



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
IN BUSIA
ENVIRONMENT AND LAND COURT
ELC NO. 16 OF 2018 (O.S.)

DAVID ODONGO MAKOKHA.....APPLICANT

VERSUS

TURUTEYA OBARE ODENDA.....RESPONDENT

R U L I N G

1. The application before me is a Notice of Motion dated 30/7/2018 and filed on the same date. The Applicant – **DAVID ODONGO MAKOKHA** - and the Respondent – **TURUTEYA OBARE ODENDA** - are involved in a legal tussle over ownership of land parcel No. MARACHI/ELUKONGO/968 (“suit Land” hereafter). But before the determination of their suit, the Applicant wants temporary restraining orders. That is why this application was filed.

2. The application was brought under Order 40 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules, 2010, and has three (3) prayers on the face of it. BUT at this stage, only two – prayers 2 and 3 – are for consideration. The two prayers are as follows:

Prayer 2: That a temporary order of injunction do issue restraining the Defendant herein and/or his agents and/or assignees from interfering in any way with the Plaintiff’s stay, use and occupation of Land Parcel MARACHI/ELUKONGO/968 pending the actual hearing and final determination of the substantive suit.

Prayer 3: That the costs of this application be provided for.

3. The Applicant is claiming a portion of the suit land by adverse possession. The Respondent is the title holder. According to the Applicant, the Respondent is threatening to remove him from the portion he possesses and is occupying. He avers that he will suffer irreparable loss.

4. The supporting affidavit accompanying the application gives a narrative as to the background and history relating to the suit land. It appears clear that the Applicant is a brother to the Respondent’s late husband. The Respondent’s late husband is said to have been registered as owner of the suit land in trust for his other siblings. The other siblings are dead and the Applicant seems to be the one left to share the suit land with the Respondent. But the Respondent succeeded her late husband and got herself registered as the sole owner of the suit land. This is what the Applicant is contesting, besides claiming the land as an adverse possessor.

5. But the Respondent has her own narrative which is reflected in her replying affidavit dated 24/9/2018. And her narrative is that the Applicant is not entitled to the suit land or any of its parts. To her, the Applicant is a trespasser who is forcefully trying to stake a claim to the land. According to the Respondent, the Applicant and her late husband do not share a father. The Applicant is said to be a son born out of a marriage between his mother and a different man. And the marriage union took place long after the death of the father of the Respondent's late husband. It would appear that according to traditions, the Applicant is supposed to get his land from his biological father.

6. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 18/10/2018. The Applicant gave a brief overview of the matter and submitted that the principles enunciated in the case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358** for grant of interlocutory injunction have been met. The principles involve establishing a *prima facie* case with probability of success, demonstrating the likelihood of suffering irreparable loss, which is not compensable in damages, and consideration of the balance of convenience if the court doubts the first two principles.

7. To the Applicant, it is demonstrated he is an adverse possessor. He said he has shown that he has a *prima facie* case. He is said to be in actual possession and use of a portion of the land and will thus suffer irreparable loss if removed. And the balance of convenience is said to be in Applicant's favour as he is the person currently in occupation of the suit land.

8. The Respondent's submissions were filed on 15/10/2018. Like the Applicant, the Respondent gave an overview that contained some history and background of the matter. Much of what is contained in the submissions is also contained in the Respondent's replying affidavit filed in response to the application. I have already outlined such contents in summary form while highlighting the Respondent's response.

9. I have had a look at the suit as filed. I have considered the application, the response made, and rival submissions. Even as the Applicant makes his claim as an adverse possessor, the fact remains that the Respondent is the current title holder. And the benefits that go with titled ownership must be presumed or construed in her favour at this stage. It would therefore be rash to rush to issue injunctive orders against such owner unless a very clear basis is laid to justify it. Question is: Has the Applicant laid such clear basis?

10. The Applicant claims about 4.5 acres of land from the suit land. The Respondent asserts that the Respondent occupies only a very small portion which his late mother used to occupy. One of the basic requirements when considering whether to issue temporary injunctive orders is clarity of the manner in which the order is to apply and specificity of the size, area, or location where the order is to apply. In view of the conflicting positions given as to size, and given that the Applicant has said nothing about the boundaries of the claimed portion, I am not so sure about the effectiveness of the order that the court may give.

11. It is also clear that what prompted the Applicant to apply for temporary restraining orders are some alleged threats made by the Respondent to remove him from the land. I expected the Applicant to say more about the threats. It should have been apparent in the supporting affidavit that came with the application, how, where, and when the threats were made. And I think too that the Respondent needed to have been shown capable of carrying out the threats. I say so because mere words, without more, will not suffice. The threats must be shown to be real, imminently danger-posing, and capable of being carried out.

12. There is an old case which is instructive here. The case is that of **WEY Vs L.E.D.B. [1957] LLR. 20**. In the case the Plaintiff's applied for interlocutory injunction to restrain the Defendants from putting down the Plaintiff's houses and ejecting them or the occupiers therefrom. The Plaintiff's contended that the Defendant had threatened to pull down their houses. It was held, *inter alia*, that injunction could not be granted because the allegation of threats was based on the bare word of the Plaintiffs which was not supported by any evidence. This is the exact scenario I find here. The Applicant made allegations of threats without substantiating them. Such allegations are not enough to justify a grant of temporary injunctive relief.

13. The Applicant also submitted that he has met the threshold set in Giela's case (ante). It should be appreciated that *prima facie*, you don't get temporary injunctive relief where damages would be an adequate remedy. The Applicant talked of irreparable loss. One is bound to ask: What kind of loss is that which damages cannot compensate? Is it a loss that is not quantifiable? The Applicant needed to come out clear on this but did not. The fact of the matter is that the Applicant's handling of the threshold set in Giela's case (ante) is rather perfunctory and therefore unconvincing.

14. I therefore hold, in light of the foregoing, that the application herein is unmeritorious. I dismiss it with costs.

Dated, signed and delivered at Busia this 5th day of December, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondent: Absent

Court Assistant: Nelson Odame