



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 129 OF 2016.

WYCLIFFE AMBETSA OPARANYAPLAINTIFF/APPLICANT.

VERSUS

SELLAH KARANI.....1ST DEFENDANT/RESPONDENT.

CALLEB KARANI.....2ND DEFENDANT/RESPONDENT

PATRICK OUMA KARANI.....3RD DEFENDANT/RESPONDENT.

R U L I N G.

1. The application under consideration is a Notice of Motion dated 27/9/2016 and filed here on the same date. The applicant, who is plaintiff in the suit contemporaneously filed with the application, is **WYCLIFFE AMBETSA OPARANYA**. The respondents, who are defendants in the same suit, are **SELLAH KARANI** (1st defendant), **CALLEB KARANI** (2nd defendant), and **PATRICK OUMA KARANI** (3rd defendant). The application is brought under sections 1A and 1B of Civil Procedure Act (cap 21) and order 40 rules 1, 2, 3 and 4 of Civil Procedure Rules, 2010. Five (5) prayers are made in the application but prayers 1 and 2 were for consideration at the exparte stage. For this interpartes stage therefore, only prayers 3, 4, and 5 are for consideration.

2. Prayers 3, 4, and 5 in this application are as follows;

Prayer 3: That pending hearing and determination of this suit an order of temporary injunction do issue relating the defendants/respondents either by themselves or through agents, servants, employees, relatives and/or any other person acting on defendants/respondents behalf from entering , remaining, working, tilling, erecting structures, encroaching, interfering and/or in any way intermeddling in L.R. NOS. BUKHAYO/MUNDIKA/9188, 9156, 9157, 9163, 9166, 9167, 9174, 9175, 9187, 9189, 9190, 9191, 9193, 9194, 9195, 9196, 9197, 9198, 9199, 9200, 9201,, 9202, 9203, 9204, 9205, 9206, 9207, 9208, 9209, 9210, 9211, 9212 and 9213.

Prayer 4: That the officer commanding station (OCS) Busia police station does ensure compliance with the orders granted in terms of prayer 2 herein above.

Prayer 5: That the costs of this application be provided for.

3.The grounds advanced in support state, interalia, that the applicant is the registered owner of the parcels of land, having acquired them legally for valuable consideration. The defendants are said to have illegally entered the suit parcels of land and are destroying boundary features, tilling, making bricks, and erecting structures. Their actions are said to be provocative, unlawful and untenable and the applicant

stands to suffer irreparable harm.

4. The supporting affidavit shows, inter alia, that the applicant bought original parcels **NO. BUKHAYO/MUNDIKA/1997** which he subdivided, with the numerous parcels mentioned in the application being the portions arising from the subdivision. The applicant sold some and retained others for himself. The respondents started trespassing in the year 2015. The applicant engaged them peacefully and urged them to stop their actions. The respondents stopped for a while but came back later and started going on with their activities. That is what necessitated the filing of this suit.

5. The response on record was made by the 3rd respondent. It appears clear that the understanding of the respondent is that they are intended to be enjoined from using land parcel NO. BUKHAYO/MUNDIKA/1395. It appears clear that, according to them, that is the land parcel they are using. The land belongs to their late father - KARANI MALONGO – and they are using it as his children.

6. The response also shows that the applicant has a pending case with the respondents father, the same being ELC. NO.75 OF 2015 here in Busia, where the plaintiff is accused, inter alia, of illegally subdividing land parcel NO. 1395. This case itself is seen as a repetition or continuation of that case.

7. The application was canvassed by way of written submissions. The applicants submissions were filed on 13/12/2015. According to the applicant the court has to establish whether a prima facie case is established, whether the applicant is the registered owner of the parcels of land, whether the respondents have trespassed, and whether the respondents actions are provocative and unlawful and likely to lead to breach of peace.

8. The applicant then submitted that a prima facie case is made as the applicant has shown he is the registered owner of the parcels of land. The applicant was said to have lawfully acquire parcel NO. BUKHAYO/MUNDIKA/1997 which he subdivided into the parcels of land now under dispute.

9. The counsel for defendants had filed his submissions earlier. To be specific the applications were filed on 11/11/2016. According to the respondents, the applicant has not demonstrated existence of titles to the land parcels. He has not, it was further submitted, shown that he is the registered owner. According to the respondent the court needed to be shown the existence fo the parcels of land, their registered status, whether they are encumbered in any way by parties having interest, the history of their acquisition and whether the parcels exist on the ground. All these are not demonstrated satisfactorily or at all.

10. The respondents further averred that the threshold set in the case of **GIELA- VS -CASSMAN BROWN & CO. LTD [1973] EA 358** has not been met. According to them, ownership is not demonstrated. It is also not shown that damages would not suffice as a remedy. The respondents reiterated that they live on parcel NO. BUKHAYO/MUNDIKA/1396, which is their fathers land.

11. I have considered the application, the response made, the submissions and the suit as filed. I note that the applicant has not responded at all to the respondents allegation that they are on parcel NO. 1395, not the land parcels alleged by the applicant. It was incumbent upon the defendant to try and clear the air on this issue. I note too it was necessary for the applicant to make clear that there is no connection between the suit the respondents father has with him and this suit. I make this observation because that other suit mentions some subdivision concerning or affecting parcel NO. 1395. Is it the subdivision referred to by the Applicant in this suit or a different subdivision?

12. The respondents made a pertinent point namely: nothing is availed in the application to show ownership by the applicant of the mentioned parcels of land. True, the applicant availed a list of documents accompanied by the relevant documents while filing the suit. But these are for use during trial, not for application. The application was supposed to come with its own annexures even if those annexures would comprise the same documents. The omission to avail these annexures gives weight and credibility that the applicant failed to demonstrate ownership at this stage.

13. I have had a look nevertheless at the documents availed for the suit itself. The copies of search availed were meant to show that the applicant owns the parcels of land mentioned in the plaint. Among these parcels are 9166 and 9167. The search copies availed show that the parcels are owned by one **ALEX LURONGO MWINDALO**. Question is: Does the applicant have instructions to act for **ALEX**? If he has, this is not made clear. The assumption, then, is that he does not. It is therefore improper for him to lump those two parcels with the others.

14. The respondents averred that they are on land parcel NO. 1395. The applicant saw no need to respond to this. This was a serious omission. The applicant should have responded to this either by way of supplementary affidavit or in the submissions or both. As things stand, this crucial allegation by the respondent stands unchallenged. The court cannot ignore it at this stage.

15. The application by the applicant alleges that the respondents have trespassed and involved in various activities like making bricks, construction of shelters and destruction of boundaries. This is not admitted by the respondents. I think the applicant needed to avail pictorial or photographic proof of this allegation. As things stand, this is an allegation made without a good effort being made to substantiate it.

16. I have pointed all this to show that the application as presented and submitted on has serious weaknesses. There are various serious concerns that are not addressed. The end result is that the applicant falls short of achieving the necessary threshold for a grant of interlocutory injunctive orders. It is for these reasons that I find the application unmeritorious. I dismiss the same with costs.

A.K. KANIARU,

JUDGE.

DATED AND DELIVERED ON 18TH DAY OF JANUARY, 2017.

IN THE PRESENCE OF;

PLAINTIFF.....ABSENT.....

1ST DEFENDANT.....ABSENT.....

2ND DEFENDANT..... ABSENT.....

3RD DEFENDANT...ABSENT.....

COUNSEL – MR. NYENYENYE FOR GACHIRI FOR PLAINTIFF PRESENT.-

J U D G E.