



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC. NO. 17 OF 2017

HELLEN AJIAMBO MUKANDA.....APPLICANT

(BALONGO & CO. ADV)

VERSUS

1. SOLOMON OTIENO TOTO

2. STEPHEN OUNDO BARASA.....RESPONDENTS

3. FAUSTINE OUNDO OCHUNGA

(OUMA-OKUTTA & CO. ADV)

RULING

1. This is a ruling on an amended Notice of Motion filed here on 2/2/2017 and dated the same. The original Notice of Motion was filed on 30/1/2017 and brought to court for consideration on 31/1/2017. The Court expressed its reservations about the application and that led to an attempted amendment on 1/2/2017, which did not turn out right. This led to yet another amended application which is the one under consideration.

2. The amended application originally had four (4) prayers but only two (2) are for consideration at this stage, the others having been considered earlier. The prayers for consideration are as follows:

Prayer 2A: That an order for injunction be and is hereby granted restraining the Respondents by themselves, their agents, workers, and/or servants from building, digging or in any way interfering whatsoever with LR Nos. BUKHAYO/MUNDIKA/9153 and 9154 until this case is heard and determined.

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

3. The application is brought under order 40 Rules 1 and 2 and Sections 3A and 3B of the Civil Procedure Act and any other provisions of law. The Applicant – **HELLEN AJIAMBO MUKANDA** – is the Plaintiff in the suit herein where she complains that the Respondents – **SOLOMON OTIENO TOTO**, and **STEPHEN OUNDO BARASA** – who are Defendant in the suit, have trespassed into her parcels of land L.R. BUKHAYO/MUNDIKA/9153 and LR BUKHAYO/MUNDIKA/9154 – and needed to be evicted and enjoined from conducting activities there. As can be seen from the application what is essentially sought is a temporary restraining order before the case is determined.

4. According to the Applicant, the Respondents have fenced her land. They have deposited construction materials on it and have destroyed her nappier grass. She said they are daring her to step on the land.
5. The Respondents replied through two replying affidavits dated 13/2/2017 and 15/2/2017 respectively. They denied the Applicants allegations against them and averred that they occupy and use parcel No. BUKHAYO/MUNDIKA/1395. They said they have no wish or desire to use the Plaintiff's land. They also seemed to insinuate that there could be a possible overlap between what they use and what the Applicant claim as her own. They faulted the Applicant for not availing current ownership documents to show that her parcels of land actually exists.
6. The application was canvassed by way of written submissions. The Applicants submissions were filed on 24/2/2017. According to the Applicant, the Respondents have illegally encroached on her land and they need to be restrained. She noted that the Court has already granted an interim restraining order exparte. According to the Applicant, the Court should readily grant orders if an Applicant demonstrates some sort of ownership.
7. The submissions of the Respondents were filed on 23/2/2017. According to the Respondents the application is incurably defective, having been filed without leave of Court and with a supporting affidavit whose date of deponing has not been disclosed. It was reiterated too that the Respondents have not trespassed or interfered with the Applicant's land. They said they are occupying parcel No. 1395 and the Applicant ought to have shown that her parcels of land exist on the ground.
8. I have considered the application, the response made, rival submissions, and the suit as filed. I do not agree that the Applicant's application is defective or required leave of court to amend. The amended application was filed on 2/2/2017. It has a supporting affidavit dated 30/1/2017 and the affidavit is commissioned. The only thing missing is the date of its commissioning and I consider that a minor defect that does not affect the validity of the application. The Respondents replying affidavits were filed later than the amended application. Leave of court would be required if the application came later than the response; it came earlier.
9. But a more crucial and critical issue was raised by the Respondents. They said they occupy and use parcel No. 1395, not the Applicant's parcels Nos 9153 and 9154. They challenged the Plaintiff to avail up to date records showing her parcels of land still exist. I think the Applicant was duty-bound to respond to this. And one simple way of doing it was to avail current search copies demonstrating ownership. She did not do it and the uncertainty raised by the Respondents allegation was not dispelled.
10. Courts of law are always reluctant, even unwilling, to grant orders in situations of uncertainty. In particular, injunctive orders are required to be clear as to the area covered by the order and the manner in which the order is supposed to operate. In a situation like this where possible overlap or even non-existence of property is alleged, it becomes imprudent to issue a restraining order. And it is even pointless to concern ourselves with the application of the requisite principles for granting temporary injunctive relief when more basic issues of fact remain un-addressed.
11. It is for this reason that I find the application herein unmeritorious and dismiss it with costs.

Dated this 13th day of July, 2017

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

Respondents:

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