



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 157 OF 2016

PAMELA NDUBI.....APPLICANT

VERSUS

JAVAN NDUBI.....1ST RESPONDENT

PATRICK ASURAH AMUGUNE.....2ND RESPONDENT

R U L I N G

1. The application for determination before me is a Notice of Motion dated 6/6/2018 and filed on 13/6/2018 brought under Order 40 Rule 1, 2 and 7 of Civil Procedure Rules and Section 3A of Civil Procedure Act. The Applicant – **PAMELA NDUBI** – is the Plaintiff in the suit while the two Respondents – **JAVAN NDUBI** and **PATRICK ASURAH AMUGUNE** – are the Defendants. The Applicant is seeking an interim order of injunction against the two Respondents, or their kin, agents or servants from putting up structures, digging trenches, depositing construction material or dealing with land parcel No. BUKHAYO/KISOKO/6685 in any way whatsoever for a period to be determined by the court. The Applicant also prays that costs be in the cause.

2. According to the Applicant, this dispute is still pending determination and the Applicant has resided on the disputed land for over 30 years. The disputed land is BUKHAYO/KISOKO/6685 formerly owned by 1st Respondent who later sold it to 2nd Respondent. The disputed land is currently registered in the name of the 2nd Respondent. The Applicant alleges that her entry to the disputed land has been blocked.

3. The Applicant further states that the 1st Respondent became registered owner of the suit land through fraud. The land, she said, belonged to her late father – JOHNSTONE OUMA NDUBI – who gifted it to her before his demise. The 2nd Respondent is accused of putting up a structure right in front of the Applicant's homestead.

4. Each of the Respondents filed a replying affidavit on 18/7/2018. The 1st Respondent stated, *inter alia*, that the application is an abuse of the court process. He alleged that the Applicant owns land elsewhere; the application is brought in bad faith; and is a waste of courts time. The 1st Respondent further said that he transferred the disputed land to the 2nd Respondent lawfully after following the laid down procedures.

5. Like the 1st Respondent, the 2nd Respondent said that the application is an abuse of the court process. He further said he is the registered owner of the disputed land and acquired it after following the laid down procedure. He is the registered owner, he said, and should not be enjoined from using his own land. He denied that there was fraud in the manner he acquired the land.

6. The application was argued before me on 19/9/2018. Jumba for the Applicant said that the Applicant has been in occupation of the land for over 20 years. The 1st Respondent is said to have acquired the land when he was only two (2) years old, which is not lawfully possible. He therefore had no good title, it was argued. The 2nd Respondent on the other hand was said to be constructing on the land.

7. The 1st Respondent on his part said that the land was gifted to him by his grandfather, who happens to be the Applicant's father. That happened in the year 2012 and the 1st Respondent then decided to sell the disputed land to 2nd Respondent.

8. The 2nd Respondent emphasized that he is the registered owner of the land. He said he is constructing on the land because he owns it. According to him, it is the Applicant who should be restrained.

9. I have considered the application, the responses made, and the rival arguments. The Applicant failed to demonstrate that she has satisfied the principles for granting interim injunctive relief. The principles were laid down in the celebrated case of **Giela Vs Cassman Brown & Co Ltd [1983] EA 358**. They involve showing that the Applicant has a *prima facie* case with a probability of success. It is required too that the Applicant should show the likelihood of suffering irreparable loss if the order is not granted. And as a final measure, it is required that the court decides the issue on a balance of convenience if doubts arise as to compliance with the first two requirements. In my view, the Applicant should have focussed on these requirements. She did not.

10. I have also looked at the suit as filed. It is founded on fraud but the particulars of the alleged fraud are not stated or pleaded. It is a serious omission not to do so. It is not lost on me that it is 2nd Respondent who will be restrained if the order is issued. The 1st Respondent has already sold the land. During hearing, no fraud was alleged against the 2nd Respondent. Besides, the 2nd Respondent is shown to be the title holder to the disputed land. It is never a very easy task to issue a restraining order against the registered owner of land. The Applicant should have been alive to this fact and therefore done better to prosecute her application.

11. My finding, in light of the foregoing, is that the application herein is unmeritorious. I therefore dismiss the same with costs.

Dated, signed and delivered at Busia this 11th day of December, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

1st Respondent: Absent

2nd Respondent: Present

Counsel for Applicant: Absent

Counsel for Respondents: Absent

Court Assistant: Nelson Odame