



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 112 OF 2015

WILLIAM ONGARIA.....PLAINTIFF

= VERSUS =

JOHN DINDI OPIYO..... DEFENDANT

R U L I N G

1. What is before me for determination now in this matter is the Notice of Motion dated 25/9/2017 and filed on 27/9/2017. The Applicant – **JOHN DINDI OPIYO** – is the Defendant while the Respondent – **WILLIAM ONGARIA** – is the Plaintiff in the suit herein. The application is brought under Sections 1A, 1B and 3A of Civil Procedure Act (cap 21), Order 40 rules 1(a) and 3(3) of Civil Procedure Rules, and all other enabling law.

2. Essentially, the application is one for restraining orders. There are four (4) prayers on the face of it but three (3) – prayers 1, 2, and 4 – are now spent, having been considered at an earlier stage. Only one (1) prayer – Prayer 3 – is for determination.

That prayer is as follows:

Prayer 3: That this honourable court be pleased to issue a temporary injunction restraining the Respondent, his agents, servants, employees or other persons claiming through him from transferring, ploughing, deriving profits and/or using in any other manner land parcel number BUKHAYO/KISOKO/6025 pending the hearing and determination of the substantive suit.

3. The Applicant is the registered owner of land parcel number BUKHAYO/KISOKO/6025 and he says he will suffer prejudice if the prayers sought are not granted. The land, he averred, was transferred to him by the Respondent. It originally belonged to his father and that is why it was transferred to him. The Respondent is said to be intent on selling the land and the Applicant fears that the purchasers will come and occupy it.

4. The Respondent responded to the application, first, vide grounds of opposition filed on 17/10/2017 and, second, by way of a replying affidavit filed on 15/11/2017. To the respondent, this application is RES-JUDICATA, there being an earlier application dated 15/9/2017 which is not yet determined. He also said that he is in occupation of the land and a restraining order at this stage would amount to eviction from the land even before his case is determined.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 8/11/2017. He submitted, *inter alia*, that he is the registered owner of the land and, that being the position, he has a *prima facie* case with a probability of success. He also submitted that he will suffer irreparable loss and, as the Respondent intends to sell the land to third parties, the balance of convenience should be construed in his favour. And contrary to the Respondents assertion that he lives on the land, the Applicant submitted that is not the position. The Respondent, it was submitted, resides on the neighbouring land.

6. The Respondent's submissions were filed on 11/12/2017. It was submitted, *inter alia*, that the Applicant has no prima facie case. He is not the Plaintiff and has no counter-claim and the issue of prima facie case therefore does not arise. The Respondent reiterated too that a restraining order granted at this stage would amount to a pre-determination of his yet untried case. He wondered how he can transfer land that is not registered in his names.

7. I have looked at the pleadings in the file generally and the accompaniments that came with them. I have also considered the application, the responses made, and the rival submissions. The Applicant first brought an application dated 15/9/2017 seeking restraining orders. The court entertained the application *Ex parte* on 21/9/2017 and declined to issue a restraining order because of the confusion then manifest in the application. That application is still in the court file. That application is still pending and while so pending, this application itself was filed.

8. The present application is not an amended version of the earlier application. It is another application filed while the other one seeking

similar orders is still pending. When the Respondent then talks of abuse of the court process, I agree. The earlier application should have been withdrawn or marked abandoned in order to give way to this application. That was not done.

9. I now turn to this application itself. It is clear that what the Applicant fears is sale of land to third parties. As pointed out by the Respondent, one would wonder how the Respondent would succeed to sell land that is not-registered in his names, and with an undetermined suit hovering over it. In my view, if a purchaser is naïve enough to part with money to purchase such land, that should not pose any problem to the Applicant. Such a purchaser stands doomed to suffer from his own folly should the court ultimately decide that the Applicant is the proper owner of the land.

10. But there is also another curious thing: Though the Applicant’s main fear is that of sale, such sale is not one of the things sought to be restrained in the application. A look at the prayer being considered will show that various things are sought to be restrained but sale is not one of them. One would wonder then how effective the order would be assuming it was found to be merited.

11. I also see the Applicant saying that the Respondent resides on the adjacent land. There is no suggestion or information that the Respondent is using the Applicant’s land. The court would have been interested to know how he is using the land. In other words, is the Respondent “ploughing, deriving profits or using in any other manner” as suggested in the order being sought. This needed to be demonstrated, but was not.

12. It can be seen from all these that the problem with the Applicants application is not so much what the other side availed by way of response and submissions – good though these might be – but the shortcomings already pointed out. And most of these shortcomings have a lot to do with the way the application was brought and prosecuted. The upshot is that the application herein is found unmeritorious and the same is hereby dismissed with costs.

Dated, signed and delivered at Busia this 25th day of September, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: