMIN AGOT

DEMTILA AGOT ADIT.....DEFENDANTS

RULING

1. The application before me is a Notice of Motion filed here on 5/9/2016. It is brought under Sections 1A, 3A and 63 (e) of Civil Procedure Act and order 40 Rule 3 of the Civil Procedure Rules. The two Plaintiffs – **PETER CHEGE** and **MONICAH NYAMBURA** – brought it against the Defendants – **ADIT OGOT AMBROSS, AMIN AGOT, OPUNDA AGOT, and DEMITILLA ADET OGOT** alleging, inter alia, violation of a Court order issued against the Defendants in respect of land parcel L.R No.**BUKHAYO/MUNDIKA/2681**.

2. The following prayers are sought in the application.

Prayer 1: That Adit Ogot Ambrose, Amin Ogot, Opuna Ogot and Demitilla Adit Ogot be arrested and committed to jail for a period of 6 months for disobedience of the Court order issued on 3/5/2016 or any other herein.

Prayer2: That any structure constructed on the subject matter by the Defendants after service of the order of 3/5/2016 be demolished forthwith.

Prayer3: That the OCS Busia do provide security to the Plaintiffs during fencing and/or use/development of parcel No.BUKHAYO/MUNDIKA/2681.

Prayer 4: That this Court do grant such order that shall meet the ends of justice.

Prayer 5: That costs be provided for.

3. A look into the application shows, inter alia, that the Court issued a restraining order on 3/5/2016. The order was extracted after allowing the application asking for it on 26/4/2016. The Defendants were served

with the order. They never obeyed it. Instead, they entered the suit land and put up structures.

4. The Defendants responded to the application through a replying affidavit filed on 7/12/2016. The 1st Defendant represented the others in the response. He said that he does not reside on the suit land and the suit is therefore wrongly brought against him. He also said that the suit land was ancestral land originally owned by the late **MICHAEL ONYANGO ADIT**. There have not been any succession proceedings and he wondered how title changed hands.

5. The 1st Defendant said further that the order dated 3/5/2016 was incapable of being breached by any of the Defendants as they have not sold, alienated, disposed of or transferred the land to anyone. It was also denied that any fence has been destroyed. The 1st Defendant said that it is the Plaintiffs who are in the wrong because they had demolished the 4th Defendants house on the suit land.

6. The application was argued interpartes on 7/12/2016. The Plaintiffs Counsel Mr. Fwaya, emphasized that the order was served on the Defendants. Ipapu for the Defendants emphasized that the order granted had not been violated. Many other things were said by Counsel on both sides but I don't consider them crucial in the determination of the matter. The crucial issue in my view is the purported meaning and implication of the order dated 3/5/2016 vis-à-vis what the Defendants are alleged to have done.

7. It is necessary to state the order and it was as follows:

“That the Honourable Court has issued an order of temporary injunction against the Defendant/Respondents by themselves, their servants, workers, agents, and third parties from selling, disposing off, alienating and/or transferring L.R No.BUKHAYO/MUNDIKA/2681 from the Plaintiffs ownership pending hearing and determination of the main suit.”

8. The order talked of selling, disposing of, alienating and transferring. If one were to look up the meaning of these words in a good dictionary, one would realize that what is restrained is sale or transfer of the suit property by the Defendants to other people. In other words it is the ownership or possession of the suit property that the Plaintiffs sought to protect from being transferred to other people by the Defendants. The order did not restrain entry and/or use of the land by the Defendants. More specifically, the order did not restrain any other kind of interference.

9. When the application from which the order emanated came before me exparte on 30/3/2016, I noted then that the Defendants were said to have been cutting trees and intending to start construction. I observed that the orders sought, which incidentally is the same order complained of, did not cover the kinds of action that the Defendants were attributing to the Plaintiffs. It is that same scenario that is repeating itself here. One would have thought that Counsel for the Plaintiff then would have taken care to amend the prayer so that it could capture and include the complaints of the Plaintiffs. That was never done.

10. What then emerges is exactly what Ipapu for the Defendants pointed out: That the actions of the Defendants can not be construed as constituting any violation of the order. The order is concerned with preventing sale or transfer of the suit property to other people. The Defendants are not said to have attempted any of this. What they are said to have done is to enter the land, destroying a fence and/or a toilet. The order issued does not restrain this. How, then, can contempt arise? That is why I have refused to be drawn into many irrelevant side issues said during hearing. The crucial issue is what I have mentioned herein. The upshot is that no order in the application can be granted. The other orders sought are supposed to flow from a finding that there is contempt. The finding is that there is no contempt as the order granted was not violated. I therefore hereby dismiss the application herein with costs.

A.K. KANIARU

J U D G E

DATED AND DELIVERED ON 25TH DAY OF JANUARY 2017.

IN THE PRESENCE OF:

1ST PLAINTIFF – PRESENT

2ND PLAINTIFF - ABSENT

1ST DEFENDANT - PRESENT

2ND DEFENDANT - ABSENT

3RD DEFENDANT - ABSENT

J U D G E