



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 41 OF 2016 (FORMERLY CMCC 84/2012)

RASHID ODEDE BARASA.....PLAINTIFF

VERSUS

PETER BARASA..... 1ST DEFENDANT

HILLARY WANYONYI NAMULUNDU..... 2ND DEFENDANT

GRACE WANYONYI.....3RD DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 14/12/2016 filed here on the same date. It is brought under Sections 1A, 1B, and 3A of the Civil Procedure Act (cap 21) and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as read together with articles 40, 64 and 159 of the Constitution of Kenya, 2010. The Plaintiff – **RASHID ODEDE BARASA** – is seeking restraining orders against the Defendants – **PETER BARASA, HILLARY WANYONYI NAMULUNDU** and **GRACE WANYONYI** – whom he claims to have invaded his land.

2. The application has six (6) prayers but some prayers have already been dealt with. The prayers already dealt with are 1, 2 and 5. The prayers for consideration now are 3, 4 and 6. And they are as follows:

Prayer 3: That this honourable court do issue an order of permanent injunction against the Defendant/Respondent by itself, its servants, workers, agents, 3rd parties from selling, disposing off, alienating and/or transferring L.R. No. SOUTH TESO/ANGOROMO/4323 from Plaintiff's ownership pending hearing and determination of the main suit.

Prayer 4: That the OCS – BUSIA POLICE STATION do effect this order.

Prayer 6: That the costs of this application be provided for.

3. According to the Plaintiff, he is the registered owner of L.R. No. SOUTH TESO/ANGOROMO/4323 ("Suit Land" hereafter) and the Defendants have invaded it and started putting it to their own use. The Defendants' actions are said to be illegal and unconstitutional. The actions, Plaintiff further said, are likely to cause irreparable loss.

4. The 1st Defendant did not respond to the application. The 2nd and 3rd Defendants responded vide a replying affidavit dated 24/1/2018 and filed on 25/1/2018. It would appear that the 2nd and 3rd Defendants are in occupation of the suit land through purchase. Simply put, the 2nd and 3rd Defendants purchased a portion of the suit land and the Plaintiff allowed them to use and/or possess it. The full purchase price was allegedly paid but the Plaintiff seems to have changed his mind at some point and decided to sell the suit land to the 1st Defendant.

5. It appears clear from the plaint that the Plaintiff was selling portions of the suit land to the Defendants. He alleged that the Defendants never paid the full purchase price but had instead resorted to fraudulent activities to gain ownership.

6. The application was not argued in court; written submissions were filed instead. The Plaintiff's submissions were filed on 14/3/2018. He emphasizes his right of ownership under both constitutional and statutory provisions. He reiterated that he has exclusive rights of use and occupation by virtue of being the registered owner. He averred that the Defendants have no rights of ownership at all as the arrangements for purchase never succeeded.

7. The 2nd and 3rd Defendants submissions were filed on 22/2/2018. It was pointed out that the Plaintiff was selling five (5) acres of the suit

land to 2nd and 3rd Defendants and had even started the transfer process before he changed his mind. According to these Defendants, the Plaintiff has not met the threshold for grant of temporary restraining orders as set out in the celebrated case of **GIELLA vs CASSMAN BROWN LIMITED [1973] EA 358**. What this essentially means is that the Plaintiff has not established a *prima facie* case with a probability of success and/or shown that he is likely to suffer irreparable loss. Even the balance of convenience, another consideration in Giella’s case (supra), is said to be in favour of 2nd and 3rd Defendants.

8. It also seemed to be the 2nd and 3rd Defendants position that, they have become adverse possessors, having gone into possession of the purchased portion in 1990. The Plaintiff was also faulted for seeking a permanent injunction in an interlocutory application. According to the 2nd and 3rd Defendants, a permanent injunction is a substantive relief which, if granted in interlocutory stages can prematurely determine a suit.

9. I have considered the application, the response made, rival submissions, and the suit as filed. It is clear that the Plaintiff is the registered owner of the suit land. The Defendants do not have title; the Plaintiff has it. Yet even when this is the position, he seeks to restrain the Defendants from “selling, disposing off, alienating or transferring” the suit land. The Plaintiff has not told the court how the Defendants would succeed in doing this when the title to the suit land is not their own. In my own view, it is infact the Defendants themselves who should be concerned that the Plaintiff might do the things he is seeking to restrain them from doing. And I think the Defendants are alive to this and have placed restrictions on the title.

10. In my view, it is absolutely unnecessary to grant the orders sought unless the Plaintiff shows clearly that the Defendants are capable of doing what he seeks to restrain them from doing. And this is not shown or demonstrated.

11. I do not deem it necessary to delve into the contents of each side’s submissions. And this is so because each side missed it all. No side raised the issue of the Defendants’ ability to deal with the Plaintiff suit land in the manner feared and alleged by the Plaintiff. The Defendants are simply not capable of executing such feat given that they are not the title holders. The application herein is therefore clearly unmeritorious and I hereby dismiss it with costs to the Defendants.

Dated, signed and delivered at Busia this 17th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

1st Defendant:

2nd Defendant:

3rd Defendant:

Counsel of Plaintiff:

Counsel of Defendants: