



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 177 OF 2016

KALORI BARASA OTUBA.....1ST APPLICANT
KIZITO OJIAMBO OTUBA.....2ND APPLICANT
PAULO WANDERA OTUBA.....3RD APPLICANT
HILLARY OJIAMBO OTUBA4TH APPLICANT
CHRISPINUS ODUORI OTUBA5TH APPLICANT
MICHAEL ODUORI BWIRE6TH APPLICANT

VERSUS

MONICA NAFULA ADUI1ST RESPONDENT
JUDITH NERIMA OGOMBE2ND RESPONDENT

R U L I N G

1. The application before me for determination is a Notice of Motion dated 31/7/2017 filed here on the same date. It is brought under Order 1 Rule 1 of the Civil Procedure Rules and Section 3A of Civil Procedure Act (cap 21). The Applicants – **KALORI BARASA OTUBA, KIZITO OJIAMBO OTUBA, PAULO WANDERA OTUBA, HILLARY OJIAMBO OTUBA, CHRISPINUS ODUORI OTUBA, and MICHAEL ODUORI BWIRE** – want to become parties to the suit. They want to be enjoined as Plaintiffs.

2. The Respondents in the application are **MONICAH NAFULA** and **JUDITH NERIMA OGOMBE**. They are the Plaintiffs in the suit. The sued party, who is the Defendant, is **LEONARD SHANYA**. When the Plaintiffs first filed the suit, they also filed an application for temporary restraining orders dated 19/12/2016. The court delivered a ruling on that application on 19/7/2017 and granted the restraining order. The disputed parcels of land are SAMIA/BUDONGO/2577 and SAMIA/BUDONGO/2578 and the restraining order was in regard to these two parcels. The order issued however seems to have affected the Applicants, who are not parties to the suit. The application herein is filed as a necessary counterpoise to the order that was granted.

3. In addition to the prayer to be enjoined as parties in the suit (which is prayer (b)), the Applicants are also seeking the following other orders:

Prayer C: That a temporary order of injunction be issued restraining the Defendants, their agents, their kins, servants and/or any other person or body claiming through them from enforcing or executing an order issued by this court on 19/7/2017 pending hearing and determination of this application.

Prayer (c) is already spent, having been meant for the *ex parte* stage, but it is reproduced here at this stage because prayer (d) in the application is meant to grant the same prayer, this time for a longer period to meet the ends of justice. Prayer (d) is for consideration at this interparties stage. The last prayer is (e), which asks that costs of this application be provided for.

4. On the grounds advanced to support the application, the Applicants averred, *inter alia*, that the restraining order issued on 19/7/2017 adversely affects people (probably meaning themselves) who are not parties to the suit. They said too that they have homes and houses on the parcels of land and the order issued is therefore affecting them. The Applicants also stated that they are brothers to the Defendant and the Respondents have threatened to evict them.

5. The application also came with a supporting affidavit where one Applicant, Kalori Barasa Otuba, has deponed for himself and the others, that there was land parcel No. SAMIA/BUDONGO/99 owned by their mother – **WILBRODA APONDI** – which the Respondents unprocedurally subdivided into land parcels Nos SAMIA/BUDONGO/2272 to 2278 and caused a change of ownership.
6. The Respondents responded to the application vide a replying affidavit filed on 30/11/2017. According to the Respondents, the subject matter of litigation involves land parcel Nos SAMIA/BUDONGO/2577 and SAMIA/BUDONGO/2578 which are different from land parcels Nos SAMIA/BUDONGO/2272 to 2278 referred to by the Applicants. The Applicants averred that they have no interest in land parcel Nos. 2272 to 2278. The Respondents averred too that the Applicants do not reside on land parcels Nos 2577 and 2578. To the Respondents, the Applicants, who are brothers to the Defendant, are trying to assist the Defendant to defeat the order issued by this court on 19/7/2017. This application is seen as a back-door attempt by the Applicants to review the order.
7. The application was canvassed by way of written submissions. The Applicants submissions were filed on 26/2/2018. They submitted, *inter alia*, that they are in occupation of some parts of the land; that they were not involved in the sub-division of the original parcel No. 99; that the order of 19/7/2017 was against the Defendant and not them; that the Respondents want to demolish their homes; and that they want to have their day in court.
8. The Respondents submissions were filed on 6/3/2018. The Respondents invoked the provisions of Order 1 Rule 1 of Civil Procedure Rules, 2010 and pointed out that in light of that provision, the Applicants needed to demonstrate that they have a right or relief against the Defendant arising out of the Plaintiffs case against the Defendant. They were also duty-bound to show that a common question of law or facts would arise. This was never shown, the Respondents submitted.
9. The Respondents also disputed the factual narrative and background given by the Applicants. They referred the court to their own version of events narrated in their response as to what transpired before the ownership of Original Parcel No. 99 came to vest in them. The court was asked to dismiss the application.
10. I have considered the application, the response made, rival submissions, and the suit as filed. I think the Applicants approached the whole issue in a rather muddled way. They want to join the case as Plaintiffs. It should be appreciated that the Respondents, who they are complaining against, are the Plaintiffs in the suit. If the Applicants are allowed to join as Plaintiffs, that would mean that they and the Respondents have one common adversary, the Defendant. Yet the facts as narrated by the Applicants do not show this to be the position. The Defendant is not the Applicants adversary; the Plaintiffs are. How then can the Applicants join the case as Plaintiffs yet the Defendant, who is said to be their brother, in not their adversary? Here, the Applicants obviously got it wrong. They cannot appear on the same side as the Plaintiffs. They can only appear in a position or capacity that allows them to oppose Plaintiffs. I am in general agreement with the Respondents in their submissions regarding the application of Order 1 Rule 1 of Civil Procedure Rules, 2010. It appears to me that the Applicants fail to appreciate fully the meaning and purport of that provision. They cannot be Plaintiffs in this matter; they can only be something else.
11. It seems clear to me that the Applicants also got it wrong regarding the prayer for restraining order. It is clear that they want a restraining order to injunct the Respondents from implementing the restraining order granted on 19/7/2017. In simple terms, the Applicants are seeking a counter-injunction. I do not know which law they are relying on for this. To me, it is very clear that the Applicants would have been better served by seeking to stay or set aside the order issued on 19/7/2017. There is clear case law on stay or setting aside. There are also clear statutory provisions. But the Applicants left out all this and instead went out on a wild goose chase. They ended up asking for an anomalous order that is not based on any known law.
12. I am constrained to observe that the application as filed is incompetent. It is not feasible to allow the Applicants to join the suit as Plaintiffs. It is also not possible to grant what amounts to a counter restraining order meant to neutralise an earlier order whose merits have not been successfully challenged. The Applicants obviously need to rethink the position or capacity in which they should join the suit in order to counter the threats or perils posed by the Plaintiffs in the suit. They cannot do so by appearing on the same side as the Plaintiffs they are complaining against. And even assuming that the Applicants could get injunctive relief, it is obvious they cannot get without becoming proper parties first. For all these reasons, the application herein is dismissed with costs.

Dated, signed and delivered at Busia this 22nd day of January, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant: Absent

2nd Applicant: Absent

3rd Applicant: Absent

4th Applicant: Absent

5th Applicant: Absent

6th Applicant: Absent

1st Respondent: Present

2nd Respondent: Absent

Counsel for Applicants: Present

Counsel for Respondents: Present

Court Assistant: Nelson Odame