



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 152 OF 2014.

GILBERT OUNDO ADAKAI.....APPLICANT

VERSUS

ALFRED ONIALA MAGIO.....1ST RESPONDENT

JOHN OUMA KIMOSO.....2ND RE SPONDENT

RULING

1. The application before me is a Notice of Motion filed on 15th May, 2015 and dated 12th May 2015. The application is brought under Section 3A and 63(e) of Civil Procedure Act (cap 21) and Order 40 of the Civil Procedure Rules 2010. The applicant – Gilbert Adakai Oundo – filed it against the two respondents - **Alfred Oniala Magio** and **John Ouma Kimoso**

2. The application came with seven (7) prayers but at this stage only prayers 3, 4, 5, 6, and 7 are for consideration. The prayers are as follows;

Prayer 3: That pending hearing and determination of this suit a restriction/inhibition be placed on title L.R BUKHAYO/MATAYOS/1171.

Prayer 4: That pending hearing and determination of this suit, a temporary injunction be and is hereby issued against the respondents, their family, servants, agents, or any other person acting on their behalf restraining them from interfering with the applicants, his family, agents or servant's occupation and use of Land Parcel L. R. NO BUKHAYO/MATAYOS/1171.

Prayer 5: That the status quo – the applicants occupation and use of land parcel NO. L.R. NO. BUKHAYO/MATAYOS/1171 be maintained pending the hearing and determination of this suit.

Prayer 6: That directions be given as to the hearing of this suit.

Prayer 7: That costs be provided for.

3. From the grounds advanced and from the supporting affidavit accompanying the application, it appear clear that the applicants late father bought some land from the 1st respondent. The respondent's father died before the land was transferred to him. He and his family however had gone into possession of the land.

4. The 1st respondent then went ahead and subdivided the land. The portion sold to Applicants late father became L.R. BUKHAYO/MATAYOS/1171. That same parcel was then sold to 2nd Respondent. The

applicant says he has lived on that parcel of for a longtime and is entitled to it by or through adverse possession.

5.The 1st respondent has a different story. The story appears in his replying affidavit filed on 27th June, 2015. He said he was selling the land to the Applicant's late father and arrangements were even made to have it transferred to him. A problem arose though. The applicants father claimed he had bought 4 acres. The transfer process then fell through. The 1st Respondent said he had only sold two acres. The transfer process then fell through. The 1st Respondent however allowed the Applicants late father possession of the land while awaiting him to climb down from his claim of 4 acres to 2 acres. This never happened.

6.The 1st Respondent then sold the land to the 2nd respondent. This happened in 2013 and the 2nd respondent went into possession. According to the 1st Respondent, it is a lie to say that the applicant and/or his family are on the land. They have never lived there; they were only cultivating it. And even now, the plaintiff and his family are not living there. They live at Igere, Masiebi village.

7. I don't see the response of the 2nd respondent in the file. His response to the originating summons is however available. It would appear that his position is that he is an innocent purchaser for value without notice.

8. No oral arguments were proffered in this matter; submission were filed instead. And while the 1st respondent is the one who respondent to the application, there are no submissions from him. The submissions were filed on 13th October, 2015. The applicants submissions were filed on 7th October, 2015.

9. The submissions filed by the 2nd Respondent seem to focus on the suit itself, not the application. The submissions end by affirming reliance on the 2nd respondents replying affidavit dated 1st September, 2015. That affidavit too is responding to the main suit, not the application.

10. The Applicant submitted that a prima fade case is well made out. The respondents are said to have admitted that the Applicant occupies the land. According to the applicant, there is need to maintain the status quo.

11. I have considered the suit as filed, the application herein, the responses made and the submissions. The applicants' suit is founded on adverse possession. It would appear that the 1st Respondent does not use the land. And the issue of adverse possession is essentially one between the applicant and 1st Respondent. If a restraining order is issued, it will essentially affect the 2nd respondent. The 2nd Respondent is the registered owner of the land. If you are not the registered owner, you need to do a good job of convincing the court to issue you with one. "And this is essentially because the registered owner prima facie enjoys rights that are not easy to defeat.

12. In this matter, the 2nd respondent says he is an innocent purchaser for value without notice. The Applicant has not shown that the 2nd Respondent connived or colluded with the 1st Respondent to defeat any rights that the Applicant may claim. That is why the court has to be wary of issuing a restraining order as asked. I would have no problem issuing it if the land title had not changed hands.

13.The Applicant also prays for inhibition. The court was not addressed on this. The submissions do not dwell on this issue. The law applicable to inhibitions is different from the law applicable to restraining orders. The submissions dwelt largely on the issue of injunctions. I needed to be persuaded on the merits of this order. This was not done. It is not an order that I can issue now.

14.Another order prayed for is that of maintenance of Status Quo. And by Status Quo in this context is meant continued occupation and use of the disputed land by the Applicant. As I have already pointed out, the 2nd Respondent is already the registered owner. It was suggested that he is using the land. An order of status Quo as prayed would forment trouble. There would be possible confrontation if a potential adverse

possessor is allowed to use land already being used by the registered owner. The court's hand should not be seen to sign on for this state of affairs. I therefore decline to issue this order.

15. The court is also asked to issue directions concerning hearing of the suit. the suit is filed by way of originating summons. It is seriously contested and serious issues seem to be up for determination. It is necessary therefore to convert the suit into an ordinary case. Accordingly, the suit is converted into a normal ordinary suit. The originating Summons becomes the plaint. The response to it becomes the defence. Parties should comply with pretrial procedures so that the suit can be heard in the usual manner.

16. It can be seen that the application herein has not succeeded. Its merits have not been demonstrated. Save therefore for the prayer for directions, all the other prayers stand dismissed. The applicant will therefore pay the costs of the application.

A.K. KANIARU,

JUDGE.

7/3/2016.

DATED AND DELIVERED ON 7th DAY OF March 2016.

IN THE PRESENCE OF;

PLAINTIFF.....

1ST RESPONDENT

2ND RESEPONDENT

COUNSEL

JUDGE..