



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 178 OF 2017

VINCENT OGAI WANDERA.....PLAINTIFF

VERSUS

VICTOR OCHIENG OPONDO.....1ST DEFENDANT

EVANS ODUORI.....2ND DEFENDANT

MARIA ACHIENG OPONDO.....3RD DEFENDANT

JOHN OKUMU.....4TH DEFENDANT

NICHOLAS AMBOGA.....5TH DEFENDANT

RULING

1. The application before me for determination is dated 27/3/2018 and was filed here on 5/4/2018. It is an amended Notice of Motion brought under Sections 3A and 63(e) of the Civil Procedure Act (cap 21), Order 40 Rules 1, 2 and 3 of Civil Procedure Rules, 2010, and all other enabling law. The application is brought by the Plaintiff – **VINCENT OGAI WANDERA** – against the Defendants – **VICTOR OCHIENG OPONDO, EVANS ODUORI, MARIA ACHIENG OPONDO, JOHN OKUMU and NICHOLAS AMBOGA**. The Plaintiff is the registered owner of land parcel No. SAMIA/WAKHUNGU-ODIADO/1886, which he claims the Defendants are unlawfully using and have prevented him from using.

2. The application has four prayers but prayers (a) and (b) are now moot as they were meant for consideration at the exparte stage. The prayers for consideration now are (c) and (d), which are as follows:

Prayer (c): That an order of injunction do issue to restrain the Defendant/Respondents, their agents, servants or their family members or otherwise howsoever from trespassing on, remaining on, cultivating, farming on, cutting down trees, or continuing in occupation or possession of the whole or any part thereof parcel No. SAMIA/WAKHUNGU-ODIADO/1886 pending hearing and determination of the suit.

Prayer (d): That costs of this application be provided for.

3. According to the Plaintiff, the Defendants have violently been preventing his workers from working on the land. The Defendants were said to have no rights at all to interfere with the Plaintiff's ownership. The Plaintiff averred that he acquired the land through purchase and the Respondents did not raise any complaint or contest at all. He said further that the Defendants are determined to annex his land to consolidate it with their own. The Plaintiff even claimed that the Defendants want to transfer a portion of his land to someone else.

4. The response of the Defendant is to be found in the replying affidavit filed here on 5/3/2018. Strictly speaking, the response is for 1st and 3rd Defendants. I do not see any response filed by the other Defendants. The replying affidavit itself is a response to an earlier un-amended application. Procedurally however, it can be deemed to be a response to the application at hand now as no response was filed when the application was amended.

5. The response contains claims that the Plaintiff fraudulently acquired the land. The 1st Defendant alleged that the Plaintiff took advantage of his late father's illiteracy and old age. The father is said to have been led to apply for letters of administration, which he did without

involving his three other brothers – RAPHAEL ODHIAMBO, MICHAEL ODUORI and COSMOS OKETCH. The original land parcel was said to have been L.R. NO. SAMIA/WAKHUNGU-ODIADO/246. The 1st Defendant’s late father seems to have secretly sold a portion to the Plaintiff and when the Succession Court issued a grant the land was subdivided into two – L.R. No. SAMIA/WAKHUNGU-ODIADO/1885 and L.R. No. SAMIA/WAKHUNGU-ODIADO/1886. The Plaintiff got to own parcel No. 1886.

6. The Defendants are challenging this, alleging fraud in the manner of acquisition by the Plaintiff. The Defendants averred that their homes are on the land and their families have been using the land.

7. The application was canvassed by way of written submissions. The Plaintiff’s submissions were filed on 18/9/2018. The Plaintiff submitted, *inter alia*, that he has shown that he is the registered owner of the land, having acquired it through purchase. It is the 1st Defendant’s father who sold the land to him.

8. The Defendants were said to lack capacity to agitate their counter-claim, having not acquired the requisite grant from Probate and Administration Court. It was submitted that the Plaintiff will suffer irreparable loss as the Defendants are cultivating it and leasing it to others. The court was urged to grant the orders sought. And the decided cases of **DAVID SIRONGE OLE TUKAI Vs FRANCIS ARAP MUGE & 2 others [2014] eKLR** and **WEVASITY SACCO SOCIETY LIMITED Vs MOSES MUSA LUMITI ABURA & others: CA No. 91 of 2016, KISUMU**, were availed for guidance.

9. The Defendants submissions were filed on 5/11/2018. It was submitted that that land is the Defendants’ **“ancestral home which they have lived in for more than 30 years”**. The Defendants cited the case of **GIELA Vs CASSMAN BROWN & CO. LTD [1978] EA 358** and observed that an applicant for a temporary restraining order is duty-bound to demonstrate that he has a *prima facie* case with a probability of success and/or that he will suffer irreparable loss not compensable in damage. The case enjoined that the court can invoke the principle of balance of convenience if doubts arise as to the suitability or applicability of the first two.

10. The Plaintiff was said to have no *prima facie* case as he obtained the suit land by fraud. Persuasion was urged on this court from the case of **KAMAU MUCHUA Vs RIPPLES LIMITED: CA No. 106 of 1992** where the court observed, *inter alia*:

“A party as far as possible ought not to be allowed to retain a position of advantage that is obtained through a blatant unlawful act.”

11. Further, the Plaintiff was said to be in no position to suffer irreparable loss as he has nothing on the land. According to the Defendants, the Plaintiff has never used the land in any way. According to the Defendants also the grant upon which it became possible to transfer the land to the Plaintiff will be revoked as it was obtained behind the backs of all family members.

12. I have considered the application, the response made and the rival submissions. I have also looked at the pleadings. It appears to me that the Plaintiff does not live on the land. The Defendants alleged that he has never used it. This seems to be the position as the Plaintiff does not allege there is any development interfered with when the Defendants allegedly entered the land. This being the position then, it becomes difficult to accept that the Plaintiff will suffer irreparable loss not compensable with damages. Infact the Plaintiff is not claiming any damages for loss in the plaint. He is also not claiming mesne-profits. What then is the irreparable loss he is likely to suffer?

13. I am constrained to take the position that the Plaintiff’s allegation concerning irreparable loss is unconvincing and/or inadequately demonstrated. And the law is that *prima facie*, you do not get a temporary restraining order where damages are an adequate remedy.

14. Then there is the issue of *prima facie* case with a probability of success. The Plaintiff pegged this largely on the fact he is the registered owner of the land. But I note too that the Defendants have alleged fraud in the manner of acquisition of title by the Plaintiff. The Defendants cited KAMAU MUCHUA’s case (*supra*) to convince the court not to grant the restraining order. That case is reasonably persuasive. I may also point out that in **MUNYU MAINA Vs HIRAM GATHIMA [2013] eKLR** the court of appeal held, *inter alia*, that where a registered proprietor’s title is under challenge, it is not enough to dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal, and free from any encumbrances.

15. It could well be that in this matter, the Plaintiff may ultimately proof the merits and legality of his ownership. But I am not convinced that he faces the likelihood of suffering irreparable loss that an award of damages cannot compensate. And on balance, I am not convinced that the best way to go is to grant a temporary restraining order. I am more persuaded that the best way is to expedite the hearing of the main suit. The upshot then is that the Plaintiff is found not to have demonstrated the merits of his application. The application is therefore dismissed with no order as to costs.

Dated, signed and delivered at Busia this 31st day of January, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

3rd Defendant: Absent

4th Defendant: Absent

5th Defendant: Absent

Counsel for Plaintiff: Present

Counsel for Defendants: Absent

Court Assistant: Nelson Odame