



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 125 OF 2017

LAWRENCE OTENG'E ENG'ORIT.....PLAINTIFF/APPLICANT

VERSUS

OWIRE ALUKU OMUNG'A.....DEFENDANT/RESPONDENT

RULING

1. The application under consideration is the Amended Notice of Motion filed on 25/7/2016 in the Chief Magistrate's Court at Busia on 25th July 2016. The Applicant - **LAWRENCE OTENG'E ENG'ORIT** - seeks injunctive orders restraining the Respondent - **OWIRE ALUKU OMUNG'A** - from subdividing the land parcel known as **LR No. SOUTH TESO/ANGOROMO/9431** as well as its subsequent subdivisions **SOUTH TESO/ ANGOROMO/10717, 10718, 10719** and **10720**. There is also an alternative prayer for the cancellation of the latter subdivision titles and reversion back to the former title, **LR No. SOUTH TESO/ANGOROMO/9431**. The Applicant – **LAWRENCE OTENG'E ENG'ORIT** – is the Plaintiff while the Respondent – **OWIRE ALUKU OMUNGA** – is the Defendant.

2. The Application is supported by the Affidavit of the Applicant. He depones he purchased 2 acres out of **LR No. SOUTH TESO/ANGOROMO/778** from the Respondent. Pursuant to an undisclosed tussle he sued the Respondent at the Chakol Land Disputes Tribunal which awarded him the said 2 acre parcel which award was adopted by the Chief Magistrate's Court and the Executive Officer directed to sign all documents necessary for effecting the transfer to the Applicant. Before the action was taken the Applicant discovered that one Santulino Emukulo had also sued the Respondent in High Court Civil Case No. 2 of 2011 (OS) and was awarded 2 acres from the same piece of land. Consequently, the mother title **LR No. SOUTH TESO/ANGOROMO/778** was subdivided into **SOUTH TESO/ANGOROMO/9431** retained by the Respondent and **SOUTH TESO/ANGOROMO/9432** registered in the name of **SANTULINO EMUKULO**. The Applicant further deponed that the Respondent further subdivided **SOUTH TESO/ANGOROMO/9431** into four portions, **SOUTH TESO/ANGOROMO/10717, 10718, 10719** and **10720** to defeat his claim. The Applicant claims that his 2 acre portion is within **SOUTH TESO/ANGOROMO/10717** that measures about 17 acres. Parcel No. 10717 is registered in the name of the Respondent's son, **Fidelis Ekuri Abura**. The Applicant avers that he has been in occupation of his 2 acre parcel since 1989 and it is clearly demarcated with a boundary.

3. The Respondent filed grounds of opposition on 5th September 2016 challenging the Chief Magistrate's jurisdiction to hear the matter. Consequently, the file was transferred to this Court. The Respondent then filed a Replying Affidavit on 23rd April 2018. The Respondent dismissed the Application as fatally defective and devoid of merit. He asserted that the Tribunal did not give any award against **LR Nos SOUTH TESO/ANGOROMO/9431, 10717, 10718, 10719** and **10720**. The Respondent deponed further that the subject property of the Tribunal's award namely **LR No. SOUTH TESO/ANGOROMO/778** is not mentioned in the Application, hence it is frivolous and an abuse of Court process. There is a 2nd Affidavit on record entitled "**Defendant's Affidavit Evidence**" filed on 24th April 2018 mentioning **LR No. SOUTH TESO/ANGOROMO/7760** which the Respondent claims is the subject property of the Application and is non-existent. It is not clear which of the two responses the Respondent expects the Court to rely on.

4. Parties were directed to canvass the Application by way of written submissions on 25th July 2018. Despite numerous extensions the Applicant did not file submissions. The Respondent's submissions were filed on 22nd October 2018. Counsel for the Respondent reiterated that the suit property **LR No. SOUTH TESO/ANGOROMO/778** to which the Tribunal made a decision is no longer in existence. Moreover, the subsequent subdivisions, **SOUTH TESO/ANGOROMO/9431** and **10717 – 10720** are registered in the names of third parties who are not parties to this suit yet they are reflected in the green cards of the properties annexed to the Application by the Applicant himself. It is submitted that issuance of injunctive orders against the said third parties will be grossly unfair. Further, the Respondent's Counsel submits that the Applicant has come to Court with unclean hands as the tribunal did not outrightly award him the parcel sought but the transfer of property was conditional upon him paying a further Kshs.10,000 which he did not do. The Respondent prayed that the Application be dismissed with costs.

5. I have read the parties pleadings, submissions and the applicable law. The Applicant seeks injunctive orders and must satisfy the essentials set in the celebrated case of **Giella Vs Cassman Brown [1973] EA 358** where Spry JA held thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

6. The Amended Application shows glaring legal irregularities both in substance and form. Firstly, it seeks injunctive orders over several properties namely LR No. SOUTH TESO/ANGOROMO/9431 and its resultant subdivisions being SOUTH TESO/ ANGOROMO/10717, 10718, 10719 and 10720 yet in the Supporting Affidavit to the Application, the Applicant admits that his parcel of land is squarely within 10717. But he has included several parcels of land unaffected by his claim. Moreover, he states that 10717 is registered in the name of the Respondent’s son. The Respondent’s son is not named as a party to the suit yet the Applicant is fully aware that the property is registered in his name and has presented evidence to that effect. Civil procedure and practice requires the Applicant to enjoin Respondents against whom relief is sought. I agree with the Respondent that the Court cannot issue binding orders against unnamed third parties. Secondly, on the issue of the alternative prayer of cancellation of titles, it is apparent that the Applicant seeks reliefs of a permanent nature at an interlocutory stage. For these reasons, the first condition of a prima facie case with a probability of success has not been met.

7. The second requirement is that the Applicant will suffer irreparable harm that cannot be compensated by way of damages. The Applicant has not demonstrated how he shall so suffer if the orders sought are not granted. He states that he is still in occupation of the suit property and resides thereon. He has not stated if there is any impending threat of eviction or dispossession in any way. The first two conditions have not been met and the balance of convenience does not lie in favour of the Applicant. It lies elsewhere, particularly the third parties he wants to condemn unheard.

8. The Respondent in his submissions has raised evidentiary issues such as the Tribunal’s conditional award to the Applicant which the Court cannot delve into at this stage. It is also noteworthy that this Application was filed under a Certificate of Urgency on 25th August 2016 and the Applicant has not been keen on its prosecution since then. The urgency seems have to dissipate as the Applicant has lost interest.

9. The upshot of the foregoing is that the Amended Notice of Motion Application filed on 25/7/2016 is hereby dismissed. Costs in the cause.

Dated, signed and delivered at Busia this 24th day of July 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Applicant: Present

Defendant/Respondent: Absent

Counsel for the Plaintiff/Applicant: Absent

Counsel for the Defendant/Respondent: Present

Court Assistant: Nelson Odame