



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 8 OF 2016

JULIUS HENRY FORNE WAFULA.....1ST PLAINTIFF/APPLICANT

VICTOR GEORGE WAFULA.....2ND PLAINTIFF/APPLICANT

ROBERT PAUL WAFULA.....3RD PLAINTIFF/APPLICANT

= VERSUS =

WASHINGTON WAFULA..... 1ST DEFENDANT/RESPONDENT

MARIA K. WAFULA..... 2ND DEFENDANT/RESPONDENT

R U L I N G

1. By a Notice of Motion dated 6/12/2018 filed here by the Plaintiffs on the same date, various orders were sought, among them one (prayer 4) that requires an injunction to issue against the Defendants, their servants, workers, agents, the county surveyor of Busia or any other surveyor from surveying with a view to selling and/or transferring LR. Nos BUKHAYO/MUNDIKA/10706, 10707, 10708, 10709, 10710, 10711, 10712, 10713, 10714, 10715, 10716, 10717, and 10718 respectively pending the hearing and determination of the suit herein. Another prayer (prayer 6) asks for provision for costs. All the other prayers are moot at this stage, having been compromised or considered earlier.

2. The application was brought under Sections 1, 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 42 Rules 1, 2, 3, 4 (???), Order 51 Rules 1, 4, 6, 10(1), (2) of the Civil Procedure Rules, together with all other provisions of law. The parties are members of the same family, with the Plaintiffs – **JULIUS HENRY FORNE WAFULA, VICTOR GEORGE WAFULA** and **ROBERT PAUL WAFULA** – being children of the Defendants – **WASHINGTON WAFULA** and **MARIA K. WAFULA**.

3. The disputants are tussling over a parcel of land that initially existed as LR. BUKHAYO/MUNDIKA/1002 before it was subdivided into the parcels aforementioned. The Plaintiffs claim that the 1st Defendant, their father, long ago apportioned some two acres to them and they in turn expended some 3 million shillings developing it. The Plaintiffs are aggrieved because the Defendants allegedly want to destroy the development thus causing them loss and damage. They are also afraid that the Defendants may also sell or transfer the land. That is why interlocutory restraining order is sought at this stage.

4. According to the Plaintiffs, the Defendant's intended or threatened actions are illegal and aimed at defeating justice.

5. As a response to the application, the Defendants filed a replying affidavit on 11/1/2019. The depositions in the affidavit were by 2nd Defendant who stated, *inter alia*, that she is the registered owner of the land which she subdivided into 21 units in the year 2013. She said she uses the land for farming and has been doing so since 1975. And the land is her own, not ancestral land, and the 1st Defendant, the Plaintiff's father, has ancestral land in SAMIA where, in 2nd Defendant's view, the Plaintiffs can justifiably lay a claim. She also averred that she has already sold some portions of the land to 3rd parties. The 2nd Defendant emphasised that the land is her own and asked to be allowed to dispose of it as she pleases.

6. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 25/2/2019. The submissions contain some background and antecedents surrounding the land. In particular, it was emphasised that the 1st Defendant apportioned some two acres to the Plaintiffs with the consent of 2nd Defendant. The Plaintiffs emphasised that they own that portion. They also seem to take the position that the land is ancestral. The Plaintiffs said they will suffer irreparable loss if their development on the land is destroyed. The court was urged to grant the restraining order.

7. The Defendants submissions were filed on 4/6/2019. The celebrated case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358** was cited as a benchmark for the threshold to be met in order to get temporary restraining orders. And the threshold involves demonstrating a *prima facie* case with a probability of success; showing the likelihood of suffering irreparable loss not compensable in damages, and, resorting to consideration of the balance of convenience if in doubt regarding the first two requirements.

8. The Defendants submitted that the Plaintiff have not established a *prima facie* case, the land being not ancestral and being registered in the name of 2nd Defendant. It was submitted that the Plaintiffs entitlement by virtue of family ties can only be in Samia where the 1st Defendant, their father, has ancestral land. It was further submitted that the Plaintiffs only allege their right without availing evidence to demonstrate their entitlement to the right.

9. I have considered the application, the response by the Defendants, rival submissions, and the pleadings on record. It is common ground that the land is registered in the name of the 2nd Defendant. She subdivided it long ago and some portions are already said to have been sold to third parties. Such third parties are not part of this case and the restraining order as sought would affect them. That would be tantamount to condemning them unheard.

10. It also seems to be the Plaintiffs position that their entitlement is two acres allegedly apportioned to them by the 1st Defendant. A question arises: Why is the restraining order sought to apply to the whole parcel of land including portions to which the Plaintiffs have no claim? Why couldn't the prayer for restraining order be formulated to apply to the portion that the Plaintiffs are claiming?

11. Establishing a *prima facie* case against a registered owner of the land is not easy. And that is generally because a registered owner enjoys some rights that are not very easy to defeat or interfere with. In this matter, the 2nd Defendant has evidently been the registered owner. The presence of the Plaintiffs on the land is said to have been through permissive arrangements. In other words, the 2nd Defendant never renounced or abandoned her right of ownership. In her response to the application, she is clear that she should be allowed to use her land as she pleases. Given what the Plaintiff have availed as a back-up to their case, I am not satisfied that they have established a *prima facie* case against the Defendants.

12. Further, bearing in mind that the Plaintiffs are not the registered owners of the land, they should have undertaken to pay damages to the Defendants should they ultimately lose the case. In **Gati Vs Barclays Bank (K) Ltd, [2001] KLR 525**, the court considered the circumstances of the case and ultimately held, *inter alia*, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue. In this matter itself, the circumstances prevailing clearly warrants such an undertaking. This omission by the Plaintiffs weakens their position.

13. The upshot, in light of the foregoing, is that the application herein is unmeritorious. I therefore hereby dismiss it with costs to the Defendants.

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

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff/Applicant: Present

2nd Plaintiff/Applicant: Absent

3rd Plaintiff/Applicant: Absent

1st Defendant/Respondent: Absent

2nd Defendant/Respondent: Absent

Counsel for the Plaintiffs/Applicants: Absent

Counsel for the Defendants/Respondents: Present

CA: Nelson Odame