



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
IN BUSIA
LAND & ENVIRONMENTAL DIVISION
ELC NO. 72 OF 2017

VINCENT JUMA AWORI.....APPLICANT

VERSUS

PRISCA ANYANGO KUBADI.....RESPONDENT

R U L I N G

1. The application before me is a Notice of Motion dated 4/4/2017 filed here on the same date. It is expressed to be brought under Sections 1A, 3, and 3A of Civil Procedure Act, order 10 Rule 11, Order 22 Rule 25 of Civil Procedure Rules, 2010, and all other enabling provisions of law. The Applicant - **VINCENT JUMA AWORI** - filed it against the Respondent - **PRISCA ANYANGO KUBADI** - seeking, *inter alia*, a temporary restraining order. The dispute between the parties relate to parcel No. **SAMIA/WAKHUNGU-ODIADO/617**, which the Applicant alleges that the Respondent wants to subdivide but on which the Respondent herself avers she merely wants to re-establish a destroyed boundary.

2. The Applicant is Plaintiff in a case filed a day earlier (3/4/2017) where he sued the Respondent as Defendant. He was generally complaining about the alleged subdivision and was seeking to stop it. This application is part of that case and is meant to forestall or prevent the alleged subdivision before the suit is determined.

3. The prayers for consideration at this stage are as follows:

Prayer (3): Pending the hearing and determination of the suit this honourable Court be pleased to issue temporary injunction restraining the Respondent from causing subdivision and/or survey on family land SAMIA/WAKHUNGU-ODIADO/617 and/or interfering with any property therein in the said portion of land by herself, her agents, servants, or employees. The status quo to be determined until the suit is determined.

Prayer (4): Costs of the suit to be borne by the Respondent.

I may mention at this stage that prayers 1 and 2 in the application had been considered earlier at the *ex parte* stage. They are now spent.

4. From the supporting affidavit accompanying the application, the Applicant alleged that Land parcel No. SAMIA/WAKHUNGU-ODIADO/617 (“suit Land” hereafter) is family land now registered in the

name of the Respondent's deceased husband. The Respondent is said to have stealthily obtained letters of administration by fronting herself and her children as the ones solely entitled to own the land. That was later challenged by the Applicant and the grant was revoked. The Respondent is now said to be intent on subdividing the land, again to the exclusion of other deserving extended family members. That is why this suit was filed.

5. The Respondent denied the Applicant's averments vide a replying affidavit filed here on 10/4/2017. She did not, she deponed, try to obtain grant by underhand means. The land is her own, her late husband having been the sole registered owner. She denies that the land is family land. The applicant and others are merely meddlers intending to illegally get a piece of land while their land – SAMIA/WAKHUNGU-ODIADO/443 – is still there. And she did not intend to sub-divide the suit land; her aim being only to re-establish boundaries destroyed by the alleged meddlers.

6. The application was canvassed by way of written submissions. The Applicants submissions were filed on 15/5/2017. The submissions contain a narrative of the background and some history. It is clear that parties have disputed at various fora in the past. At one point a directive was given that they could agitate their competing claims before this Court. None of them has so far done that.

7. According to the Applicant the threshold set in the case of **GIELLA vs CASSMAN BROWN & CO. LTD [1973] EA 358** has been met. The threshold entails establishing a *prima facie* case with a likelihood of success; showing possibility of irreparable loss not compensable in damages; and invoking the balance of convenience where the Court is in doubt. The position of the Applicant is that a temporary restraining orders is merited.

8. The Respondents submission were held on 19/5/2017. She defended her action. The suit land is without a boundary and she wants to re-establish it. She faulted the Applicant for not filing his claim to Court as directed. The Applicant was said to be apprehensive that if the boundary is established, he will be found to have trespassed and the permanent house he has put up on the land may be ordered demolished. The Respondent further said that the threshold set for granting temporary injunctive orders has not been met.

9. I have considered the application, the response filed, rival submissions, and the pleadings in general. It is clear that this is a case of disputed ownership of land. An order issued by TUIYOTT, J. on 1/10/2015 directs either party to come to this Court to ventilate their claim. None has done so. This suit itself is not meant to resolve the issue of ownership. It seems aimed at preventing some activities from taking place on the suit land.

10. In my view, this suit presents an opportunity to the parties, or either of them, to ventilate their claims. The land is currently registered in the names of the Respondent's deceased husband. The Applicant needs to bear this in mind. In my view, since the Respondent as wife may rank higher in priority to inherit her late husband's estate, the Applicant needs to move fast to stake his claim, if any. Any delay only takes him closer to the point where his claim may be said to be time-barred. And this applies to any other family member intending to lay a claim.

11. I note that the Court issued an order reached by consent of both sides on 3/5/2017 directing that status quo be maintained. And by status quo was meant that the suit land remain as it was, with neither the Applicant nor the Respondent doing anything new on it. To me, this is the most appropriate order to issue even now. And I hereby issue it in exactly the same terms as it was issued on 3/5/2017. But there is a rider: This order will only stay in force for 90 days from the date of the delivery of this ruling. After 90 days, it will cease to have effect unless one or both parties will have brought their claims either as part of this suit or in a fresh matter.

12. This rider is put because the suit as filed does not seek to resolve the underlying problem of ownership. It seems aimed at maintaining the status quo. Costs of the application will be in the cause.

Dated, signed and delivered at Busia this 26th day of July, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

Respondent.....