



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 112 OF 2016

The CHAIRMAN ALUPE A.C.K. CHURCH 1ST APPLICANT

THE SECRETARY ALUPE A.C.K. CHURCH.....2ND APPLICANT

ALUPE A.C.K. CHURCH3RD APPLICANT

CHURCH COMMISSIONERS FOR KENYA4TH APPLICANT

VERSUS

SAVERIO ENYANG AND MELINA ITINO OKELLO (Suing as the

Administrators of the Estate of FEDERIKO OKELLO).....RESPONDENTS

RULING

1. I am called upon to determine the application dated 1/2/2017 filed by the Applicants – **THE CHAIRMAN, ALUPE ACK CHURCH, THE SECRETARY, ALUPE ACK CHURCH, ALUPE ACK CHURCH AND CHURCH COMMISSIONERS FOR KENYA** – on 2/2/2017 against the Respondents – **SEVERIO ENYANG OKELLO and MERINA ITINO OKELLO**. The Applicants are the Defendants in the suit herein while the Respondents are the Plaintiffs. The application under consideration is a Notice of Motion expressed to be brought under **“Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010, Rule 3(1) of the High Court (practice and procedure) Rules of the Judicature Act and all enabling provisions of law”**.

2. The application came with three (3) prayers (prayers a, b, and c), two (2) of which were considered at the exparte stage. The prayers already considered are (a) and (b). Only prayer (c) is therefore for consideration now. That prayer is as follows:

Prayer (c): A temporary injunction be issued restraining the Respondents either by themselves, their agents, or employees or assignees from trespassing and/or dealing with the suit property by either digging, tilling, cutting down of trees, grazing of animals and/or conducting any activities that are detrimental to the interest of the Defendants/Applicants pending hearing and determination of the suit.

3. The dispute in this matter revolves around land parcel No. SOUTH TESO/ANGOROMO/240 (“suit Land” hereafter) claimed by the Respondents (who are Plaintiffs) but currently shown in legal documents to be owned by the Applicants (who are Defendants). The Applicants complaint is that the Respondents have entered the land and engaged in activities like digging, cutting down trees, and grazing of animals without authority and/or permission from the Applicants. That is why a restraining order is sought.

4. The Respondents responded in two ways viz: Grounds of opposition filed on 23/2/2017 and replying affidavit filed on 29/3/2017. According to the Respondents, the application is frivolous and an abuse of the court process. They are old and sickly, they averred, and therefore lack energy to engage in the alleged activities. They asked the court to dismiss the application.

5. The Applicants filed a supplementary affidavit after seeing the response of the respondents. They reiterated the allegations they had made concerning the activities of the Respondents on the suit land.

6. The application was canvassed by way of written submissions. The Applicants’ submissions were filed on 12/10/2017. They emphasized their legal status as registered owners and affirmed their entitlement to the rights that go with such ownership. They pointed out that the orders sought are meant **“to protect, preserve and maintain status quo pending the hearing of the main suit”**.

7. The Respondents submissions were filed on 5/12/2017. They submitted, *interalia*, that **“the Plaintiff and his family stay on this land; he was born thereat; his father’s grave is on it. He has lived thereat for 58 years; his mother, brothers and their children are living on the land”**. To the Respondents, if the order sought is granted **“then the main suit would be spent”**.

8. I have considered the application, the responses made, rival submissions, and the pleadings by both sides. It is shown well that the Applicants are the registered owners of the suit land. The Respondents say that the land was owned by one FEDERIKO OKELLO who is deceased, but all the documents they have availed seem to show the said FEDERIKO as owner of land parcel No. SOUTH TESO/ANGOROMO/239. Given what the Respondent have availed, it is difficult at this stage to understand their allegation that they have been living on the suit land. It could well be that they will be able to demonstrate it at a later stage but for now, they are not convincing. Their documents relates to parcel No. 239, not 240.

9. It is also difficult to agree with the Respondents’ submission that issuance of a temporary injunctive relief at this stage would amount to determining the suit. Such order is only meant to apply before the suit is heard and determined. It cannot apply thereafter.

10. Given that the Respondents have not filed anything that shows a clear connection between them and the suit land, and given that the Applicants have shown their status as registered owners, then this court would be right to construe proprietorship rights in their favour at this stage. I agree with the Applicants that an order of temporary injunction would ensure the maintenance of status quo. In **Otieno Vs Ougo and Another (No2) [1987] KLR 400**, the court held, *interalia*, that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action. That is precisely what the court is doing in this matter. I therefore make a finding that the application herein is meritorious. I hereby allow it by granting prayer (c) as prayed. Costs in the cause.

Dated, signed and delivered at Busia this 31st day of October, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant: Present

2nd Applicant: Present

3rd Applicant: Present

4th Applicant: Absent

1st Respondent: Absent

2nd Respondent: Absent

Counsel of Applicants: Absent

Counsel of Respondents: Present