



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELCNO. 136 OF 2017

PROTAS OTANG'O ODUOR.....PLAINTIFF

VERSUS

HELLEN JUMA DADA.....DEFENDANT

RULING

1. The application under consideration is a Notice of Motion dated 14/7/2017 filed in court on 17/7/2017. The application was filed contemporaneously with a suit of even date and is expressed to be brought under Sections 1A, 1B, 3, 3A and 63(e) of Civil Procedure Act (cap 21) and orders 40 rule 1 and 51 rule 1 of Civil Procedure Rules, 2010. The disputants are **PROTUS OTANGO ODUORI**, as Plaintiff, and **HELLEN JUMA DADA**, as Defendant. The dispute revolves around ownership of Land Parcel No. 395/BUKHAYO/MALANGO ("disputed land" hereafter). The Plaintiff claims to own a portion of the disputed land through purchase but the Defendant denies this and avers that the land is wholly her own.

2. The application has five (5) prayers on the face of it, which are formulated as follows:

Prayer 1: That this application be certified urgent, service be dispensed with, and heard *ex parte* in the first instance.

Prayer 2: The Plaintiff therefore prays for an order of injunction restraining the Defendant either by herself or through her sons by themselves, their servants, employees, agents and/or any other persons working under their instructions from selling, transferring, alienating, disposing, interfering and/or dealing with the suit property being 395/BUKHAYO/MALANGA PENDING THE HEARING AND DETERMINATION OF THIS APPLICATION.

Prayer 3: The Plaintiff also prays for an order of inhibition inhibiting any dealings in the suit property being 3 acres part of the 395/BUKHAYO/MALANGA PENDING THE HEARING AND DETERMINATION OF THIS SUIT.

Prayer 4: That the area OCS do ensure compliance of these orders and further assist in maintaining peace and order in enforcement of these orders as the Defendant through her sons did threaten the Plaintiff against setting foot on the said piece of land.

Prayer 5: That costs be provided for.

3. I have set out all the prayers verbatim because some of them, particularly prayers 2 and 3, have a directing bearing on the final outcome of this ruling. Infact the outcome will be based on them.

4. The Defendant opposed the application vide a replying affidavit dated 11/10/2017 and her response prompted the filing of a further affidavit by the Plaintiff on 30/10/2017. If the application had no problems with the prayers as formulated and submitted on, I would have bothered to delve more into the details of both the application and the response made. But I now consider such details unhelpful.

5. It is necessary to point out that prayer 2 as formulated is meant to run until the hearing and determination of this application. The prayer as worded is not meant to last beyond this ruling. In applications of this nature, the usual approach is to have a prayer for a restraining order meant to last until the application is determined. Such a prayer is normally entertained *ex parte*. But there is also usually another similarly worded prayer meant to last until the suit is heard and determined. That is the prayer that is missing here. The Plaintiff needed to make such prayer or, in the alternative, make it clear in prayer 2 that it was for consideration twice, first to run until the application is heard and determined and second to run until the suit is heard and determined.

6. As things stand, prayer 2 is meant to run for the duration of the application only and becomes spent when this ruling is delivered. Arguably even, it became spent when it was not granted *Ex parte* since it was meant for consideration at that stage.

7. What appears baffling is that even the defence did not notice this shortcoming. The submissions filed by both sides assume that the prayer, if granted, can run until the suit is heard and determined. The fact of the matter is that it cannot as it is clearly meant to serve the period before the application is determined.

8. The only prayer clearly expressed to be intended to run until the suit is heard and determined is prayer 3. That prayer is for an inhibition. Curiously though, there is no mention at all of that prayer in the submissions. That prayer remains only in the application. The Plaintiff made no effort to substantiate it at all. Besides, the considerations necessary to grant an inhibition are different from the considerations applicable to the granting of injunctive relief. The law is also different. These considerations needed to be submitted on. They were not.

9. It is clear therefore that the Plaintiff got it wrong right from the start. There is clearly no prayer of injunction to consider at this stage and the prayer for inhibition was not addressed at all in the submissions. And given this scenario, it would be an idle exercise to contemplate consideration of the merits of the application.

10. The upshot is that the application herein is dismissed with costs to the Defendant.

Dated, signed and delivered at Busiathis 18th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: