



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 10 OF 2017

PIUS OLIMA OMUSO.....1ST DEFENDANT/ APPLICANT

CHRISTINE ADHIAMBO ABOGE.....2ND DEFENDANT/ APPLICANT

EDWARD OWINO RAPELA.....3RD DEFENDANT/APPLICANT

MIGORI COUNTY LAND REGISTRAR.....4TH DEFENDANT/APPLICANT

VERSUS

DANIEL ONYANGO OMUSO.....RESPONDENT/PLAINTIFF

RULING

1. On 23RD April 2018, the defendants/applicants namely Pius Olima Omuso (1st applicant) Christine Adhiambo Aboge (2nd applicant) and Edward Owino Rapela (3rd applicant) appearing in person, filed an application by way of a Notice of motion dated 16th April 2018 against the plaintiff/respondent, DANIEL ONYANGO OMUSO who is represented by M/s Agure Odero & Co. Advocates. They are seeking the following orders;-

a) An order for review and setting aside this honourable court's conservation orders dated 28th February, 2017 issued against the applicants/defendants.

b) Costs of this application be provided for by the respondent/plaintiff.

2. The application is premised on the 2nd defendant/applicant's supporting affidavit sworn on the 16th day of April, 2018, conservation orders of 27th February 2017 issued by this court and the 1st and 3rd defendants/applicants accompanying authority of the even date. The application is also based on the following grounds;

a. The applicants are family people who have children to feed and educate.

b. That it is as if the applicant/defendants have been condemned when the case has not been finalized.

c. The applicants/defendants were never served with the application than bore the conservatory under.

3. By an eleven (11) paragraphed replying affidavit sworn on 15th May, 2018, the plaintiff/respondent opposed the application and sought its dismissal with costs to him in the interest of justice. The plaintiff/respondent averred that the defendants/applicants have trespassed on the portion belonging to him and cultivated thereon in spite of the preservation orders dated 28th February 2017 hence they are in contempt thereof. He urged the court to fast track the hearing of the suit because to grant the orders sought would allow the defendants/applicants, to further interfere with his portion of the suit land originally LR NO. Kanyamkago/Kawere/716. He has annexed to the affidavit a copy of the Chief's letter dated 26th April 2018, together with copies of photographs marked DOO1 (a) 1 (b) and (3) in support of his response to the application.

4. The defendants/applicants in person and the learned counsel for the plaintiff/ respondent filed submissions dated 8/6/2018 and 19/7/2018 respectively further to this court's directions given on 17/5/2018; see Order 51 Rule 16 of Civil Procedure Rules, 2010 and Practice Direction No. 33(a) of the Environment and Land Court Practice Directions, 2014.

5. Ms. E. Opiyo learned counsel for the 4th defendant neither responded to the application nor filed submission in this matter.

6. The defendants/applicants submitted that the suit land was in the name of Ndege Omuso (deceased) prior to its sub-divisions. However, the plaintiff /respondent fraudulently transferred it into his name. That the plaintiff respondent is not a member of the family of the deceased hence he is not entitled to any share of the land.

7. The defendants/applicants further submitted that there is no legal provision that supports a person to transfer whole family or community land in his or her name without any court process. They urged the court to vacate the exparte order. They cited the Land Registration Act and the law of Succession Act (Cap 160) in support of their submissions.

8. By their submissions, learned counsel for the plaintiff/ respondents termed the orders sought a waste of court's time as no orders for review of the court's order has not been sought by the defendants/applicants. He prayed that the suit be heard and determined hence the application be dismissed.

9. I have considered the entire application, the replying affidavit and submissions. The issue for determination is whether the defendants/applicants have satisfied the court for the grant of orders sought in their application.

10. The defendants/applicants seek review and setting aside of interim injunctive orders made on 27/2/2017 and issued on 28/2/2017. The orders were granted further to an affidavit of service sworn on 24/2/2017 by Opiyo Juma, an authorized process server that the defendants/applicants had been fully served for inter partes hearing of Notice of motion application dated 15/2/2017. They were made pursuant to, inter alia, **Article 159 (2) (a) (b) of the Constitution of Kenya, 2010, and Section 13 (7) of the Environment and Land Court Act, 2015 (2011).**

11. The court considered and granted an interim injunction which is a substantive equitable remedy upon establishment of a right on a prima facie, among other principles; see **Pricillah Wanja Kiburi –v- James Kiongo Kibui and Another (2014) eKLR**. Moreover, in the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**, the court settled the principles governing the grant of injunctions and which I need not to overstretch.

12. The defendants/ applicants claim that they are entitled to a fair hearing and that they depend on the suit land as their source of income, food and education for their children. I take onto account the right to fair trial as well as economic and social rights under articles 50 and 43 respectively of the Constitution of Kenya, 2010.

13. Notably the defendants/applicants were given an opportunity to be heard in respect of Motion of motion application dated 15th February, 2017. Inter partes hearing of the application was fixed for 27th February 2017 when the defendants/applicants did not show up. Upon satisfaction that the defendants/applicants were duly served and as already observed, interim preservation orders in terms of interlocutory injunction were granted accordingly.

14. The national values and principles of governance in article 10 of the Constitution of Kenya, 2010 bind all the state organs, state officers, public officers and all persons whenever any of them applies or interprets the law, among other things. Equity in one of those values and principles provided under the article. The interim injunction granted is an equitable remedy meant to preserve the suit property.

15. This court has inherent power to grant injunctive remedy as provided under **Section 3A of the Civil Procedure Act (Cap 21)**. The interlocutory injunction granted on 27th February, 2017 is merited in the circumstances. The defendants/applicants have not advanced sound reasons for this court to vacate the orders which are in the interest of justice.

16. I thus disallow the notice of motion dated 10th April 2018 with costs in the cause.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of September 2018.

G.M.A. ONGONDO

JUDGE

In the presence of: -Mr. Agure Odera learned counsel for the plaintiff and holding brief for learned counsel Mr. Opiyo for the 4th defendant

1st to 3rd defendants/applicants in person

Tom Maurice – Court Assistant