



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 189 OF 2017**

**PATRICK DOMIANO ERONI.....APPLICANT**

**= VERSUS =**

**PATRICK MOSISI SOKONI.....1<sup>ST</sup> RESPONDENT**

**FLORENCE AMUSUGUTU SOKONI.....2<sup>ND</sup> RESPONDENT**

**DIANA SANDE KALORI.....3<sup>RD</sup> RESPONDENT**

**WILBRODA SOKONI.....4<sup>TH</sup> RESPONDENT**

**VINCENT ORONO OMANYALA..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The application before me for determination is a Notice of Motion dated 30/11/2017 and filed on 5/12/2017, contemporaneously with a suit of even date. The application is brought under Order 51 rule 1, order 40 Rule 1 of Civil Procedure Rules, Section 3A of Civil Procedure Act (cap 21) and all other enabling provisions of law. The Applicant – **PATRICK DOMIANO ERONI** – is the Plaintiff in the suit while the Respondents – **PATRICK MOSISI SOKONI, FLORENCE AMUSUGUTU SOKONI, DIANA SANDE KALORI, WILBRODA SOKONI,** and **VINCENT ORONO OMANYALA** – are the Defendants. The parties are disputing over land parcel No. BUKHAYO/LUPIDA/2266 (“disputed land” hereafter) currently registered in the name of the Applicant as owner.

2. In the suit, the Applicant pleads that the Respondents have illegally entered the land and settled thereon. That is said to have taken place on diverse dates in 2017. Each of the Respondent is said to have constructed some structures on the disputed land. The Applicant wants them evicted and restrained from going back to the land.

3. In the meantime, this application was filed as a temporary measure to restrain the Respondents. The application has four (4) prayers but two – prayers 1 and 2 – were for consideration at an earlier stage and are therefore moot now. The prayers for consideration now are also two – prayers 3 and 4 – and are as follows:

Prayer 3: That pending the hearing of this suit there be

an order of temporary injunction against the Defendants/Respondents restraining them by themselves or their agents and/or servants and/or proxies and/or any other person acting under their authority or direction from wasting, damaging, alienating, trespassing, selling, utilizing, developing, removing or otherwise disposing off land known as BUKHAYO/LUPIDA/2266.

Prayer 4: Costs be provided for.

4. Various grounds were advanced in support of the application, including that the Applicant is the registered owner of the disputed land; that the Respondents have unlawfully entered it; that the Respondents have constructed thereon; and that it is in the interests of justice to grant the orders sought. There is also a supporting affidavit which generally amplify the grounds.

5. The Respondents responded vide a replying affidavit filed on 5/3/2018 and dated the same. They denied that they have trespassed on the disputed land. They averred that they have been living on that land for over 40 years. The Applicant was accused of engaging in forgery of ownership documents in the past including forging an order of eviction. The Respondents averred that they have a right to use and occupy the land. They also said there was a previous case – ELC NO. 2/2016 – which was generally similar to this one.

6. The Respondents reply elicited a further supporting affidavit from the Applicant. That affidavit was filed on 14/6/2018 and is dated 17/4/2018. According to the Applicant, it is not true that the Respondents have occupied the disputed land for over 40 years. It became apparent from the affidavit that the original parcel of land was BUKHAYO/LUPIDA/270, with the disputed land being a resultant subdivision of it. The Applicant stated that the land was owned by his late father whom he and others succeeded after following due process. The Respondents were never part of the succession process.

7. And the previous suit, Applicant deposed, didn't involve the Respondents and it became inactive when one of the parties – DANSON SOKONI – died. The Applicant denied being involved in forgery and traced the dispute to an earlier period when his late father and others tussled over the ownership of the original parcel No. 270. That earlier tussle seems to have led to the killing of the Applicant's late father, with the killers subsequently being brought to book and convicted accordingly. The Applicant alleged that the Respondents are building on his land and selling portions of it.

8. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 5/7/2018. He gave a snapshot of the application. He then submitted that the Applicant has demonstrated that he is the registered owner of the disputed land while the Respondents occupy and are constructing on the land yet they have no proof of ownership. This being the position, the Applicant was said to have established a *prima facie* case while the Respondent's activities on his land were said to be likely to cause irreparable loss. According to the Applicant, the threshold set in the case of **GIELLA Vs CASSMAN BROWN & CO. LTD: [1973] EA 358** is met and the court should therefore grant the orders sought.

9. The Respondents submissions were filed on 10/4/2018. They submitted, *inter alia*, that the court should aim at hearing the matter to the full instead of issuing temporary restraining orders. The Applicant was said to have engaged in unbecoming conduct in the past relating to the same land and such conduct in a related case is said to be subject to police investigations. The Respondents also said that the land is family land and they have been living on it.

10. The orders sought were said to be discretionary and rooted in equity. The Applicant was said not to have clean hands and is therefore undeserving of any orders in equity. He was accused of fraud in the manner he acquired the disputed land.

11. I have considered the application, the Respondents' response, the Applicant's counter-response by way of further supporting affidavit, the rival submissions, and the pleadings on record generally. It seems clear to me that the Applicant is the registered owner of the land but the Respondents are living on it. The order sought seeks, *inter alia*, to restrain sale and disposal of the land. I honestly do not know how the Respondents would effectively sell or dispose of the disputed land or portions thereof without title. Development is also mentioned as an aspect the restraining order. But it is not made clear what kind of development the Respondents are engaged in that would so much alter the land as to make damages an inadequate remedy.

12. In my view, though the Applicant has a *prima facie* case by dint of being the registered owner, he has not demonstrated that damages in this matter would not be an adequate remedy. The Respondents are on the land. The Applicant seeks to restrain trespassing and utilising the land. I would understand the need to restrain trespass and use if the Respondents are not on the land already. But they are and they have their houses there. I would assume that their occupation goes with use. I think the restraining order sought may not serve the interests of justice well if I have to be fair to both sides. The Applicant can well be compensated by way of damages and my view is that he has not made out a case of irreparable loss.

13. When the balance of convenience is considered, it appears clear to me that the Respondents stand to suffer the bigger risk of injustice given that the order sought, if granted, would deny them access to their houses or cripple the productive activities they are involved in to earn a livelihood.

14. It is for all these reasons that I make a finding that the application herein is not merited. I therefore dismiss it. Costs in the cause.

**Dated, signed and delivered at Busia this 29<sup>th</sup> 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