



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 73 OF 2018

ALOYSE WANGIRA OKOBA.....APPLICANT

= VERSUS =

MICHAEL MALOBA OUMA MAKUDU

FELISTA JUMA NADIERA alias FELISTA JUMA OKELLO

WERASON JOB RAGAMA & MARY NABWIRE AGU

(sued as Administrators of the deceased estat

WERASON JOB RAGAMA & OKUMU PETER RAGAM

(both sued as Administrators of deceased estate)

GETRUDA ATHIENO OUMA & MICHAEL MALOB OUMA

MAKUDU (sued as administrators of a deceased's estate).....RESPONDENTS

R U L I N G

1. The application before me is a Notice of Motion dated 10/12/2018 and filed on 18/12/2018. It is brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (cap 21), Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The Applicant – **ALOYSE WANGIRA OKOBA** – is the Plaintiff in the suit filed herein by her on 24/8/2018. The Respondents – **MICHAEL MALOBA OUMA MAKUDU, FELISTA JUMA NADIERA alias FELISTA JUMA OKELLO, WERASON JOB RAGAMA & MARY NABWIRE AGUJA** (sued as administrators of deceased estate), **WERASON JOB RAGAMA & OKUMU PETER RAGAMA** (both sued as administrators of deceased estate) and **GETRUDA ATHIENO OUMA & MICHAEL MALOBA OUMA MAKUDU** (also again sued as administrators of a deceased's estate) – are the Defendants in the suit.

2. The application is essentially one for restraining orders and it came with four (4) prayers. But two prayers - (a) and (b) – are now spent, having been dealt with at the ex parte stage. The remaining prayers for consideration are two – prayers (c) and (d) – and they are as follows:

Prayer c: That this honourable court be pleased to issue an order of injunction restraining the defendant/respondents, their agents, servants, herelings, and/or employees from trespassing on, further subdividing, transferring, occupying and/or alienating the Plaintiff/Applicant parcel of land known as BUNYALA/BULEMIA/5166 and BUNYALA/BULEMIA/5167 formerly known as BUNYALA/BULIMIA/1453 pending hearing and determination of the suit herein.

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

3. The dispute between the parties relates to land parcels No. BUNYALA/BULEMIA/5166 and BUNYALA/BULEMIA/5167 which are resultant subdivisions of the original land parcel No. BUNYALA/BULEMIA/1453. The Applicant pleaded, *inter alia*, that one WILLIAM OUMA MAKADU, now deceased, had purchased an acre of the original parcel of land from the late John Okello Agike and Felista Juma Okello. He paid the full price and took possession. He and his family enjoyed such possession for about 14 years. One member of the family was REGINA AUMA alias AUMA OKUMU, now deceased, and represented in this case by 1st Defendant MICHAEL MALOBA OUMA

MAKUDU.

4. The plaintiff/Applicant then purchased the same one acre from the deceased REGINA AUMA and took possession. The purchase allegedly took place on 26/6/2008 and the Plaintiff/Applicant has had possession of the one acre for about 9 years. All the Defendants are accused of intending to disinherit the Plaintiff/Applicant of the one acre and planning to dispose of it and other portions to third parties. The orders sought in this application are meant to forestall such eventuality.

5. But the Respondents have a different story. According to them, the late WILLIAM OUMA MAKADU never bought the alleged one acre or any other portion at all. And the issues raised by the Applicant in this suit were allegedly ventilated before the High Court in Succession Cause No. 217 of 2008 and orders were made. And according to the orders, the Applicant was given an opportunity to file his claim in this court within 90 days. He failed to do so and is only belatedly now filing this suit. It was further said that the Applicant has never taken possession of the disputed land. He was said to own the adjacent land – BUNYALA/BULEMIA/1454 – and he tried to fence off a portion of the suit land at one time but the respondent thwarted it and even reported to police who preferred charges against him.

6. The Respondents also averred that the late Makadu's family have never possessed the land. They said further that the agreements shown were forgeries.

7. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 24/1/2019. The Applicant reiterated that he purchased the land from a previous genuine purchaser. The 2nd Defendant was said to have been aware and even participated in what was going on. But all the Defendants now are interfering with the Applicant's interests with a view to dis-entitling him from ownership.

8. Further, the Applicant submitted that he has met the threshold for grant of temporary restraining orders as set out in the case of **Giela vs Cassman Brown & Co. Ltd [1973] EA 358**. The threshold entails establishing a *prima facie* with a probability of success, demonstrating a likelihood of suffering irreparable loss that cannot be compensated by way of damages, and, finally, if the court doubts the applicability of these two, then it is enjoined to decide the matter on a balance of convenience.

9. The submissions of the Respondents were filed on 7/2/2019. According to the Respondents, the late WILLIAM OUMA MAKADU was given a portion of land near the lake to plant vegetables. He did not buy the land and it would be a lie to say that the portion was one acre since nobody ever measured the portion. The Respondents wondered why the late Makadu never got the title deed if he ever bought the land.

10. And as regards the subdivision of the land mentioned by the Applicant, the Respondents submitted it was lawful, having been done as a result of the outcome of succession proceedings in which the Applicant participated. According to the Respondents, the Applicant has not established a *prima facie* case as he is trying to rely on un-enforceable purchase agreements. He will not also suffer any loss, leave alone irreparable one. And this is so because he has never taken possession of the land he is claiming and has never developed it. On balance of convenience, the Respondents are said to be in possession of the land and have title. Discretion therefore was urged to be exercised in their favour.

11. I have considered the application, the response made, rival submissions, and the pleadings on record generally, including the documents that came with them. I will start by observing that the submissions filed by both sides are more detailed than the summaries I have set out here. The summaries are short because most of the issues covered can only appropriately be considered after trial of the action. I have decided to take the approach taken by the court in the case of **SHITAKHA Vs MWAMODO and 4 others: [1986] KLR 445** where the court held, *inter alia*, that the court should not decide substantive issues at the interlocutory application stage. This ought to be left for the trial.

12. It appears to me that this is not the first time the parties are facing-off in court. They were before the High court in Succession Cause No. 217 of 2008, here in Busia. It is clear that like here, the Applicant was claiming the land. It would appear that as that court lacked jurisdiction to decide on ownership, the Applicant was given a 90 day period to ventilate his claim of ownership before the appropriate court. He never did so and this suit itself seems to be a belated attempt to do what he should have done about an year earlier (the order giving the 90 day period is dated 1/8/2017 and this suit itself was filed on 24/8/2018).

13. It is clear that after the given period of 90 days, and with the Applicant having not confirmed that he had taken the desired action, the High Court proceeded to conclude the succession proceedings in favour of the Respondents. The subsequent partition of the disputed land was essentially a logical sequel to the conclusion of the succession Proceedings. Now the Applicant explains the partition as intended sale to third parties. The Respondents explain it as part of an endeavour to distribute the estate of the deceased owner to the beneficiaries. The explanation of the Respondents seems more credible. The Applicant would have done well to say who the third parties are.

14. I note that the Applicant has not shown that he occupies or is still in possession of the disputed land. In fact as an alternative, he does not mind getting its purchase price provided it is calculated at the current market value. This seems to suggest to me that damages would be an adequate remedy. It really does not matter what changes the Respondents might effect on the ownership register. It would still be possible to point out the physical location of the portion claimed by the Applicant.

15. But this is not the only consideration in this matter. I bear in mind that the Applicant had been given an earlier opportunity to ventilate his claim before a competent court in order that his interests, if successful, could be factored in the outcome of the succession proceedings at the High Court. He failed or neglected to seize the opportunity. Now after an un-explained indolence of more than one year, he belatedly comes to this court of equity to try and stop what the Respondents are doing to implement concluded succession proceedings. Equity aids the vigilant, not the indolent. And injunction is an equitable remedy. I would hesitate to issue it in the circumstances of this case.

16. The upshot is that the application herein is found to be unmeritorious and the same is hereby dismissed with costs.

Dated, signed and delivered at Busia this 29th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

Respondents: Absent

Counsel for the Applicant: Present

Counsel for the Respondents: Absent

Court Assistant: Nelson Odame