



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT BUSIA**

**ELC CASE NO 48 OF 2019**

**JOHN OMUSE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SIFROSA AKUMU OBURON.....DEFENDANT/APPLICANT**

**R U L I N G**

1. For determination is the amended notice of motion application dated 20<sup>th</sup> May 2020 brought by the defendant/applicant under the provisions of oxygen rules and order 40 of the Civil Procedure Rules. The applicant prays for orders;

**i. Spent.**

**ii. Spent**

**iii. That this court be pleased to grant temporary injunction restraining the respondent, his agents, servants, employees and persons claiming through him from making bricks, selling, alienating, constructing, cutting trees or wasting in any other manner whatsoever the land title no South Teso/Osureti/202**

**iv. Costs of the application be provided for**

2. The application is premised on the grounds listed inter alia;

*a) The respondent is illegally wasting away the suit land by making bricks and cutting down trees.*

*b) The respondent is leasing and selling away part of the land to third parties under the pretext that he is the owner*

*c) The applicant will be prejudiced as she will have challenges with these third parties*

3. In the affidavit in support of the application, the applicant deposed that the respondent upon obtaining orders of restriction descended to wasting the suit land by cutting down trees, leasing it and making bricks on it as shown in the photograph annexed as SOA-4 dated 17-12-2019.

4. He added that the respondent obtained monies from third pretending to transfer to them the land once the case is concluded and the third parties have started constructing permanent houses on the land as shown in a photo marked as SAO-5 dated 21-1-2020. That the respondent is misusing the orders he obtained from this court on 24<sup>th</sup> October 2019 and his actions may greatly prejudice the applicant unless he is enjoined.

5. The respondent filed a replying affidavit on 18<sup>th</sup> June 2020 in opposition to the application. He termed the present application as vexatious and based on falsehoods. Mr Omuse deposed that he is a co-owner of the suit land with a distinct portion which he has been occupying for the last 50 years with his dependants and siblings. He denied selling any portion thereof adding that it is the applicant who attempted to sell to deprive him of his inheritance.

6. That it is idle thought to imagine that he cannot profitably use his portion as he has been doing without wasting it. That applicant is not candid for failing to name the person he has sold the land to and which he cannot do as the portion they occupy is not sufficient. He urged the court to allow the matter to proceed on merits so that the matter can be put to rest. He also urged the court to dismiss the application with costs.

7. Parties filed submissions which I have read and considered. The principles for granting injunction are clearly set out in case law. The

applicant is the registered owner of the suit land and she has been sued on account of her registration. On 24<sup>th</sup> of October 2019, the court rendered herself in an application brought by the plaintiff/ respondent by issuing orders of injunction against the defendant/applicant. The defendant has now moved the court seeking similar orders.

8. Has the defendant/applicant demonstrated a prima facie case? Or that she will suffer loss unless the orders are granted? Given that the applicant is the registered owner of the land and that no orders have been issued to change the position of ownership bestows on the applicant the right to have a say in activities being done on the suit land which activities must be shown to be prejudicial to her claim.

9. The applicant pleaded that the respondent had sold off portions of the suit land to third parties who have commenced construction of permanent houses on the sold portions. In the affidavit in support to the motion, no name was given neither was a photograph of a permanent house under construction annexed. The applicant deposed that the respondent is cutting down trees on the land. A photo of people cutting trees on the land was annexed as well as those engaged in brick making. Although the respondent in answer stated that he should not be restrained from profitably using the portion he occupies.

10. It will serve the interest of justice to both parties that no one should put the suit land to use in a manner that is likely to alter its status during the pendency of the suit. Cutting down of old/big trees such as the one shown in annexure SAO-4 and making of bricks as shown in annexure SAO-5 if allowed to continue is likely to change the substratum of the suit land. To this extent, I am persuaded to find that the defendant/applicant has demonstrated prima facie case and is likely to suffer irreparable loss unless the orders of injunction are issued.

11. In the circumstances, I am satisfied that there is merit in the amended application dated 20-5-2020 and allow it in the following terms;

**That a temporary order of injunction be and is hereby issued restraining the plaintiff/respondent, his agents or persons claiming through him from selling, cutting down trees, making bricks and or undertaking new construction on the suit title SOUTH TESO/OSURETI/202 pending hearing and determination of this suit. Costs of the application to abide the winner of the suit.**

**Ruling dated and signed at Kisumu this 6<sup>th</sup> August 2020.**

**A. OMOLLO**

**JUDGE**

**And delivered electronically by email to counsels for parties on 6-8-2020**