



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC NO. 18 OF 2017

WILBRODA AKINYI OOKO..... APPLICANT

VERSUS

MERCCELINA ANYANGO OMOLO

BONFACE ODUOR OMOLO.....RESPONDENTS

CORNEL OUMA MUKOSWA

CAROLINE AUMA OMONDI

RULING

1. The application before me is a Notice of Motion dated 13/1/2017 and filed on 30/1/2017 contemporaneously with a suit of even date. The applicant – **WILBRODA ANYANGO OMOLO** – is the Plaintiff in the suit while the Respondents – **MERCCELINA ANYANGO OMOLO, BONFACE ODUOR OMOLO, CORNEL OUMA MUKOSWA** and **CAROLINE AUMA OMONDI** – are the Defendants. The application herein is expressed to be brought under Sections 68 and 76 of Land Registration Act and Sections 3A and 63(e) of the Civil Procedure Act.

2. In the application, the following orders are sought:

(i) That an inhibition or restriction be placed on titles LR. MARACHI/BUMALA/2422, 2473 and 2474 or any other resultant numbers pending the hearing and determination of the case.

(ii) That an order of injunction be issued restraining the Defendant, their agents, servants, family members or any other person claiming on their behalf from interfering with the Plaintiff and/or the family peaceful use of all formerly Land parcel No. LR MARACHI/BUMALA/83 and/or all resultant numbers pending the hearing and determination of this case.

(iii) Costs.

3. The application is premised on the grounds, *inter alia*, that the registration of Henry Omollo Omondi as owner on 30/8/1983 was illegal; that the Plaintiff and her family are using land parcels Nos 2472, 2473 and 2474 which are subdivisions from the original land parcel No. 83; and that the Defendants might dispose of the land parcels to defeat this case.

4. Some background and history can be gathered from both the grounds and the supporting affidavit of

the Applicant. The original land parcel No.83 belonged to one Omondi Mono who is now deceased. It is clear that Omondi Mono was the father of two sons – HENRY OMOLLO OMONDI and THOMAS OKELLO OMONDI. These two sons are also deceased. The 1st Respondent – MERCELINA ANYANGO OMOLO – was wife to HENRY OMOLLO OMONDI. The Applicant introduces herself as wife to the late THOMAS OKELLO OMONDI.

5. After the death of Omondi Mono sometimes in 1973, the late husband of the 1st Respondent is said to have illegally registered himself as owner of land parcel No. 83, leaving out the interest of the late THOMAS OKELLO OMONDI. After the death of her husband, the 1st Respondent inherited the land. The land has since been subdivided into several parcels, some of which have been sold.

6. The Applicant and her family members are said to be using a portion of that land. The Applicant is contesting the current registration of ownership and is asserting her entitlement to the land by virtue of her connection to the late Omondi Mono through Thomas Okello Omondi. The Respondents would have none of this and are arguing that the land solely belonged to the late Henry Omollo Omondi, having been gifted the same by the late Omondi Mono.

7. The Applicants rightful place is said to be possibly land parcel No. MARACHI/BUMALA/69 where the other children of the late Omondi Mono were left to inherit. And according to the Respondents, the Applicant was not a wife to the late Thomas Okello Omondi. She was a lover and upon Thomas death she got married to one LUCKAS OOKO, who is her current husband. She lives in Siaya but she recently came with goons and invaded the land. She has no right to claim the land, having been away since 1974 when she got married to Lukas Ooko.

8. The other Respondents were in general agreement with first Respondent. The 3rd Respondent in particular averred that he is a purchaser and was at a loss as to why he was dragged into this suit.

9. I heard the application interpartes on 11/4/2017. It is not necessary to dwell much on the argument given since much of what was said had to do with the background and history already stated in this ruling. The rest was an attempt by both sides to delve into issues which would be better left for consideration at the trial.

10. Bearing all this in mind, I draw useful guidance from the case of **SHITAKHA vs MWAMODO & 4 Others [1986] KLR 445** where the court held, *inter alia*, that substantive issues should not be decided in an interlocutory application stage. This ought to be left for trial.

11. In this matter, there are two kinds of orders already granted. There is an order of inhibition. There is also an order to maintain Status Quo. Counsel for the Applicant mistakenly thought that the order of inhibition was granted to last until the determination of the suit. It was not. The Court record is clear that it was granted to last until determination of the application. And this was so because it was granted at the *ex parte* hearing stage. But nothing hinders the Court from extending it if the interests of justice so require.

12. Since I have taken the position that dealing with substantive issues at this stage is not appropriate, I find it necessary to adopt an approach adopted by the Court in the case of **MBUTHIA vs JIMBA CREDIT FINANCE CORPORATION & another [1988] KLRI**. The case involved an application for injunction which the High Court had dismissed. On appeal, it was held, *inter alia*, that the correct approach in dealing with an application for injunction is not to decide issues of fact, but rather weigh up the relevant strength of each sides' proposition.

13. In this matter, though the Respondents seem to view the Applicants presence on the land as an invasion, it seems rather obvious that the 1st Respondent and her family members are occupying part of the land. And this position is borne out by the fact that when the Court granted an order for maintenance of Status Quo on 11/4/2017, the Status Quo was specified to mean that each side was to continue using the part of land it was using. The Respondent side conceded to this arrangement. Both the order of

inhibition and the order for maintenance of Status Quo are useful in this case. My view is that peace can be fostered by having these orders extended until the determination of the case.

14. An order of injunctive relief as sought would be oppressive to the Respondents as it would restrain them while leaving the Applicant and her family free to do as they please on the land. The order of inhibition will preserve the land by ensuring that no unauthorized official transactions are conducted. The order of maintaining Status Quo ensures that each sides sticks to its side of the land. My view is that this is the way to go.

15. To dispose of the application therefore, I order that the order of inhibition issued earlier is to remain in force until the case is determined. I order too that the order for maintaining Status Quo granted earlier is to remain in force until the case is determined. Costs of the application will be in the cause.

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

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Respondent.....

2nd Respondent.....

3rd Respondent.....

4th Respondent.....