REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC. NO. 12 OF 2016

JOE DAVID ABETTER ….....……..... APPLICANT

(OUMA-OKUTTA & CO. ADV)

VERSUS

COUNTY GOVERNMENT OF BUSIA..... RESPONDENT

(MAKOKHA & CO. ADV)

R U L I N G

1. The focus of this ruling is on an application dated 28/3/2017 filed on 29/3/2017. It is a Notice of Motion expressed to be brought under Section 1, 1B, 3, 3A of Civil Procedure Act, Orders 13 rule 6, Order 2 Rule 15(1) (a), (b) and (c), Order 36 Rules 1 (1) (a), Order 40 Rules 1, 2, 3 of Civil Procedure Rules and all other enabling provisions of law. The Applicant – **JOE DAVID ABETTER** – wants the following prayers granted against the Respondent – **COUNTY GOVERNMENT OF BUSIA.**

Prayer 1: Spent

Prayer 2: That pending hearing and determination of the suit interim orders of injunction do issue against the Defendant, its agents, workers or anyone claiming through or under them from occupying, entering, using, or utilizing in any way all that parcel known as BUKHAYO/MUNDIKA/3644 measuring 0.66Ha or part thereof.

Prayer 3: That in the alternative and without prejudice to the foregoing judgement be and is hereby entered summarily for the Plaintiff/Applicant as prayed.

Prayer 4: That the honourable Court be pleased to strike out the Defendant's statement of defence for disclosing no defence (sic) with costs.

Prayer 5: In the alternative the Defendant be ordered to deposit in Court a sum of Kshs.3,500,000 pending trial or any other interest earning account with a reputable bank.

Prayer 6: That costs of the application and suit be met by the Defendant/Respondent.

2. The grounds advanced to support the application stipulate, *interalia*, that the Applicant is the sole owner of land parcel No. BUKHAYO/MUNDIKA/3644; that the Defendant has started some construction on the land; and that there is no defence to the claim.

3. The supporting affidavit accompanying the application, amplifies the grounds on the body of the application.

4. The Respondent replied in two ways: Vide grounds of opposition dated 21/11/2016 and a replying affidavit dated 26/4/2017. The grounds of opposition were filed earlier than the application. They were in response to a similar application that had been filed earlier. On 24/4/2017 it was agreed that the grounds of opposition be accepted as a response to this application.

5. It is necessary to cast a brief look at the responses. The grounds of opposition contain allegations terming the application as frivolous, vexatious, incompetent, defective and/or premature. The application is said to be brought in bad faith, abusive of court process, and unprocedural. The injunctive order sought was said to be undeserved as the conditions set in **GIELA vs CASSMAN BROWN & CO. LTD [1973] EA 358,** have not been met.

6. In the replying affidavit, it was denied that there was any sale of land between the parties. It was pointed out that no agreement was availed. The institution said to be on the land was said to have been built in 1986, not 2011, and was managed by then the BUSIA COUNTY COUNCIL, not Busia Municipal Council. It occupies 10 acres, not 0.66 acres as alleged. And the application therefore should be dismissed.

7. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 28/4/2017. It was submitted, *interalia*, the ownership of the land by the Applicants is not disputed. That being the position, the alleged invasion is unconstitutional, unlawful, and in violation of his proprietorship rights. The Respondent was accused of having failed to pay the purchase price and the Applicant therefore feels he is deserving of the orders sought.

8. The Respondents defence was also said to be a sham and should be dismissed and/or struck out and summary judgment should be entered for the Applicant. Alternatively, the Respondent should be ordered to deposit the purchase money in Court while awaiting the determination of the suit.

9. The Respondents submissions were filed on 2/5/2017. It was pointed out that the application herein is similar to an earlier one dated 16/11/2016. That earlier application was abandoned by the Applicant in order to expedite the hearing of the suit itself. The Respondent lamented that the basis of granting the prayers sought, which are exactly the same prayers in the abandoned application, has not been laid.

10. I have considered the application, the responses made, rival submissions, and the pleadings herein in general. I have looked at the content and form of the application. It is exactly the same as the earlier application, warts and all. The earlier application was filed on 16/11/2016 and is dated 15/11/2016. By consent of both sides, it was abandoned on 30/1/2017. That move was taken so that the suit itself could be heard. That consent order has not been set aside or varied; it is still in force. And while so in force, this application was filed. This application therefore looks like a superimposition on the earlier application and the justification for it has not been given.

11. It is obvious to me that the approach taken by the Applicant is wrong. He needed first to do something about the earlier order abandoning the earlier application. That order needed to be set aside or varied to pave way for this application itself. He needed to justify why there should be a reconsideration of the same prayers contained in the earlier application. All this was not done and this works against the Applicant.

12. It is also important to look at the nature of the application. In one and the same application, the Applicant is asking for injunctive relief, summary judgement, striking out orders, and a rather anomalous prayer to deposit purchase price in a claim that is already denied. To me, this makes the application unwieldy, and therefore unsuitable for effective handling.

13. Anyone familiar with the way applications are done can readily understand, for instance, that an application for injunction alone is enough to tax properly the judicial mind. For such application alone,

lengthy rulings often issue from our Courts. The same position applies to an application for summary judgement or even one for striking out orders. The applicable law and facts for each kind of application are vastly different. But the applicant wants all these considered together in one application. An application of this type is said to be *omni-bus*. No court loves it.

14. I will give an example: In **RAJPUT vs BARCLAYS BANK OF KENYA LTD & 3 others [2004] eKLR 393**, the Plaintiff had filed an application containing a number of prayers namely: to restrain a firm of auctioneers from distraining for rent on his goods; an order that the Defendants had no authority to evict him pending hearing of the suit; an order granting him leave to institute contempt proceedings against the 4th Defendant; and finally that the suit be heard on priority basis. The Defendant opposed the application for reasons, *interalia*, that the application was *omni-bus* in that it carried a multiplicity of prayers all of which could not be possibly decided. The Court held, *interalia*, that the application was an all-cure *omni-bus* application. The *omni-bus* application was incapable of proper adjudication by the Court because each of the reliefs sought apart from being governed by different rules, was also subject to long established judicial principles which needed to be raised and considered by the Court. That alone made the application defective and a candidate for striking out.

15. This is the same scenario that obtains in this application. The application is therefore incurably defective. This, together with the earlier reason regarding the manner of approach taken to re-file an abandoned application; makes this application a suitable candidate for dismissal. The application is hereby dismissed with costs.

Dated this 13th day of July, 2017

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

Applicant: .....

Respondent:.....