



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 98 OF 2017**

**WILSON BARASA KACHERO.....PLAINTIFF**

**= VERSUS =**

**FREDRICK OJIAMBO MAKOKHA.....DEFENDANT**

**R U L I N G**

1. The application before me is a Notice of Motion dated 9/5/2017 filed here on the same date. The Plaintiff – **WILSON BARASA KACHERO** – filed it contemporaneously with a suit of even date. The application is brought under order 40 rule 1 and Order 50 rule 1 of Civil Procedure Rules. It has three prayers on the face of it but prayer 1 is now moot, having been for consideration at an earlier stage. The prayers for consideration therefore are 2 and 3 and they are as follows:

Prayer 2: An order of inhibition be issued against the

Defendant in accordance with Section 68 of Land Registration Act, 2012, restraining the transfer, subdivision, disposition or charging of L.R. No. BUNYALA/BULEMIA/96 until the hearing and determination of the suit.

Prayer 3: Costs of this application be provided for.

2. The application was brought against the Defendant – **OJIMABO MAKOKHA NANJALA** – who is currently the registered owner of land parcel No. BUNYALA/BULEMIA/96 (“suit land” hereafter) which is at the centre of this dispute. The Plaintiff was initially the registered owner of the suit land. In this suit, he alleges that the Defendant transferred the suit land to himself fraudulently.

3. The Application herein is meant to maintain the Status Quo as the Plaintiff is apprehensive that the Defendant might deal in the land in a prejudicial manner.

4. The Defendant responded to the application vide a replying affidavit dated 11/10/2017. He stated, *inter alia*, that the Defendant lawfully transferred the suit land to him.

5. The application was argued before me on 23/4/2018. The Plaintiff expressed his fear that the Defendant might sell, mortgage or transfer the land to someone else. He reiterated that the Defendant acquired the suit land fraudulently. The Defendant however responded, saying, *inter alia*, that the defendant gifted the land to him. And the Plaintiff did so after he was unable to repay some money advanced to him by the Defendant. The Defendant also said that he does not intend to do what the Plaintiff is alleging.

6. The Plaintiff filed written submissions on 19/4/2018. He generally reiterated the substance of the application and his arguments during hearing.

7. I have considered all what has been availed to me. It appears to me that the Plaintiff is treating the order of inhibition like an order for injunction. Infact, the application, though seeking an order of inhibition, is brought under order 40 of Civil Procedure Rules 2010, which deals with temporary or interim injunctions and has nothing to do with inhibitions. And the prayer for inhibition is expressed as meant to “**restrain**”, which again is the function of injunctions.

8. Be that as it may however, it is clear that the Plaintiff wants an order of inhibition placed on the land register at the land’s office to inhibit or prohibit dealings that may prejudice his pleaded rights before the case is determined.

9. In this matter, I consider that the Defendant will not be prejudiced in any way if an order of inhibition is placed on his title. It is necessary to grant the order so that no dealings prejudicial against the Plaintiff are conducted at the lands office. This is done so that opportunity is given to the Plaintiff to demonstrate whether he has arguable rights enforceable against the defendant.

10. But I must point out that I am granting this order more because the Plaintiff will not suffer prejudice but not because the Plaintiff has demonstrated sufficiently that he deserves it. In an application of this kind, the court normally requires the applicant to show that the suit property is at risk of being disposed of to his detriment and/or that refusal to grant the order will render the suit nugatory. The Applicant is also duty-bound to demonstrate that he has an arguable case (See **JAPHET KAIMENYI M'NDATHO Vs M'NDATHO M'MBWIRIA [2012] eKLR**).

11. The Plaintiff did not address himself to these requirements. Moreover, he adopted the wrong approach of treating the application as one for temporary injunctions. The court however considers the overall interests of justice. It also considers that the Defendant suffers no harm if the order is issued. I therefore allow the application in terms of prayer 2. Prayer 3 is about costs. I order that costs be in the cause.

**Dated, signed and delivered at Busia this 14<sup>th</sup> day of May, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Absent

Court Assistant: Nelson Odame