



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 25 OF 2017

CHRISPINUS OUMA MAKUDA.....APPLICANT

VERSUS

PASKALIA AKOCHI INZIANI.....RESPONDENT

RULING

1. The application before me for determination is a Motion of Notice dated 25/7/2018 filed here on the same date. It is expressed to be brought under order 40 Rules 1(a) and 4 of Civil Procedure Rules and Section 3A of Civil Procedure Act (cap 21). The Applicant – **CHRISPINUS OUMA MAKUDA** – is the 1st Defendant in the suit, the other Defendants being **STEPHEN OUMA MAKUDA** and **OPIYO SEMU**. The application is not stated to be brought on behalf of these other two Defendants. The Respondent – **PASKALIA AKOCHI INZIANI** – is the Plaintiff in the suit.

2. Essentially, the application is one for restraining orders. It has four (4) prayers on the face of it but two prayers – prayer 1 and 2 – are now moot, having been for consideration at an earlier stage. The prayers for consideration now are two – prayers 3 and 4 – and they are as follows:

Prayer 3: The Plaintiff, her agents, or those claiming

through her be restrained from entering, demolishing, selling, charging or in any way interfering with land parcel number SAMIA/BUTABONA/89 or its subsequent partitions or subdivisions namely SAMIA/BUTABONA/2289, 2290, 2291, 2292, 2293, 2294 and 2295 until the hearing and determination of the suit.

Prayer 4: The costs of the application be provided for.

3. The dispute between the parties relate to parcel No. SAMIA/BUTABONA/89 (disputed land) which seems to have been subdivided later into several other portions. The Respondent filed the suit herein on 6/2/2017 seeking mainly an order of eviction of the Defendant's and restraining them from re-entry or encroachment.

4. The Applicant and the others sued with him filed a defence stating, *inter alia*, that the Respondent hold the land, or a portion of it, in trust for them. They also pleaded that they qualify to be adverse possessors by virtue of long possession and occupation running over 12 years.

5. According to the Applicant, the Respondent has already demolished the 2nd Defendant's house and the second Defendant, who is sickly, has sought refuge in the Applicant's home. This has happened during the pendency of this case here. The Applicant averred that he has clearly been told that his house would be next for demolition. That is why he filed this application.

6. The Respondent responded to the application vide a replying affidavit filed on 15/1/2019. He emphasised that he is the registered owner of the disputed land, having acquired it by transmission following probate and administration proceedings in court. The sued parties were said to have no purchaser's or beneficiary's interest in the disputed land. To the Respondent, the averments made by the Applicant in the affidavit supporting the application are irrelevant, false and misleading and this application itself is meant to delay the case.

7. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 19/2/2019. In the submissions, he accused the Respondent of failing to disclose the circumstances in which he obtained title to the disputed land. He submitted too that the disputed land is ancestral land that was registered in the name of the Respondent's father to take care of 1st and 2nd Defendant's father. Upon the death of the Respondent's father, the Applicant said an agreement was reached to subdivide the disputed land into three portions according to houses of each family.

8. It was pointed out that the defence raises the issue of trust. The respondent is said to hold the land in trust for her cousins who include the Applicant and the 2nd Defendant. The Respondent was said to be intent on selling the disputed land, which would leave the Defendants landless. This court was told to be guided by the decision made in **MUNYU MAINA Vs HIRAM GATHIMA [2013] eKLR** where the court held, *inter alia*, that a challenged title cannot be dangled as an instrument of ownership without demonstrating the legality of its acquisition. It is a decision that this court earlier invoked in **VINCENT OGAI WANDERA Vs VICTOR OCHIENG OPONDO and Others: ELC No. 178 OF 2017, BUISA**.

9. The Respondent's submissions were filed on 28/1/2019. The Respondent emphasized her position as the registered owner of the disputed land and affirmed her rights conferred by such ownership. She also pointed out that the Defendants were the losers in the Probate and Administration proceedings that gave her the greenlight to obtain title. The Defendants, Applicant included, were said to be **"trespassers who have encroached into the Plaintiff's land without her consent"**.

10. I have considered the application, the response made, rival submissions, and the pleadings already on record. It seems well shown that the Respondent is currently the registered owner of the land. Infact it is from this position that she filed the suit herein seeking to evict and injunct the Defendants. The Respondent however has not denied the action attributed to her by the applicant. If she did something like that, it was improper for that kind of action is supposed to come only if the suit is heard and determined in her favour. It was rash of her to rush to engage in an action that amounts to premature eviction of the parties.

11. The Defendants are claiming the disputed land. They plead trust and are said to have filed a related suit as adverse possessors. I agree with the defence counsel's position regarding the decision in Munyu's case (*supra*). I venture to add that this is a matter that commends itself to me as one where Status Quo needs to be obtained. It requires no stressing that only an injunctive order can maintain the Status Quo. It is also necessary to appreciate that as an injunction is an equitable remedy the court may, while remaining guided by the principles enunciated in **GIELA Vs CASSMAN BROWN & CO. LTD [1973] EA 358**, also consider all other circumstances surrounding the case including conduct of the parties.

12. In **Otieno Vs Ougo & Another (No2 (1987) KLR 400**, the court held, *inter alia*, that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action. Given the circumstances obtaining in this case, including the alleged premature eviction of the second defendant, and considering that the Applicant seems to have genuine fears that the disputed land may be dealt with in a manner prejudicial to his alleged interests, it is only fair that injunctive relief be granted.

13. It is in light of the foregoing that the application herein is allowed in terms of prayer 3. Costs of the application (prayer 4) to be in the cause.

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

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Present

Respondent: Absent

Counsel for the Applicant: Present

Counsel for the Respondent: Absent

Court Assistant: Nelson Odame