



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CASE NO.67 OF 2019**

**(Formerly BUNGOMA ELC NO. 13 OF 2014)**

**BENJAMIN BARASA WAFULA.....PLAINTIFF/APPLICANT**

**VERSUS**

**PUBLIC HEALTH OFFICER BUNGOMA EAST**

**SUB-COUNTY & 28 OTHERS.....DEFS/RESPONDENTS**

**R U L I N G**

1. Before the Court for determination is the application dated 12<sup>th</sup> May 2020 filed under Order 40 rules 1 - 3 of the Civil Procedure Rules in which the Applicant seeks the following orders:

*i. Spent.*

*ii. That pending the judgment of this case, the Court be pleased to issue orders restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 24<sup>th</sup> defendants/respondents by themselves or through their relatives, agents and workers from blocking the open drainage and diverging storm water on the plaintiff/applicant's ancestral 2 acre parcel being part portion of LR No. Ndivisi/Muchi/1234 which were wrongly enjoined on the Public Utility LR No. Ndivisi/Muchi/1372.*

*iii. That pending judgment of this case, the Court be pleased to order the 4<sup>th</sup> Defendant, his relatives, agents and workers to cut down the Eucalyptus tree that was being felled by his now-deceased father because it was planted in the water way and the public road of access whereby its dangerous to people and property.*

*iv. That pending judgment of this case, the Court do order the 2<sup>nd</sup> upto the 5<sup>th</sup> and 19<sup>th</sup> Defendant/Respondents herein under the supervision of the OCPD Webuye West Sub-County, to re-open the Public access road passing between LR No. Ndivisi/Muchi/3851 and 3852 on one side; and 2210 on the other side.*

*v. That the Court be pleased to grant temporary orders restraining the 2<sup>nd</sup> to 5<sup>th</sup>; 16<sup>th</sup>, 17<sup>th</sup> and 19<sup>th</sup> defendants/respondents from intermeddling with the late Jackson Juma Wangachi's LR No. Ndivisi/Muchi/4213; and confining them on the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondent's parcel LR No. Ndivisi/Muchi/2525 pending the determination of this case*

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

2. The application is supported by the affidavit sworn by Benjamin Barasa 12<sup>th</sup> May 2020. He deposes that the 2<sup>nd</sup> to 5<sup>th</sup> and 19<sup>th</sup> Defendants failed to comply with the Court order of 21<sup>st</sup> May 2015 by intermeddling with the property of the Estate of the late Jackson Juma Wangachi namely LR Ndivisi/Muchi/4213. He continued that the named defendants together with the 16<sup>th</sup> and 17<sup>th</sup> defendants intermeddled with the property while purporting to transact on LR Ndivisi/Muchi/2525 to LR No. Ndivisi/Muchi/3851 and 3852. Moreover, they disobeyed the Court order of 25<sup>th</sup> September 2013 by diverting storm water to his maize farm thereby damaging his aforementioned two acre portion.

3. The Plaintiff annexed a bundle of photographs demonstrating how the storm water was diverted by blockage of waterways using rags, iron sheets, bricks and nappier grass; supposedly by the named defendants. That the said defendants secretly cheated an innocent purchaser then proceeded to do so. He continued that the water was also diverted onto a public access road passing through LR No. Ndivisi/Muchi/4208, 4219 – 4226 and 4227 – 4231.

4. The Plaintiff avers that he reported the same to the local administration but they declined to assist as he had also sued them in a separate case. He asserted that the Chief and his assistant were in collusion with the named Defendants herein. However, the Plaintiff at paragraph 9 stated that the photographs annexed as BBW1, 3, 4 and BBW6 show that his workers have cleaned the water drainage which he deposed was blocked by Rashid's family and Aisha's family.

5. Despite being served the defendants/respondents did not file any responses to the application. Consequently the application is deemed unopposed. I have considered the application, perused the record and the applicable law. The Court notes that the Plaintiff is self-represented which explains the want of form exhibited in the drafting of the application. It shall be widely construed to accommodate this reality in accordance with article 159(2)(d) of the Constitution.

6. With regard to substance, the Plaintiff in prayer (ii) seeks injunctive orders restraining the named Defendants from interfering with the drainage affecting the parcel of land he deems to be entitled to comprised in 2 acres portion of LR No. Ndivisi/Muchi/1234 which he pleads is wrongly joined to the Public Utility LR Ndivisi/Muchi/1372. Prayers (iii) to (v) however are prayers for mandatory injunctions which by nature are only issued in the rarest and clearest of cases

7. The Court of Appeal in **Barclays Bank of Kenya Ltd vs Banking, Insurance & Finance Union (Kenya) (2019) eKLR** cited Meggary J with regard to issuance of mandatory injunctions as follows;

*“The rationale as stated by Meggary, J. in the case of **Shepherd Homes Ltd vs Shandahu (1971)1 Ch. D. 34**, is that:*

*“...a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”*

8. The Plaintiff has a pre-determined notion that the Court ought to grant orders based on his entitlement to his aforesaid 2 acres from parcel of land Ndivisi/Muchi/1234. In the affidavit in support of the motion and or the applicnt's list of documents filed on 13<sup>th</sup> Sept 2016, there are no details annexed showing ownership of the said title. Similarly, evidence needs to be adduced to prove that indeed 2 acres of L.R no 1234 was wrongly joined to Ndivisi/Muchi/1372. The orders being sought are mandatory in nature therefore cannot be granted where there is uncertainty that ought to cleared after hearing both parties to the suit.

9. The Plaintiff further contradicted himself by stating in paragraph 9 of his supportive affidavit that he has already taken remedial action restoring the open drainage to its former state. The object of interim injunctions is to protect a party against violation of his rights for which he stands to suffer irreparable harm that he cannot be adequately compensated by way of damages. In this case the Plaintiff has himself deposed that the drainage has been cleared thus curing the violation complained of. In any event, if the Defendants are in violation of any interim orders granted prior to this application the remedy is to apply that the defendants be indicted for contempt.

The upshot of the foregoing is my holding that the application dated 12<sup>th</sup> May 2020 is hereby dismissed for want of merit. Since the Respondents did not oppose the application no costs is awarded.

**Dated and signed at BUSIA this 15<sup>th</sup> day of October 2020.**

**A.OMOLLO**

**JUDGE**