

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 21 OF 2019

IBRAHIM NYONGESA OUMAPLAINTIFF/APPLICANT

VERSUS

PHILIP NAMENGE OPEMI.....DEFENDANT/RESPONDENT

R U L I N G

1. The notice of motion dated 22/3/2019 brought under the provisions of section 1A, 2B, 3A of the Civil Procedure Act and Order 40 of the Rules by the Plaintiff/Applicant seeks for Orders;

a) Spent

b) **That thereafter, pending the hearing and determination of the main suit, a temporary injunction do issue restraining the defendant, by himself, his servants, agents or any persons purporting to derive authority from him from entering into remaining in, cultivating, using or in any other manner interfering with the plaintiff's quiet occupation, possession and use of land parcel number BUKHAYO/EBUSIBWABO/65.**

c) **That the cost of this application be provided for.**

2. The application is supported by the Applicant's affidavit sworn on the same date. He deposed that he got the title to the suit land through inheritance and has been using it peacefully. That recently the defendant without any colour of right commenced cultivation and planting trees on the suit property now threatening to dispossess him. The Applicant prays that the Respondent be stopped from doing so pending determination of the suit.

3. The defendant/respondent filed a replying affidavit on 19/2/2020 in opposition to the application. He deposed that he purchased a portion of L.R Bukhayo/Ebusibwabo/65 from Ronald Ouma Wafula on 9th August 2016 and 21/11/2016 and took possession immediately. The Respondent added that the plaintiff/applicant was a witness to the agreement of 21/11/2016 as shown in the copy annexed as "PNM 3". The Respondent deposed that he has been using the land for over 4 years with the Applicant's knowledge.

4. It is the Respondent's claim that the Applicant conspired with the local administration to disinherit other beneficiaries of the estate of Desterio Ouma – deceased and that the Applicant's brother called Ronald Ouma has since filed an application for revocation as shown in annex **PNM 3**. He concluded that he is a purchaser for value and the orders sought will greatly prejudice him because he resides on the plot with his family. The Respondent urged the court to dismiss the application.

5. Parties argued the application by filing of written submissions which submissions I have read and considered. Both the Applicant and the Respondent relied on the renowned case which laid the principles for grant of injunctions i.e. **Giella Vs Cassman Brown (1973) EA 358**. The Respondent also cited the Case **Mrao Ltd Vs First American Bank of Kenya Ltd (2003) eKLR**. The principles undoubtedly require that an Applicant must show that he has a prima facie case with probability of succeeding or that he is likely to suffer irreparable loss unless the orders are granted or for the Court to weigh on which side the balance of convenience tilts.

6. From the pleadings, it is not in doubt that the Applicant is the current holder of title to the suit land. The Applicant did not file any supplementary affidavit to respond to the facts set out in the replying affidavit. However, in his submissions, he conceded that he came to know of the transaction between the Respondent and Ronald Wafula Ouma on 21/11/2016 after being invited to witness the payment of the balance of the purchase price. That he was ignorant that it was their share of the land being sold. The Applicant submitted facts that ought to have been brought by way of affidavit before being included in the submissions.

7. The Applicant in his affidavit did not disclose when the Respondent began committing the acts complained of yet. He got registered on 23rd August 2018. If he was aware of the Respondent's interest on the land by November 2016, he cannot therefore approach the court to grant him mandatory order of injunction pleaded under the guise of a temporary injunction. He did not deny the Respondent's averment that the Respondent is living on the land with his family. Thus orders of temporary injunction if granted may be used to cause the eviction of the Respondent. On the Applicant's contention that the land sold is Bukhayo/Ebusibwabo/767 not 65 is an issue that can only be determined during the hearing since the copies of agreements annexed to the affidavits on record does show on its face to refer to the suit land. The Applicant has in my view not demonstrated that he has a *prima facie* case with probability of success.

8. The Applicant did not expressly tell this court that the loss he is likely to suffer cannot be compensated in damages. Lastly, since the Respondent is already in occupation of the suit portion, the balance of convenience tilts in his favour by remaining on the land (status quo) until the suit is determined.

9. Going by the circumstances of this case, it is my finding that the application dated 22/3/2019 is unmerited. The same is dismissed with costs.

Dated, signed & delivered at BUSIA this 5th day of November, 2020.

A. OMOLLO

JUDGE