



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 21 OF 2020

ANTHONY MASIBO DIFFU aka ANTHONY GABRIEL MASIBO and

JOSEPHINE NAOMI DIFFU (suing as the Administrators of the Estate of

CHARLES NAULE DIFFU (DECEASED).....PLAINTIFF

= VERSUS =

MILDRED AWINO WERE.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR.....2ND DEFENDANT

FELISTER JUMA SIFUNA (sued as the Administrator of the Estate of

EDWARD BULUMA SIFUNA (DECEASED).....3RD DEFENDANT

FRANK M. OKINGO.....4TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....5TH DEFENDANT

MATHEWS TONADO OKECH..... 6TH DEFENDANT

R U L I N G

1. For determination is the amended notice of motion dated 7th July 2020 and filed on 8th July 2020 brought under the provisions of Order 40 of the Civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act. The plaintiff/Applicant seeks orders;

(i) Spent

(ii) Spent

(iii) That this Honourable Court be pleased to issue a temporary order of injunction restraining the defendant/respondents by themselves, their servants, agents and/or employees and any other person whatsoever from evicting or interfering in any manner with the plaintiff/applicant’s right to peaceful and quiet possession, occupation and use of all that property known as L.R No. Bukhayo/Bugengi/14739 measuring approximately 5.6 hectares and Bukhayo/Bugengi/14740 measuring approximately 5.6 hectares (Formerly known as Bukhayo/Bugengi/801) situated in Busia District (hereinafter referred to as the “suit property”) pending the hearing and determination of the main suit.

(iv) That this Honourable Court does grant any other or further relief as it may deem fit.

(v) That the defendant/respondents do bear the costs of this application.

2. The application is premised on the grounds stated on the face of it *inter alia*;

a) That the plaintiff/applicant’s father (Charles Naulle Diffu) purchased all that parcel of land measuring Twenty One (21) acres

situated in Busia District known as Bukhayo/Bugengi/801 from the 3rd defendant's husband, Edward Buluma Sifuma vide a sale agreement dated 10th November 1993 at a consideration of Kenya Shillings Five Hundred Thousand (Kshs.500,000.00) only.

b) That similarly the plaintiff/applicant's father became ill passed away before he could follow up on the transfer.

c) That on or about 20th May 2020, the 1st defendant/respondent and her agents and or servants went to the property and demolished the plaintiff/applicant's house, destroyed the crops and carried away iron sheets and the gate from the suit property. That the aforesaid actions by the 1st defendant/respondent was reported at Busia Town Police Station vide OB: 27/222/5/2020 which led to the arrest of some of the perpetrators and recovery of the gate which is currently in custody of the police at the Busia Town Police Station.

d) That on 26th June 2020 the 2nd defendant/respondent removed the restriction and immediately issued titles to L.R Number Bukhayo/Bugengi/14739 and L.R Number Bukhayo/Bugengi/14740 to the 6th defendant/applicant to the plaintiff/applicant's detriment.

3. The application is further supported by the affidavit sworn on 7th July 2020 by the Applicant where he reiterated the facts set out in the grounds on the face of the application. The applicant annexed the sale agreement as proof of the purchase. He further annexed some photographs and copies of searches for the suit titles Bugengi/801. The applicant deposed further that he registered a caution on the title Bukhayo/Bugengi/801 to preserve it while awaiting confirmation of his grant but which caution was removed by the 2nd defendant and the title transferred to the 6th defendant who then proceeded to sub-divide it.

4. The applicant further accused the 1st defendant of attacking his workers and demolishing a newly constructed house. It is his contention that they have enjoyed uninterrupted possession of the suit land for a period of 27 years. He urged the court to grant the orders of injunction sought.

5. The application is opposed by the 1st, 2nd, 3rd, 5th & 6th defendants. The 3rd defendant filed grounds of opposition on 9/7/2020 where she pleaded thus;

a) That the application is unmeritorious since she is non-suited and the orders sought cannot be issued and or enforced against her and or any of the defendants.

b) That the applicants lack locus standi to agitate on any rights over land parcels No. Bukhayo/Bugengi/14739 and Bukhayo/Bugengi/14740, neither his father (deceased) or his Mother, and or him have ever legally acquired and / or occupied and or owned the same to date.

c) That the application does not meet the threshold enunciated in the Case of **Giella Versus Casman Brown 1973 E.A. 358** and is a sham.

d) That the application is unmeritorious, vexatious and frivolous since she is not the owner, occupier and or have any nexus with the parcels of land now owned by a third party hence non-suited.

6. The 2nd & 5th defendants filed a replying affidavit on 16/7/2020 sworn by the County Land Registrar called Wilfred Nyaberi. Mr. Nyaberi deposed that his statutory mandate is to receive documents or orders and upon due diligence register the same against interests and rights in any land as required by law. That the Land Registrar has no powers to detect fraud if any or any contractual rights which have been exercised by parties. That it is unethical and bad faith for the applicant to allege fraud or irregularity on their part. That the applicant ought to have challenged the order complained of instead of filing a fresh suit. That title Bukhayo/Bugengi/801 is already closed on sub-division hence there is no title upon which an order can be registered.

7. The 1st defendant deposed that there does not exist any suit property Bukhayo/Bugengi/801 and no cognizable right accrues to the applicant. That she lawfully acquired the original parcel No. Bukhayo/Bugengi/801 through a court order as shown in annexure 'NW3' from a public auction. The 1st defendant deposed that it is fool hardy for the applicant to attempt to appeal due process through this application/suit having not challenged her acquisition in the previous suit. The 1st defendant stated that she is non-suited having sold the land to the 6th defendant. Further she deposes that the agreement of 1993 ceased to be of any relevance because of effluxion of time.

8. The 1st respondent deposed further that the applicant has never occupied and or lived on any definite portion of the original number 801. She added that the applicant admits the land was transferred to the 4th defendant thus admitting his father never acquired any legal title. It is contended by the 1st respondent that the suit has nil chances of success hence the orders of injunction should not be granted. She urged the court to dismiss the application.

9. The 6th respondent in his replying affidavit deposed that he is the current owner of Bukhayo/Bugengi/14739 & 14740 which he acquired through purchase from the 1st respondent. He denied destroying any building on the land as there was no-one in occupation when he purchased the land on 26/6/2020. That the applicant has not met the threshold of granting injunction as the same cannot be used to undo what took place on 20/5/2020.

10. The parties relied on filed written submissions for arguing the application. For purposes of this ruling, I will confine myself to submissions relating to whether or not the applicant has established a case for granting orders of temporary injunction sought set within the

principles of *Giella Vs Cassman Brown* (The parties submitted in part on matters touching on the main suit). The brief facts of the case have been outlined by the applicant i.e. that his late father purchased the land title No. Bukhayo/Bugengi/801 in 1993. However, his father died on 9/4/2011 before effecting the transfer in his name.

11. The applicant deposed that he placed a restriction on the title No. 801 on November 2019 (**annex AMD8**) as he awaited confirmation of grant in respect of the estate of his father. From the documents filed (**annex AMD3**) the grant was confirmed on 2nd March 2016 in NBI Suc. Cause No. 53 of 2012. The certificate of search annexed as “**AMD5**” shows that the 4th defendant was registered as owner of the title No. 801 as at 26/2/2003 and title deed issued while the 1st defendant acquired her registration of the same on 21/12/2017.

12. The applicant’s documents thus show that;

a) *The transfer to the 4th defendant was effected during the life time of his father as the purchaser.*

b) *The restriction was placed after the confirmation of the grant.*

c) *The restriction was removed pursuant to a court order issued on 25/6/2020 in Busia CMC Misc app No. 3 of 2020.*

13. The applicant alleges that they have been in possession of the land since 1993 until June 2020 when their structures were destroyed by the 1st defendant. Their possession is however doubtful in view of the documents he has annexed showing change of ownership from the 3rd defendant’s husband to the 4th and later to the 1st defendant. The 6th defendant stated that when he purchased the suit land, it was in vacant possession.

14. Secondly it is pleaded that the restriction was removed pursuant to a court order which has not been set aside and or varied. The applicants were party to the proceedings before the magistrate’s court where the order was granted. In the case of **Hadkinson vs Hadkinson (1952) All E.R. 567** set the general rule that a court order once issued must be obeyed however null or void unless it is set aside. I am not persuaded that the applicant has demonstrated a *prima facie* case against the 1st and 6th defendants. The title already left the hands of the 3rd defendant and the 4th defendant was not served hence the orders of temporary injunction sought would not affect their interest if at all.

15. The applicant submitted that he will suffer irreparable loss unless the orders are granted. He stated that they have invested heavily in the property over the years after having paid for it. They referred the court to the case of **Hoffman La Roche & Co. Vs Secretary of State for Trade & Industry (1975) AC 295 @ 355** which described irreparable loss as;

“The object of [an interim injunction] is to prevent a litigant who must necessarily suffer the law’s delay; from losing from that delay the fruit of his litigation; this is called irreparable damage, ...”

16. The applicant did not however disclose the nature of the heavy investment. The applicant deposed in paragraph 22 thus;

“That on or about 20/5/2020, the 1st defendant and her agents and or servants went to the property and demolished our house, destroyed the crops and carried away iron sheets and the gate from the suit property”.

17. There was no description given of the house demolished or any report prepared by an Agricultural Officer in terms of the nature of the crops that were destroyed to confirm that their value cannot be compensated in damages. The applicant has thus not proved a likelihood of suffering irreparable loss.

18. In whose favour does the balance of convenience tilt? Equity aids the vigilant not the indolent. In the Succession Cause No. 53 of 2012, the applicant listed the title No. 801 as comprising part of the estate of the deceased. The grant was confirmed on 2/3/2016 yet the applicant did not commence the process of revoking the title of the 4th defendant immediately. The 1st respondent deposed that she acquired the title to the land pursuant to a purchase through public auction and vesting order given by the Court in Busia CMC 153 of 2015. Hence her acquisition of the property had nothing to do with the sale transaction between the applicant and the 3rd defendant.

19. I am persuaded to find that the balance of convenience does not tilt in favour of the applicant in a scenario where their possession is in doubt and the 1st, 4th and 6th respondents were not privy to the original transaction. Further on the order of temporary injunction in the manner the pleadings are filed cannot issue against the State agencies (2nd & 5th respondent). As stated earlier, the 4th respondent was not served and the applicant’s counsel informed the Court they were not pursuing orders as against him (4th respondent) in the application.

20. In view of the foregoing, I hold that the application dated 7/7/2020 has not met the threshold for granting orders of temporary injunction sought. The same is dismissed and the earlier orders of injunction given be and are hereby set aside.

21. Costs of the application to abide the winner at the conclusion of this suit.

Ruling dated, signed and delivered at BUSIA this 8th day of September, 2020 (via email to the parties advocates).

A. OMOLLO

JUDGE