



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 10 OF 2018

CHARLES LWANGA ABUOGA.....PLAINTIFF

VERSUS

MALENO ODUNGA ANJALADEFENDANT

RULING

1. The applicant – **CHARLES LWANGA ABUOGA** – is claiming a portion of land from land parcel No. L.R. Bukhayo/Bugengi/626 by way of adverse possession. The registered owner of the entire parcel of land is the respondent – **MALENGO ODUNGA ANJALA**. The applicant filed an originating summons here on 8.2.2018 in order to actualize his claim. Together with originating summons was also filed a notice of motion seeking to obtain temporary restraining orders against the respondent. This ruling relates to the Notice of motion.

2. The Notice of motion is dated 7.2.2018 and is brought under order 40 rule 1 and order 51 rule 1 of the Civil Procedure Rules, 2010. It has three prayers but only two –prayers 2 and 3 – are for consideration now, prayer 1 having been meant for consideration at the exparte stage. The prayers for consideration are as follows:

Prayer 2: That the respondent, his family members, servants, agents and those claiming through him be permanently barred, restrained injuncted from disposing, charging, parting, entering, using or in any other way interfering with the applicant's portion of 4.05 ha out of L.R. BUKHAYO/BUGENGI/626 till the hearing and determination of the originating summons.

Prayer 3: Costs be provided for.

3. No grounds were set out on the face of the application but it came with a supporting affidavit. From the supporting affidavit, the applicant appears to have agreed to purchase the entire parcel of land at 18,000/- per acre. By then, the size of the land was thought to be ten (10) acres. The applicant alleged that he paid the entire purchase price and took possession of the land on 25.3.1999.

4. But things were to change somewhat when measurement regarding the size were taken later. It turned out that the land was larger than initially thought. It was 18.3 acres and out of that, the applicant took his 10 acres. The applicant said he dug a water well, cultivated and planted crops and even put up structures on the land. The respondent, continued the applicant, was sent money to go and obtain consent from Land Control Board but he never did so. Even then, the applicant was not worried as he was in possession of his portion.

5. Later on however, the applicant got to learn that the applicant might have sold some portion to other people. This appears to have given impetus to the need to seek temporary restraining orders.

6. The respondent responded to the application vide a replying affidavit dated 20.3.2018 filed here on the same date. According to the respondent, the application lacks compelling facts to justify the orders sought. And land parcel No. 626 was said to have ceased to exist and the orders sought therefore, if issued, would be in vain.

7. Further, the applicant was said to have no structures on the land. He was said to be a mere licensee or a tenant at will who could be kicked out any time. The respondent alleged that he had sold his land to other willing buyers.

8. It would appear that the applicant felt that the respondent was less than honest in his responses to the application. For this or other reasons, he filed a further affidavit reiterating that he is in possession and/or occupation of his portion of land. He pointed out that he has a house, crops, water tower and trees, and even a well on the land. He availed some photographs to drive the point home.

9. The application was canvassed by way of written submissions. The applicant filed two sets of submissions. The first one was filed on 29.8.2018. In this first set, the applicant gave some background and history, which included a brief narrative as to how he and the respondent met and transacted. He then submitted that has met the threshold set in the celebrated case of **GIELA Vs CASSMAN BROWN & co. Ltd (1943) E.A. 358**. The threshold involves establishing a prima facie case with a probability of success, showing the likelihood of suffering irreparable loss not compensable with damages, and the option of considering the balance of convenience if the court doubts compliance with

the first two requirements.

10. The applicant submitted that he is an adverse possessor. He pointed out that it is not necessarily a requirement that he be physically present in order to prove possession. He cited the case of *TERESA WACHUKA GACHIRA Vs JOSEPH MWANGI GACHIRA CA No. 325*, where the court observed, inter alia, that possession can also be shown by way of fencing, cultivation or other activities.

11. The second set of the applicant's submissions was filed in apparent response to the submissions filed by the respondent. He submitted that he paid the full purchase price, not the partial payment suggested by the respondent. He submitted too that there was never an agreement that the sale price would be 700,000/-. Further, the applicant submitted that if parcel No. 626 does not exist, it is the respondent who partitioned it with the aim of defeating the applicant's interest in the land.

12. The respondent's submissions were filed on 11.9.2018. It was submitted, inter alia, that the applicant has not established a prima facie case as his "case for adverse possession is indeed very weak" To the respondent, the applicant's own version of events shows there is still a balance of 80,000/- unpaid. The case of *LEONOLA NERIMA KARANI Vs WILLIAM WANYAMA NDEGE [2012] eKLR* was cited to make the point that where purchase price has not been fully paid, time for adverse possession does not start running as the claimant is deemed to be on the land on permission pending the payment of the full purchase price. Time can only be deemed to have started running after payment of the last instalment of the purchase price.

13. It was the respondent's further submission that the structures and activities shown by the applicant on the land are fairly recent and purposely meant to reinforce his case for adverse possession.

14. I have considered the application, the responses made, the various submissions, and the case as filed. This matter was filed on 8.2.2018. The law requires that an extract of title be annexed to the originating summons. The applicant annexed a copy of official search dated 30.5.2013. It is the respondent's position that land parcel No. 626 no longer exists. He submitted that he has sold some portion of the land to other willing buyers. I think the applicant needed to show that the respondent averment are incorrect. The copy of search availed is too old. A more recent one which is reflective of the current position should have been availed.

15. If land parcel No. 626 has ceased to exist as a legal entity the applicant needed to establish the exact legal identify of the portion he is claiming. As pointed out by the respondent any order issued regarding a non-existent legal entity is bound to be in vain.

16. There is also the real possibility that any order issued might affect third parties who are not part of the case and who therefore have not been afforded the right of hearing. The applicant himself talked of learning that the land may have been sold to third parties. The respondent on his part averred that he has sold portions of the land. The court has to be cautious so that any order issued does not affect un-intended parties. The submissions of the applicant are good but facts dictate that a different direction be taken. It is not prudent to issue an order on the basis of facts that do not capture the present reality correctly.

17. It is because of all this that I feel not persuaded that temporary restraining orders are merited in this application. I therefore dismiss the application herein with costs.

Dated, signed and delivered at Busia this 19th day of December, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

Respondent:

Counsel for Applicant:

Counsel for Respondent: