



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 23 OF 2018

EVALINE NAFULA JUMA

As Administrator of the Estate of

BONFACE JUMA MUSUNGU.....APPLICANT

= VERSUS =

- 1. PETRO MWARI MUSUNGU alias PETER MUSUNGU**
- 2. PATRICK NGESA MWARO**
- 3. SAMSON MUSUNGU MWARO.....RESPONDENTS**

R U L I N G

1. The application before me for determination is a Notice of Motion dated 9/4/2018 and filed on 10/4/2018. The Applicant – **EVALINE NAFULA JUMA** – is the Plaintiff in the suit filed herein on 27/3/2018 and dated 26/3/2018. The Respondents – **PETRO MWARI MUSUNGU** alias **PETER MUSUNGU** and **SAMSON MUSUNGU MWARO** – are Defendants in the same suit. The dispute between the parties is about ownership of a parcel of land originally known as BUNYALA/BUKOMA/78, now subdivided into parcels Nos. BUNYALA/BUKOMA/4334, 4335, 4336, 4337, and 4338.

2. The Applicant is asking the court to do the following at this stage:

- The Defendants and those claiming through them be restrained from building, carrying out any construction, developing, charging, disposing off or in any manner dealing with land parcel numbers BUNYALA/BUKOMA/4334, 4335, 4336, 4337 and 4338 until hearing and determination of this suit.
- That the costs of this application be provided for.

3. The 1st Respondent is said to have put materials on the disputed land intending to start construction. He is also said to have stopped people who have been drying fish on the Applicant's portion of land from doing so, thereby denying the Applicant some income.

4. The 1st Respondent is accused of sub-dividing the disputed land into five (5) portions instead of four (4) as ordered in a grant secretly and fraudulently obtained by him.

5. The 1st Respondent filed a replying affidavit on 14/5/2018 and deposed, *inter alia*, that the disputed land was originally registered in the name of himself and three others – FRANCISCO MWARO MUSUNGU, OCHIENG MUSUNGU and MAKOKHA MUSUNGU. And of the four (4) registered owners, only him is alive. The 1st Respondent averred that each registered owner was entitled to a quarter ($\frac{1}{4}$) share of the land, meaning 1.35Ha as the entire parcel was 5.4 Ha. The 1st Respondent desired to get title to his portion and consulted with the potential beneficiaries of the deceased owners. Probate proceedings were instituted and the beneficiaries, who included the Applicant herein were allocated 1.35Ha each.

6. More specifically, the disputed land was subdivided as follows:

(a) PETER MUSUNGU: LR. BUNYALA/BUKOMA/4334 – 1.35Ha

(b) EVERLINE NAFULA: LR. BUNYALA/BUKOMA/4335 – 1.35Ha

(c) PATRICK NGESA: LR. BUNYALA/BUKOMA/4336 – 1.35Ha

(d) SAMSON MUSUNGU MWARO: LR. BUNYALA/BUKOMA/4337 – 1.35Ha

7. It is the Applicant's position that of the original registered owners, PETRO MWARI MUSUNGU alias PETER MUSUNGU (1st Respondent) and MAKOKHA MUSUNGU, represented herein by PATRICK NGESA NWARO, were registered as proprietors in trust for the families of two other original proprietors – OCHIENG MUSUNGU, to whom the Applicants claim can be traced, and FRANCISCO MWARO MUSUNGU, represented herein by 3rd Respondent – SAMSON MUSUNGU MWARO.

8. The application was canvassed by way of written submissions and the Applicant filed his submissions on 18/6/2018. She submitted, *inter alia*, that the 1st Respondent is the only surviving owner of the original four and he took advantage of others by using his education to obtain a grant of letters of administration for the state of the deceased owners. She reiterated that the 1st Respondent and another original owner – MAKOKHA MUSUNGU – were registered as trustees since they had another land of their own, BUNYALA/BUKOMA/179. To the Applicant, land parcel no. BUNYALA/BUKOMA/4334 registered in the name of the 1st Respondent and land parcel No. BUNYALA/BUKOMA/4336 registered in the name of PATRICK NGESA (as representative of MAKOKHA MUSUNGU) do not belong to them. A restraining order therefore should issue.

9. The Respondents submissions were filed on 29/5/2018. It was emphasized that the Respondents rights and interests as registered owners are protected under both constitutional and statutory law. Granting the restraining order, it was submitted, is tantamount to extinguishing the Respondents rights and interests in the land.

10. I have had a look at the suit as filed, the application, the response made, and rival submissions. I note that the land is shown to have been originally owned by four people, with each shown to be entitled to ¼ (quarter) share. A trust is not readily noticeable. It is only pleaded by the Applicant and its existence or otherwise is still an undecided issue at this point. But it seems to me curious that one original owner – MAKOKHA MUSUNGU – is mentioned as a possible beneficiary of the alleged trust yet PATRICK NGESA NWARO, the person said to be representing him is not claiming such trust and is instead sued together with the others.

11. Besides, the late Makokha Musungu was one of the proprietors and one would wonder at this stage how another proprietor of the same piece of land would hold it in trust for him. The Applicant herself traces her claim through one Bonface Juma Musungu who is said to have been entitled to ownership through yet another original owner – Ochieng Musungu. One would also wonder how Ochieng Musungu could have another proprietor of the same land holding it in trust for him. In other words, why wouldn't these two original proprietors be registered as owners of all of that is claimed by the Applicant now so that at the right time they could pass it to their beneficiaries?

12. The matter is still untried and it could well be that the Applicant will prove the alleged trust. But at this stage, one cannot help but wonder why the documents of ownership show the original owners as entitled to a quarter (¼) each without making a distinction that some hold the ownership in trust for others.

13. I note also that the Respondents seem to be the current registered owners of the parcels in respect of which restraining orders are sought. It is never a very easy thing to restrain a registered owner from using his land. Anyone who seeks to do so needs to have very good reasons to convince the court. I have looked at what each side has presented. At this stage, the Respondents seem more convincing.

14. It is not lost on me that the document of ownership show each of the original proprietors being entitled to a quarter portion and that the Applicant, as representative of one, is actually registered as owner of a quarter portion. And none of those sued got more than a quarter (¼).

15. When all is considered therefore, I am not persuaded that I should grant a restraining order as sought or at all. I therefore find the application unmeritorious and hereby dismiss it with costs. And I do this because given the circumstances, the Applicant has not done a good job of convincing me that she has met the threshold set in the case of **GIELA Vs CASSMAN BROWN & CO. LTD: [1973] EA 358**. In other words, I have not been persuaded that she has a prima facie case with a probability of success or that she stands to suffer irreparable loss not compensable in damages. She has not demonstrated also that the balance of convenience tilts in her favour.

Dated, signed and delivered at Busia this 18th day of September, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

1st Respondent:

2nd Respondent:

3rd Respondent:

Counsel of Applicant:

Counsel of Respondents: