



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 1 OF 2015

GEORGE OPUKO OMORITI a.k.a

SEWUS OPUKO OMORITI.....PLAINTIFF

VERSUS

JOHN OMORITI.....DEFENDANT

RULING

1. I am called upon to determine a Notice of Motion dated 3rd May, 2019 filed here by the Plaintiff – **GEORGE OPUKO OMORITI** a.k.a **SEWUS OPUKO OMORITI** – on 6th May, 2019. The application is against the defendant – **JOHN OMORITI** – and is expressed to be brought under Section 3A of the Civil Procedure Act (cap 21). There are three (3) prayers sought as follows:

*Prayer 1: That pending the hearing and determination of this application interpartes this honourable court be pleased to issue an order to the County Land Surveyor and County Land Registrar to carry out a fresh survey on land parcel **NO BUKHAYO/MALANGA/394** and curve out 6 acres for the plaintiff then the balance the defendant to share out with purchasers.*

Prayer 2: That the O.C.S of Nambale Police Station do assist the plaintiff/applicant to execute the orders.

Prayer 3: That costs of this application be provided for.

2. The application is premised on the grounds, inter alia, that the suit herein was heard by the court and a judgement was delivered in favour of the plaintiff on 18th December, 2012; that the plaintiff was found entitled to a portion of land in land parcel **NO BUKHAYO/MALANGA/394** which is 6 acres or more or less than that; that the defendant has sold most of the land leaving the plaintiff with only 3 acres; and that the plaintiff would wish the purchasers to get their portions from the part of the land meant for the defendant.

3. The defendant opposed the application via grounds of opposition filed on 20th May, 2019. According to the defendant, the judgment did not award the plaintiff 6 acres. It ordered instead that the plaintiff is entitled to the portion he possesses or occupies whether that portion is 6 acres or less or more than that. The plaintiff was said to be occupying three acres and the other portion is in the hands of third parties who were not parties to these proceedings.

4. The application was argued before me on 13th June, 2019. The plaintiff said he is entitled to 6 acres and that is what he wants the surveyor to mark for him. The defendant on the other hand reiterated that the plaintiff was not awarded 6 acres. He was awarded only what he possesses or occupies whether that is 6 acres or more or less than that. The court was asked to dismiss the application.

5. The defendant also filed written submissions. He reiterated what was stated in the grounds of opposition and in the arguments proffered when the court heard the application.

6. I have considered the application, the response made, the parties arguments in court, and the defendant's submissions after hearing. The main prayer – prayer 1 – sought by the plaintiff has a clearly noticeable deficiency. And the deficiency consists in the stated period during which the prayer is supposed to be in force. The prayer, in the plaintiff's own words, is meant to run "*pending hearing and determination of this application interpartes ...*"

7. What the above expression means is that the prayer is to run only before the application is heard and determined interpartes. It is for the period when the application is pending hearing inter-partes. That period is different from the period I am now writing this ruling. For I am writing this ruling after hearing the parties interpartes. The matter now is not pending hearing interpartes. Quite clearly, the prayer as formulated was meant for exparte stage. It is at the exparte stage that one can talk of an application as "*pending hearing and determination*" interpartes. In my view, there should have been a prayer meant to serve the period that is coming after hearing and determining the application. I suppose that is what the plaintiff wanted but he formulated his prayer wrongly. There is nothing the court can do for him.

8. There is another problem too and the defendant's side pointed this out well. The court did not award the plaintiff six acres. It awarded him what he possesses and/or occupies. It now turns out, that he occupies or possesses only 3 acres. This is clearly manifest in the substance of G.O.O 2, which is a survey report availed by the plaintiff himself. If one follows the judgement strictly, this is what the plaintiff is entitled to. But he is asking for 6 acres in the application. Who awarded him that? He was awarded what he possesses or occupies whether that is six (6) acres or not.

9. What is more, part of the portion the plaintiff now wants as his own is said to be in possession of third parties. These third parties are said to be purchasers. They were not parties to the suit. If the court issues orders that affects them, will it not be condemning them unheard? In my view, the plaintiff was wrong not to enjoin such parties. Their interests if any, needed to be considered. But the plaintiff now wants an order that will obviously affect them yet they were not parties to the suit. No way. No court of law, alive to the sacrosanct right of a party not to be condemned unheard, can grant such an order.

10. It is for these reasons that the application herein cannot be allowed to succeed. I therefore make a finding that the application is unmeritorious and I hereby dismiss it. No order as to costs.

Dated and signed at Kericho this 8th day of July, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 22nd day of July, 2020.

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A. OMOLLO

JUDGE