REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 24 OF 2017

ANTHONIE KWENA ANYIMU ..... APPLICANT

VERSUS

GABRIEL MUKELE ..... 1ST RESPONDENT

WALLANCE WESONGA ..... 2ND RESPONDENT

R U L I N G

1. The application before me is essentially one for restraining orders. It is a Notice of Motion dated 17/3/2017 and filed on 20/3/2017. The Applicant – **ANTHONIE KWENA ANYIMU –** had earlier on filed the suit herein against the Respondents **– GABRIEL MUKELE** and **WALLANCE WESONGA.** In the suit, the Applicant is the Plaintiff and the Respondents are the Defendants. The Applicant is laying claim to ownership of land parcels Nos MARACHI/ESIKOMA/1151, 1195 and 1233 registered in the names of the Respondents. In the meantime, he would wish to get temporary restraining orders and that is why the application was filed.

2. The application was brought under Sections 1A, 1B and 3A of Civil Procedure Act (cap 21) order 40 of Civil Procedure Rules and all other provisions of law. As filed, the application had five (5) prayers but three (prayers 1, 2 and 3) were for consideration at the exparte stage and are therefore moot now. For consideration now are prayers 4 and 5, which are as follows:

> Prayer (4): That pending the hearing and determination of this suit a temporary injunction do issue restraining the Respondents and their agents, or any other person claiming through them from trespassing, encroaching onto, using, selling, alienating, contracting and/or dealing in any other manner whatsoever with land parcel numbers **MARACHI/ESIKOMA/1195, MARACHI/ESIKOMA/1151** and **MARACHI/ESIKOMA 1233.**
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> Prayer (5): That costs of this application be provided for.

3. According to the Applicant, land parcels Nos MARACHI/ESIKOMA/1151, 1195 and 1233 were owned by his late father, ANYIMU KWENA, but the Respondents fraudulently registered them in their names. The Applicant averred that the Respondents have started ploughing the parcels of land. He stated also that he brings the matter in the interest of the estate of his late father.

4. The Respondents opposed the application vide a replying affidavit filed on 3/4/2017. They deposed, *interalia*, that they got to own the parcels of land through purchase. In this regard, they made reference to the defence filed and also to statements of some of their witnesses, who are allegedly sons of the seller. The purchase took place over three decades ago and the Respondents said they have been using the land. Infact one of the 1st Respondents sons is said to have a home on one of the parcels of land.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 27/4/2018. According to the Applicant a *prima facie* case is established as this court had found in an earlier application that the applicant has an **"arguable and reasonably well founded"** case. It was pointed out that the Respondents had failed to avail sale agreements to show they bought the land. It was alleged too that the Applicant would suffer irreparable loss. The Respondents are said to be farming on the land and it is difficult to estimate how much profit they are making. According to the Applicant, the Respondents may not be able to compensate him. The balance of convenience was also said to favour the Applicant. He was said to be likely to suffer more injuries as he cannot use his father's land. It was pointed out that the Applicants have been benefitting from the land for the last 40 years to the detriment of the Applicant.

6. The Respondents submissions were filed on 18/4/2018. A lot was said that is already in the replying affidavit. Reference was also made to pleadings in the suit generally. The Plaintiff was faulted for not stating when the cause of action arose and the respondents averred that their defence has already raised the issue of limitation of actions. The Applicant was said to have failed to demonstrate that he is deserving of injunctive relief. The court was asked to dismiss the application with costs. In the course of submissions, reference was made to decided cases **GIELA Vs CASSMAN BROWN & CO. LTD [1973] EA 358, MRAO LTD Vs FIRST AMERICAN BANK OF KENYA & 2**

others, [2003] eKLR and **BOARD OF GOVERNORS AFRAHA HIGH SCHOOL & Another Vs KENYA COMMERCIAL BANK [2004] eKLR.**

7. I have considered the application, the response made, rival submissions, decided authorities availed, and the pleadings generally. It seems to me well shown that the Respondents have been the registered owners of the disputed parcels of land for over three (3) decades. And for all that time, they have been using the land. The Applicant himself refers to this state of affairs when he submitted as follows concerning the Respondents:

"For they have derived profit from the said parcels of land for over 40 years to the detriment of the Applicant".

8. It is this use of the disputed land for 40 years that the Applicant wants stopped. All of a sudden, that use has become untenable and should be stopped, if the Applicant is to be believed. This court however does not believe him. The Respondents are still the registered owners of the land and the rights and benefits of such ownership must be presumed in their favour at this stage.

9. I also agree with the Respondents that the claim brought by the Applicant is not contextualised in a time perspective. The Applicant failed to state when the cause of action arose. The defence of limitation of actions is raised and when one looks at the documents availed in the matter, one realises that the Respondents have been registered owners for a long time and that defence therefore cannot be wished away at this stage.

10. It is crucial too to realise that the Applicant states clearly in the supporting affidavit to the application that he is pursuing the matter for the estate of his late father. And while this may be so, the grant he availed as evidence shows it was meant for administering land parcel No. MARACHI/ESIKOMA/1349. No nexus is shown between that parcel and the disputed parcels of land. Certainly, the disputed parcels of land are not indicated or mentioned in the grant.

11. It is clear therefore that the case as filed seem to exhibit shortcomings that would make one hesitate to grant temporary injunctive relief. Infact it is necessary to point out that it is never very easy to obtain temporary injunctive relief against registered owners of land. And this is so because proprietorship rights are regarded highly and no court is ever too quick to interfere with them. In this matter, the Applicant fails even on the basic consideration necessary to grant injunctive relief as spelt out in GIELA's case (supra).

12. Contrary to his submissions, the court did not tell him that he has a *prima facie* in its ruing delivered on 14/12/2017. It told him he had an **"arguable and reasonably well founded"** case, which is different from a *prima facie* case as anticipated in Giela's case (supra) or as explained in Mrao's case (supra). In the case of **JAMIN KIOMBE LIDODO Vs EMILY JEPONO KIOMBE & Another: HCC No. 81/05**, Gacheche J (as she then was) held, *interalia*, that where an Applicant has not shown title to the suit land, it is unsafe to hold that a prima facie case is made. I agree.

13. I would need to add too that where an Applicant is pursuing a temporary injunctive relief concerning land of which he is not the registered owner, it is always advisable to give an undertaking to pay damages. No such undertaking was given in this case. In **GATI Vs BARCLAYS BANK LTD [2001] KLR 525,** the court held, *interalia*, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

14. The upshot, when all is considered, is that the application herein is unmeritorious. I hereby dismiss the same with costs to Respondents.

Dated, signed and delivered at Busia this 30th day of October, 2018.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

Applicant: Present

1st Respondent: Absent

2nd Respondent: Absent

Counsel of Applicant: Present

Counsel of 1st Respondent: Present

Counsel of 2nd Respondent: Present