



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 147 OF 2016

DAVID ALFRED ASAKANIA MUMALI..... APPLICANT

VERSUS

FRANCIS WANDERA OGOHA.....RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 24/5/2018 and filed on the same date. It is brought under Section 3, 3A and 63 of the Civil Procedure Act (cap 21), Order 40 Rule 1, and Order 50 Rule 1 of Civil Procedure Rules, 2010 and all other enabling law. The Applicant – **FRANCIS WANDERA OGOHA** – is the Defendant in this suit herein. The Respondent – **DAVID ALFRED ASAKANIA MUMALI** – is the Plaintiff in the same suit.

2. The application has four (4) prayers on the face of it but two – prayers 1 and 2 – are now spent, having been considered and dealt with at an earlier stage. The prayers for consideration now are 3 and 4, which are as follows:

Prayer 3: That this honourable court be pleased to issue a temporary injunction restraining the Plaintiff/Respondent either by himself, his workers, agents, assignees, employees or any person working or under his instructions from fencing, ploughing, working, developing, constructing thereon or in any manner tempering with suit and parcel No. SAMIA/BUTABONA/1156 pending the hearing and determination of this suit.

Prayer 4: That costs of this application be provided for.

3. The need for the orders sought is said to arise because the Respondent is said to be constructing a house on land parcel Number SAMIA/BUTABONA/1156 (“disputed land” hereafter), which may alter the Status Quo and possibly also create a breach of peace. The Applicant also alleged that he will suffer irreparable loss.

4. It is apparent from the supporting affidavit accompanying the application that during the pendency of this case here, the Respondent has started putting up a semi-permanent structure on the land in dispute. The Applicant has tried to intervene but that only elicited threats from the Respondent.

5. The respondent responded vide a replying affidavit filed on 11/6/2018. He said that he bought the land and fully paid the purchase price. He has other structures on the disputed land. He also lives there with his family, has drilled a borehole, and has brought electricity there. He wondered why the Defendant did not stop earlier constructions.

6. The application was canvassed by way of written submissions. The applicant’s submissions were filed on 30/7/2018. According to the Applicant, a prima facie case is shown as the Applicant is the registered owner of the suit land. He is therefore entitled to the rights and privileges that go with such ownership. The Applicant pointed out that though the Respondent talks of purchase, he has not shown that he obtained the requisite consent from Land Control Board within the required period. The actions of the Respondent were viewed as provocative and likely to occasion a breach of peace. The orders sought are seen as a means of fostering peace between the parties.

7. The Respondents submissions were filed on 26/6/2018. He submitted, *inter alia*, that he took possession of a portion of the disputed land after purchase. He has constructed some structures on the disputed land and also undertaken other developments. He did all this without the Applicant raising a complaint. He submitted that he has a legitimate claim to the land.

8. I have considered the application, the response made, rival submissions, and the suit as filed. When the application was filed, the court handled it *ex parte* and granted a temporary restraining order at that stage. By then, the court had not had the benefit of seeing the Respondent’s response. At this stage now, it seems reasonably clear to me that the Respondent lives on the portion he purchased. He has other structures there. He has also made other developments on the land.

9. While the Defendant avers that he has a *prima facie* case, I note that the restraining order sought seeks even to stop working or ploughing on the land. If the order was seeking to stop only construction, that would probably be understandable. But it seeks to stop profitable or beneficial use of the land that is ordinarily associated with full time living on the land. One would appreciate that these are activities that the Respondent has been engaging in all along. I do not find it plausible or prudent to stop such activities.

10. I also note that though the Applicant talked of likelihood of suffering irreparable loss in his application, that was not demonstrated in the submissions. The applicable law is clear. And that law is that ordinarily, you do not get a temporary restraining order where damages are an adequate remedy. What this means is that any person desiring to get such an order is duty-bound to demonstrate that damages would not adequately compensate his loss. Such a person is also expected to explain the kind of loss he is likely to suffer. The Applicant failed to address all this. Infact there is no reference at all to the issue of damages in the Applicant's submissions.

11. I also expected that the Applicant would show that when all is considered, the balance of convenience lies in his favour. Again there was no reference to this in the Applicant's submissions. Infact, when all is considered, it is clear that only one relevant issue normally associated with grant or refusal of temporary injunctions was raised in the Applicant's submissions. And that issue is one of establishing a *prima facie* case. The issues of damages as an inadequate remedy and balance of convenience were left out.

12. The upshot, in light of the foregoing, is that the merits of the application are not well demonstrated. I therefore dismiss the application with costs.

Dated, signed and delivered at Busia this 27th day of November, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondent: Present

Court Assistant: Nelson Odame