



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 177 OF 2016

MONICAH NAFULA ADUI.....1ST APPLICANT

JUDITH NERIMA OGOMBE..... 2ND APPLICANT

VERSUS

LEONARD SHANYA RESPONDENT

R U L I N G

1. The application under consideration is a Notice of Motion dated 19/12/2016 and filed on 20/12/2016. It is brought under Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21) and Order 40 of the Civil Procedure Rules. It is also expressed to be brought under all other enabling provisions of law. The application was filed contemporaneously with a suit of even date where the Plaintiffs, now the Applicants herein, have sued the Defendant, now the Respondent in this application, alleging illegal entry and use by the Defendant of land parcels Nos **SAMIA/BUDONGO/2577** and **SAMIA/BUDONGO/2578**. The Plaintiffs claim to be the registered owners of the land.

2. In this application, the Applicants – MONICAH NAFULA ADUI and JUDITH NERIMA OGOMBE – want the Respondent – LEONARD SHANYA – restrained, whether by himself, agents, servants, employees or persons claiming through him from entering, using, selling alienating, constructing or dealing in any manner with Land parcels Nos SAMIA/BUDONGO/2577 and SAMIA/BUDONGO/2578. That is the essence of prayer 2 in the application. There is also prayer 3, which asks that costs of the application be provided for.

3. A look at the application shows the Applicants alleging that the Respondent is putting up structures on the land and will actually complete construction if not stopped. Some history and background is also given. The Applicants inherited the parcels of land from one COSMA OGEMBO, who originally owned it as parcel No. SAMIA/BUDONGO/99. The land was larger then and what the Applicants own are only portions of it. They got to acquire their portions through a succession process.

4. The Respondent is said to have illegally registered the entire land owned by COSMAS OGEMBO in the name of his late mother WILLIBRODA APONDI. The whole thing was however reversed and the title issued was revoked. But the Respondents and his agents then entered the Applicants portions of land and started erecting structures. The matter was reported to police and the Respondent was arrested briefly. Thereafter the Applicants filed this case.

5. The Respondent responded vide a replying affidavit filed on 8/2/2017. According to him, the land was

originally owned by COSMO OGOMBE. COSMO died and left behind three (3) daughters – MARIANA WERE, HELENA WEKESA, and WILBRODA APONDI. WILBRODA was the Respondents mother. The three daughters then entered into a written agreement agreeing that the Respondent’s mother – WILBRODA APONDI – should inherit the entire parcel comprised in SAMIA/BUDONGO/99. WILBROAD then took out succession proceedings and was issued with a grant. The Respondents claim to ownership seems to be based on his late mother’s alleged ownership of the entire parcel of land.

6. No hearing took place; submissions were filed instead. The Applicants were said to have established a *prima facie* case, having shown documents to show ownership and having explained how such ownership came about. They were also said to be likely to suffer irreparable loss as they have sentimental attachment to the land. The balance of convenience was said to lie in the Applicant’s favour since not granting the injunction would mean that the Respondent continue with his interference while the Respondent himself suffers no injustice if the injunction is granted. Two authorities were availed to guide the Court in its decision. The two are: **TRITEX INDUSTRIES LIMITED & 3 Others vs NATIONAL HOUSING CORPORATION & Another: [2014] eKLR** and **MANFRED WALTER SCHMITT vs DUBAI BANK LIMITED & 2 Others: [2014] 2014 eKLR**.

7. The Respondents submissions were filed on 9/3/2017. According to the Respondent, the Applicants have not proved that they are in possession of the alleged parcels of land. They were also faulted for not showing how they will be affected. According to the Respondent, the removal of his late mother as owner of the land was unprocedural.

8. I have considered the application and the response made by the Respondent. I have also considered the submissions including the cited case law. I have had a look to at the suit as filed. It is well demonstrated that the Applicants are the registered owners of the parcels of land. The Respondent says the Applicants are not in possession. It is not possession we are looking at; it is the *prima facie* legal ownership.

9. The Respondent says the Applicants have not demonstrated how his actions will affect them. Well, they do not have to. It is enough that they are currently the legal owners and have not given permission to the Respondent to engage in activities on the land. The Respondent alleged too that it was illegal to dislodge his late mother as the legal owner. But he seems not to have challenged that through due process. He seems to have decided to trespass and use the land instead.

10. To the Court, a *prima facie* case is well made when the circumstances of the case are considered. I think a case for irreparable loss is made given that there is no telling to what extent the Respondent might go if not enjoined, and bearing in mind that the applicants are also saying they are sentimentally attached to the land. I will not consider the balance of convenience since it is only considered when the Court is in doubt regarding the first two principles. I have not expressed any doubt here. To me, what the respondent is doing amounts to muscle-flexing. But his approach is wrong. Only due process can effectively protect any legitimate interest he may have.

11. The upshot is that the application herein is found meritorious and injunctive relief as prayed for in prayer 3 is granted to run until the suit is heard and determined. Costs of the application (prayer 3) to be in the cause.

Dated, signed and delivered at Busia this 19th day of July, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff/Applicant:

2nd Plaintiff/Applicant:

Defendant/Respondent.....