



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC CASE NO. 3 OF 2019

PAMELA ADHIAMBO OBENGO.....PLAINTIFF

VERSUS

STEPHEN N MUGO.....1ST DEFENDANT

THE LAND REGISTRAR, KERICHO LAND REGISTRY.....2ND DEFENDANT

THE LAND ADJUDICATION OFFICER, KERICHO.....3RD DEFENDANT

THE CHIEF EXECUTIVE COMMITTEE MEMBER (CEC) IN CHARGE OF

LANDS, COUNTY GOVERNMENT OF KERICHO.....4TH DEFENDANT

RULING

1. By a motion on notice dated 21st December, 2018 and filed on 11th January, 2019, the applicant – **PAMELA ADHIAMBO OBENGO** – has asked the court to grant her several orders against the respondents – **STEPHEN N MUGO** (1st respondent), **THE LAND REGISTRAR, KERICHO LAND REGISTRY** (2nd respondent), **THE LAND ADJUDICATION OFFICER, KERICHO** (3rd respondent), and **THE CHIEF EXECUTIVE COMMITTEE MEMBER (CEC) IN CHARGE OF LAND, COUNTY GOVERNMENT OF KERICHO** (4th respondent). The motion is expressed to be brought under Section 26 of the Land Registration Act, Section 3A of Civil Procedure Act, Order 40 Rules 1(a) (b) 2(1) (2) 4(1) (2), 5 and Order 51 (1) of the Civil Procedure Rules, 2010. It was filed contemporaneously with a suit of even date. The applicant is the plaintiff in the suit while the respondents are the defendants.

2. The application came with five (5) prayers but some of them – like prayers 1 and 2 – are now spent, having been for consideration at the *exparte* stage. The prayers for consideration are therefore three (3) (prayers 3,4 and 5) and I now and here set them out *ipsissima verba*:

Prayer 3: That an injunction be and is hereby issued against the 1st, 2nd, 3rd and 4th respondents either by themselves, their servants and/or agents or any person howsoever acting under their instructions from any further construction, encroachment, dealing or interfering with the applicant’s quiet enjoyment, use, possession and occupation of the suit property being parcel of land situated in Kericho Municipality in the Kericho County measuring 0.0312 of hectare, being title NO L.R NO 631/1428, IR NO. 76596 pending the hearing and determination of the suit herein.

Prayer 4: That the officer commanding police station Kericho be ordered to assist in peaceful execution of the order herein.

Prayer 5: That the costs of this application be provided for.

3. Some background is necessary. The applicant, as plaintiff, filed her suit against the respondents, as defendants, claiming, inter alia, that the 1st respondent, while aided by the others named, had illegally entered her land parcel NO L.R NO 631/1428, I.R NO 76596, and chased away her tenants, demolished her structures there, and started developing the land. In her suit, the applicant prays for several orders, including one for injuncting the respondents from interfering with the land.

4. But the respondent denied the applicant’s claim, with 1st respondent averring that he is on his own parcel of land, said to be unsurveyed residential plot No 100, bought from one Andrew Kipyegon Langat, which is where the alleged activities were taking place. That is the

background in brief.

5. The 1st respondent is the only one who responded to the applicant's application. He did so vide a replying affidavit filed on 31st January, 2019. He denied being in possession or occupation of the applicant's land. He said he is on his own land sold to him by one Andrew Kipyegon Langat who had been allotted the same by the government. He also denied the applicant's allegations that he bought his land from 3rd respondent. According to the 1st respondent, the applicant's application should be disallowed

6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 27th January, 2020. She reiterated much that is both in her application and the plaint. She further faulted the 1st respondent for carrying out construction on an unsurveyed plot that he calls his own. She called it a plot without beacons and without clear measurements. She submitted that the 1st respondent has encroached on her land and has thus denied her access to it. According to the applicant, the respondents, more so the 1st respondent, should be restrained.

7. The submissions of the 1st respondent were filed on 24th February, 2020. It was submitted that the applicant is not in occupation of the land. It was submitted that the applicant has not established a prima facie case or shown that she will suffer irreparable loss. The 1st respondent is said to have already done construction and is in occupation. The court was asked to dismiss the application.

8. I have considered the application, the response made, and the rival submissions. I have also had a look at the records in the court file. It appears to me that when the applicant says that she owns land parcel LR NO 631/1428, IR NO 76596, she means what she says and she has documents to show for it. In the same way, when the 1st respondent says he owns unsurveyed plot NO 100, he also means it and has documents to authenticate the claim. But there is confusion, which is not caused by either of these two parties. The source of confusion seems to be from official government sources.

9. I say this because a survey report dated 20th August, 2019 in the court file clearly shows that the physical position or location of the two plots that the two parties claim to own overlap. And it is clear that neither the applicant nor the 1st respondent caused the overlap. Yet it is them who are, or will be, most affected by it. The case filed may ultimately be about the resolution of the issue of ownership and/or resolving the existing confusion.

10. As would be expected, the submissions filed by the two opposing sides on the issue of interim injunction pull in different directions. The applicant would wish the injunction issued but the 1st respondent would be pleased if the court declines to issue it. In my view, the submissions filed do not offer useful guidance on what should be done in the circumstances. I think the necessary order required now is one that ensures preservation of the property. And by property I mean both the applicants land described variously as L.R 631/1428, IR NO 76569 and/or the 1st respondents unsurveyed plot NO 100.

11. If I issue a restraining order as prayed for by the applicant that will tie the 1st respondent's hands and the applicant may use the opportunity to go to the property and start doing her own things. On the other hand, if I dismiss the prayer of injunction and leave it at that, the 1st respondent will continue doing his development on the land as if the applicant's claim has been defeated.

12. Section 3A of Civil Procedure Act (cap 21), which is a provision invoked by the applicant in her application, provides as follows:

Section 3A

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court”

It is my wish to use this provision. And while doing so, I will be guided by the following legal maxim: “*Actus curiae neminem gravabit*” which translates as “*an act of the court shall prejudice no one*”. The maxim simply aims at ensuring that none of the interests of the parties are harmed. In the circumstances of this case an order directed to both sides to maintain status quo serves the purpose well. Inevitably, such an order has to be in the nature of an injunction.

13. Further, I bear in mind that in **OTIENO VS OUGO & ANOTHER (NO2) (1987) KLR 400**, the court held, inter alia, that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action. I consider that preservation of what each party is claiming is paramount before the suit herein is determined.

14. Accordingly, I issue the following order for the purpose of maintaining the status quo. Both the 1st respondent and the applicant and/or their agents, servants, assignees, employees or any other person acting at their behest or instructions be and are hereby restrained from conducting further or other activities, or selling, transferring, alienating, leasing, or in any way interfering with both land parcels NO L.R NO 631/1428, IR 76596 and/or unsurveyed plot NO 100 until this suit is heard and determined and/or until further or other orders of the court. Further, the structures on the property whether belonging to 1st respondent or applicant are allowed to remain intact but no further or other developments should take place.

15. I consider that this order serves both sides well and will preserve the property pending determination of the case. In any case, it would be foolhardy of the 1st respondent or the applicant to conduct activities on the land while it is not clear at this stage how the issue of ownership will ultimately turn out to be. In my view, it would be imprudent use of money or resources to engage in such activities.

16. In the final analysis, the application brought by the applicant is hereby dismissed. But it is not dismissed because of the response or submissions by the other side. It is dismissed because I have decided to take a different approach and give an order that best serves the

interest of justice. And the application has to be brought to finality anyway. I do not condemn any side to pay costs. To me, officialdom is to blame. The unhelpful manner it has handled the issue has made both the applicant and 1st respondent to be at loggerheads.

Dated, signed and delivered at Kericho this 3rd day of June, 2020.

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A. K. KANIARU

JUDGE