



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO.4 OF 2020

WILLIES WESONGA OKELLO.....PLAINTIFF/APPLICANT

= VERSUS =

CHRISTIAN WANJALA

FRANCIS WANJALA.....DEFENDANTS/RESPONDENTS

R U L I N G

1. For determination is the application dated 5th June 2020 brought under sections 1A, 3A and 63(e) of the Civil Procedure Act, Order 40 rules 1 and 2 of the Civil Procedure Rules and article 159 of the Constitution. The applicant seeks to be granted the following orders:

(i) Spent

(ii) That the Court be pleased to issue an injunction restraining the 1st Defendant/Respondent whether by himself, agents, servants and any other person claiming through him from building, developing, putting up structures or in any other way using the disputed land parcel LR No. Bukhayo/Matayos/1331 pending the hearing and determination of this application.

(iii) That the Court be pleased to issue an injunction restraining the 1st Defendant/Respondent whether by himself, agents, servants and any other person claiming through him from building, developing, putting up structures or in any other way using the disputed land parcel LR No. Bukhayo/Matayos/1331 pending the hearing and determination of this suit

(iv) An order of inhibition do issue restraining the 1st Defendant/Respondent either by himself, agents, servants or any other person from alienating, selling away or transferring land to third parties the disputed land parcel LR No. Bukhayo/Matayos/1331 pending the hearing and determination of this suit

(v) Costs of the application be borne by the Respondent.

2. The application is supported by the affidavit sworn by Willies Wesonga Okello on 5th June 2020. He deposes that he is the son of Okello Adiye Amollo (deceased) who was the registered proprietor of the mother title Bukhayo/Matayos/298 that gave rise to parcel Nos Bukhayo/Matayos/1330 and 1331 being the disputed titles herein. That the 2nd respondent caused the deceased to sign transfer forms of the aforementioned mother title being ancestral land while inebriated resulting in the same being subdivided into parcels Bukhayo/Matayos/1330 and 1331 of which parcel no. 1331 was then transferred to the 1st Respondent. The Applicant avers that there was no valid documentation to support the purported transaction. That the 1st and 2nd Respondents colluded to defraud him of his ancestral land.

3. The applicant deposed further that the 1st Respondent has procured materials including sand and stones so as to build permanent structures on the suit land, 1331 yet the matter is still pending in Court. Further, he has on previous occasions threatened the applicant when approached to cease his activities on the suit land until the matter is resolved in court. The applicant asserts that he is being subjected to considerable loss and suffering. That the Respondents' actions are a hindrance to his constitutionally guaranteed rights to fair administrative action. He prays for conservatory orders to bar the 1st Respondent from proceeding with development and from intermeddling with the suit parcel herein; Bukhayo/Matayos/1331 until the matter is resolved in Court.

4. The Application is opposed vide the 1st and 2nd Defendants' Replying Affidavit sworn by Christian Wanjala on 30th June 2020. He stated that he is the registered owner of land parcel no. Bukhayo/Matayos/1331 which he purchased from the late Okello/Adiye/Amollo during his lifetime. He admitted that the suit land was a subdivision of parcel no. Bukhayo/Matayos/298. That he obtained a title to the suit land sometime in 1988 and has been in peaceful occupation and use of the suit land at all material times and is currently in the process of constructing a home thereon. The deponent averred that his property is not part of the estate of the deceased for the applicant to claim it nor was there any formal dispute between himself and the deceased that was unresolved by the time of his demise hence the suit is unjustified.

Further, the applicant has not disclosed the basis upon which this suit has been brought against the 2nd Defendant/Respondent and in what capacity he has been sued. The Defendants urged the court to dismiss the application.

5. Parties elected to canvass the application by way of written submissions. Both parties filed their submissions on 27th July 2020. I have considered the application, submissions and the applicable law. Being an application for injunctive orders the same shall be weighed against the requisite essentials set out in the celebrated case of ***Giella vs Cassman Brown (1973) EA 358*** thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

6. The applicant has submitted that the Respondents have not produced a written sale agreement as proof of the impugned transaction between the late Okello and the 1st Respondent; running afoul of the provisions of section 3 of the Law of Contract Act. The same is to the effect that no suit shall be brought for a disposition of an interest in land unless the contract on which the suit is founded is in writing, signed by all parties thereto and the signing witnessed. That he has also not produced the transfer forms, a copy of the Land Control Board’s consent nor has the consideration for which the land was purchased been disclosed.

7. The 1st Respondent has shown that he has been registered as the proprietor of the suit land since 1988 as indicated in the title deed and green card produced by both parties. For all this period, the applicant has not explained what prejudice he has suffered. The allegations of fraud and/or misrepresentation or inebritation by the Plaintiff can only be established by way of evidence at the main hearing of the suit. There are documents such as the transfer form and consent both dated 12th November 1985 which form part of the Plaintiff’s list of documents showing how the 1st Respondent acquired his title. I am therefore not persuaded that the Applicant has demonstrated that he has a prima facie case with probability of success.

8. The essentials set out in ***Giella versus Cassman Brown (supra)*** are to be attained sequentially. Having failed to demonstrate the first, the Court need not venture into the other two; in accordance with the ***Court of Appeal case of Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR***, where the Court of Appeal stipulated thus:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

9. In light of the foregoing the application dated 5th June 2020 is hereby dismissed with costs to the Respondents.

Dated and signed at BUSIA this 22nd day of October, 2020.

A.OMOLLO

JUDGE