



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 28 OF 2015

LUCAS OUMA MARACHI

HENRY GABRIEL MABACHI

MASIGA OKUMU JAMES LEMMY.....APPLICANTS

VERSUS

THE LAND REGISTRAR, BUSIA

THE HON. ATTORNEY GENERAL

BENJAMIN OKELLO SEMBE.....RESPONDENTS

R U L I N G

1. The application for determination before me is a Notice of Motion dated 18/9/2018 and filed on the same date. The application has three prayers but the prayers for consideration at this stage are two – prayers 2 and 3 – as the other – prayer 1 – is already spent. The prayers for consideration are as follows:

Prayer 2: That a temporary injunction do issue restraining the Respondent from ploughing, planting, blocking the Applicant's road of access and pathways, barring the Applicants and their family members from building or literary using the land and/or interfering with the Applicant's and their families quiet enjoyment of the original land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/225 now said to be LR. Nos SAMIA/LICHULULO-BUKHULUNGU/1919, 1920 and 1921.

Prayer 3: That the costs of this application be provided for.

2. The application is anchored on grounds, *interalia*, that the applicants are the registered owners of the land, that the 1st Applicant in particular was born on the land and resides there with his mother; that the 1st Applicant wanted to construct, was stopped by the court, but later allowed to go on with construction; that the Respondent then went to the land and embarked on ploughing the very place where the 1st Applicant and his mother have been ploughing all along; that the Respondent has threatened to cut the Applicants with a panga which he carried always while on the land; that the Applicants stand to suffer irreparable damage; and finally that the Respondent stands to suffer no prejudice as he has his home and land elsewhere. There is a supporting affidavit that came with the application. It amplified the grounds advanced.

3. The Applicants are three – **LUCAS OUMA MABACHI, HENRY GABRIEL MABACHI** and **MASIGA OKUMU JAMES LEMMY**. The Respondents are also three – **THE LANDS REGISTRAR, THE HONOURABLE ATTORNEY GENERAL**, and **BENJAMIN OKELLO SEMBE**. The application however is not about the three Respondents; it is about only one Benjamin Okello Sembe. Infact it is this one Respondent who filed a replying affidavit to the application on 29/10/2018. He deposed, *interalia*, that the land is his own but the Applicants had earlier on illegally registered themselves as owners. He asked the court not to issue the orders sought. He is the 3rd Respondent.

4. The application was canvassed by way of written submissions. The Applicants submissions were filed on 28/11/2018. The Applicants submitted *interalia*, that the 3rd Respondent started engaging in the activities that necessitated the filing of this application after this court's ruling of 23/7/2018. He moved to the land and started ploughing everywhere, including the area surrounding the 1st Applicant's house and even the path used to move in and out of the land. And it was submitted that the basis of the 3rd Respondent's activities is that he is the

registered owner of the land.

5. The acts of the 3rd Respondent are said to have caused the Applicants irreparable loss. The 1st Applicant was said to be living on the land with his old and ailing mother. He needs to cultivate the land as he has been doing in order to grow food crops. It was submitted that the 3rd Respondent cannot use the fact of disputed registration as owner of the land to engage in the activities complained of. This court was referred to its own earlier ruling in this matter delivered on 26/7/2018. It was a ruling on the 3rd Respondent's application for restraining orders in this matter. The court dismissed the application and while so doing cited the Court of Appeal's decision in **MUNYU MAINA Vs HIRAM GATHIMA [2013] eKLR** where position was taken that a disputed title cannot very well be used as a conclusive basis of ownership conferring on the owner the rights that go with such ownership.

6. The Applicants' pointed out that this suit is in fact a challenge to the title. The 3rd Respondent therefore should not be allowed to derive advantage from the fact of registration as owner. The court was urged to grant the orders sought.

7. The 3rd Respondent's submissions were filed on 23/1/2019. The 3rd Respondent submitted that the Applicants have not availed current searches from the land's office for the latest position on ownership; that there has been a long running dispute over ownership; and that during the pendency of this case, the 1st Applicant wanted to construct a house on the land. The court was urged to take the position that the orders sought cannot be granted at this stage.

8. I have considered the application, the response made, rival submissions, and the pleadings on record. The 3rd Respondent is shown to have engaged in the activities complained of after this court delivered its ruling on his application for restraining orders. It is clear that the 1st Applicant and his mother reside on the land. Cultivating on the very place they cultivate and even going to the extent of ploughing the path leading to and from their house is not acceptable. These are activities that can clearly occasion a breach of peace. The activities constitute unwarranted provocation.

9. I agree with the Applicants that the 3rd Respondent cannot use the fact of disputed ownership to wreak havoc on them. The law as cited by the Applicants in their submissions is correct. The prayer sought can serve the purpose of ensuring that peace prevails.

10. And when I look at the pleadings and the submissions of the Applicants, I am of the view that the threshold set in the case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358**, which entail demonstrating a *prima facie* case with a probability of success; establishing the likelihood of suffering irreparable loss which cannot be compensated with damages; and/or considering the balance of convenience if the court is in doubt regarding the first two requirements, have been met by the Applicants. I am therefore persuaded that the application herein is meritorious and I hereby allow it in terms of prayer 2. Costs of the application, which is prayer 3, will be in the cause.

Dated, signed and delivered at Busia this 12th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant: Absent

2nd Applicant: Absent

3rd Applicant: Absent

1st Respondent: Absent

2nd Respondent: Absent

3rd Respondent: Present

Counsel for the Applicants: Absent

Counsel for the Respondents: Absent

Court Assistant: Nelson Odame