



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 118 OF 2016**

GEORGE ALFRED CHITUYI.....APPLICANT

**VERSUS**

JOHN MUNYOBİ ONDWASI.....RESPONDENT

**RULING**

1. The application before me is a Notice of Motion dated 15/9/2016 and filed on the same date. The Application was filed contemporaneously with a suit of even date. In the suit, the Plaintiff – **GEORGE ALFRED CHITUYI** – who is the Applicant in the application, has sued the Defendant – **JOHN MUNYOBİ ONDWASI** – who is Respondent in the application, claiming, *inter alia*, that the Defendant, (“Respondent” hereafter) has trespassed onto his land parcel No. BUKHAYO/MALANGA/1414 (“Suit Land” hereafter) and has damaged perimeter fence and constructed some structures thereon. The Plaintiff (“Applicant” hereafter) is claiming damages for wrongful entry and is also seeking injunctive relief to restrain the action of the Respondent or those who may do the same acts through or under him.

2. In the meantime, the Applicant wants a temporary restraining Order before the suit is heard and determined. That is what necessitated the filing of the application. The application is brought under Order 40 Rules 1 and 10 of the Civil Procedure Rules, 2010, and Sections 1A, 1B, and 3A of Civil Procedure Act (Cap 21) and other enabling laws.

3. The application has six (6) prayers but two of them – prayers 1 and 2 – were for consideration at an earlier stage. The prayers for consideration now are 3, 4 and 5. Consideration of prayers 6 is optional. I now set out herein prayers 3, 4, 5 and 6.

Prayer 3: That the Court be pleased to grant a temporary injunction restraining the Respondent whether by himself, his agents, and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiffs property being title number BUKHAYO/MALANGA/1414 pending hearing and determination of this suit.

Prayer 4: The officer commanding Nambale Police Station do enforce compliance with the orders above.

Prayer 5: The costs of this application be provided for.

Prayer 6: The honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

4. The application is premised on the grounds, *inter alia*, that the Applicant is the legal owner of the suit

land; that the Respondent has not only trespassed but has damaged the boundary and put up structures; and that owing to these actions by the Respondent the Applicant may suffer irreparable loss and there is likelihood of breach of peace.

5. The supporting affidavit accompanying the application reiterates and amplifies the grounds and additionally avails photographic evidence of the Respondent's alleged interference. The Plaintiff's copy of title to demonstrate ownership is also availed.

6. The Respondent responded vide a replying affidavit filed on 30/11/2016. The Respondent denied that the Applicant is the owner of the suit land. According to him, there is no such parcel of land as the title was to be rectified pursuant to a court order issued in case No. BUSIA PMCC No. 73 of 2007.

7. He further denied trespassing on the Applicant's land. He did not destroy any boundary, he deponed, and did not put up any structures. To him, the application is misconceived.

8. The Respondent's response elicited a further affidavit from the Applicant. The affidavit was filed on 15/12/2016 and states, *inter alia*, that the Respondent has interfered with the suit land to the extent of denying the Applicant and others access to the water point. It was reiterated that the Respondent has also interfered with boundary and is constructing a permanent house.

9. The application was canvassed by way of written submission. But as I write this ruling only the Applicant has filed his submissions. The Respondent had equal and similar opportunity to file but did not. In addition, he could have filed his submissions during the pendency of this ruling. Again he did not.

10. The Applicant has demonstrated well that he is the registered owner of the suit land. The Respondent denies this and alleges that there is a court order that directs rectification of titles. To demonstrate it, he annexed a court order marked "JMO-1". The Applicant talked of rectification of boundaries. The order seems to talk of rectifying both. But it is clear that that has not been done yet. And as long as that has not been done, there is nothing that gives the Respondent a legitimate entitlement to interfere with the suit land.

11. This being the position therefore, the rights of ownership of a title holder must be presumed or construed in favour of the Applicant at this stage. A *prima facie* case is therefore established.

12. The Applicant filed a further affidavit to counter the Respondents replying affidavit. Earlier on the Applicant had availed photos to show the Respondents interference on the land. It seems clear that the Respondent activities may bring permanent changes to the land. That would be unauthorised change as long as the Applicant continues to be the title holder to the suit land. The averment by the Applicant therefore that irreparable loss is likely is not farfetched.

13. I will not consider the balance of convenience as I find the first two requirements – *prima facie* case and irreparable loss – as stipulated in **GIELA vs CASSMAN BROWN & CO. LTD [1973] EA 358**, well demonstrated by the Applicant. It needs to be appreciated that the balance of convenience only comes into play when the Court is not satisfied as to the demonstration of the first two requirements.

14. The upshot is that the Applicant's application has merit. Not all the orders however will be granted. I only grant prayer 3. I decline to grant prayer 4. The Applicant can opt for contempt of court proceedings should the Respondent breach the order. Prayer 5 is for costs. The parties are said to be brothers. Costs will be in the cause. Prayer 6 is not one for consideration. And this is because there is no other order that the court would wish to grant.

**Dated, signed and delivered at Busia this 27<sup>th</sup> day of September, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: .....

Respondent: .....

Anambo & Co. Adv. for Applicant/Plaintiff

Ochero Kebira & Co. Adv. for Respondent/Defendant