



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
ENVIRONMENT AND LAND COURT

ELC NO. 57 OF 2018

WILFRED OPAKASI OYEKE.....PLAINTIFF/APPLICANT

= VERSUS =

THE CATHOLIC DIOCESE OF BUNGOMA...1ST DEFENDANT/RESPONDENT

THE BOARD OF MANAGEMENT

OJAMII PRIMARY SCHOOL.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The application before me for determination is a Motion on Notice dated 6/12/2018 and filed on the same date. It is expressed to be brought under Order 40 rules 1, 2, and 3, Order 8 rules 3 and 5 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act (cap 21). The Applicant – **WILFRED OPAKASI OYEKE** – is the Plaintiff in the suit while the Respondents – **THE CATHOLIC DIOCESE OF BUNGOMA ST. BENDETTE** and **THE BOARD OF MANAGEMENT OJAMII PRIMARY SCHOOL** – are the Defendants.

2. The application has several prayers for consideration at this stage and the prayers are as follows:

Prayer 1: Spent.

Prayer 2: Pending the hearing and final determination of this suit, the honourable court be pleased to issue a temporary injunction restraining the Respondents either by themselves, agents, servants and/or any other person purporting to act through the Respondents from interfering and/or closing the road of access leading to LR. No. SOUTH TESO/ANGOROMO/9563 and the Respondents be compelled to re-open the said road of access.

Prayer 3: The County Land Surveyor be mandated to supervise the re-opening of the said road of access and plant permanent boundaries thereon.

Prayer 4: That leave be granted to the Applicant to amend his pleadings and that the draft re-amended plaint herein be deemed as duly filed and served upon payment of the requisite fees.

Prayer 5: Costs be provided for.

3. The application is premised on the grounds, *inter alia*, that the Respondents have closed a road of

access and denied the Applicant access to his land; that there is a likelihood of a breach of peace should the court fail to grant the orders; and that the Respondents acts of occupying part of the Applicant's land have caused him irreparable loss and damage. The grounds are further amplified in the supporting affidavit that came with the application.

4. The only response to the application was filed by 2nd Respondent. It is a replying affidavit dated 22/1/2019 and filed on the same date. According to the 2nd Respondent, it is not true to say that they have closed a road of access or occupied the Plaintiff's land or even denied him access to his land. It was deposed that the Respondent School is on its own parcel of land which is LR. SOUTH TESO/ANGOROMO/11465. It was further deposed that there is no map showing existence of an access road to the Plaintiff's land.

5. The application was canvassed by way of written submissions. The Applicants submissions were filed on 3/7/2019. According to the Applicant, the Respondents have encroached and occupied a portion of his land. They have also denied him a road of access. He would therefore wish the court to intervene and grant him the orders he is seeking. He submitted that he has met the threshold set in the case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358**. The threshold entails establishing a *prima facie* case with a probability of success, showing a likelihood of suffering irreparable loss that cannot be adequately compensated with damages, and in case of doubt as to the first two requirements, opting for consideration of the balance of convenience.

6. According to the Applicant, a *prima facie* case is already well shown and he said also that he continues to suffer irreparable loss as he has been denied access to his land. And even if the balance of convenience is considered, the Applicant submitted that the orders he is seeking for offer the only practical and reasonable solution to the issues between the parties.

7. The 2nd Respondent's submissions were filed on 25/3/2019. The prayer for amendment of the plaint was not opposed. But the prayer for restraining order was and the Applicant was said not to have met the threshold for granting such order as set in Giela's case (supra). It is apparent that the 2nd Respondent view the Applicant's grievance as a boundary issue which, under Section 19 of the Land Registration Act, should have been handled by the Land's office first. The 2nd Respondent also submitted that the Applicant does not stand to suffer irreparable loss. The situation is said to have been as it is since 2005. This court was asked to dismiss the application.

8. I have considered the application, the response made, rival submissions, and the pleadings on record generally. The Applicant's case was filed in the year 2018. He complained of trespass, encroachment and occupation said to have taken place in the year 2005. Certainly, what is complained of is not new and the Applicant seems to have lived with it for some thirteen odd years.

9. In my view, the Applicant would need to demonstrate to the court the irreparable loss that he has borne for so long. He would need to show also how or why damages are not an adequate remedy. And he himself needed to give an undertaking to pay damages should he ultimately be found to be in the wrong.

10. But the more crucial consideration in my view is the fact that the physical extent or dimensions of the Applicant's land seem not to be clear. And I think this is partly the reason why the Applicant wants the surveyor to visit the land. The Applicant alleges encroachment and occupation of his land. The Respondents deny it and assert that they are legally on their own piece of land. An injunctive order does not issue where there is uncertainty as to the area where it is supposed to apply. Such uncertainty always lead to refusal by the court to issue the order because it is clear that there cannot be effective enforcement.

11. In this particular matter itself, it is not clear whether the Respondents have encroached or occupied the land. And even if they have, it is not clear what size is encroached upon or occupied. Quite clearly therefore, it would be difficult to enforce the order even if the court were minded to grant it.

12. When all is considered therefore, it's clear that the merits of the Applicant's application as regards

prayers 2 and 3 have not been well demonstrated. I therefore make a finding that the application is unmeritorious in that regard and I hereby dismiss it with costs to the Respondents. The prayer for amendment of pleadings (prayer 4) is however granted as the Respondents are not opposing it.

Dated, signed and delivered at Busia this 11th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Applicant: Present

1st Defendant/Respondent: Absent

2nd Defendant/Respondent: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendants/Respondents: Absent

CA: Nelson Odame