



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
ELC NO. 56 OF 2017 (OS)

1. AGNES OCHOL OGOLA

2. COLLINS OTIENO NJERO.....PLAINTIFFS

VERSUS

ANANIA OMONDI NJERO OTUNDO.....DEFENDANT

R U L I N G

1. Before me is a Notice of Motion dated 7/7/2017 and filed on 10/7/2017. The application is brought under order 40 and 51 of Civil Procedure Rules, 2010; Sections 1A, 1b, 3 and 3A of Civil Procedure Act; Section 68 of Land Registration Act, 2012 and all other enabling provisions of law. There are several prayers that are not for consideration at this stage, the same having been meant for consideration at the exparte stage. These are prayers 1, 2, 3 and 6. The applicants are **AGNES OCHOL OGOLA** and **COLLINS OTIENO NJERO** while **ANANIA OMONDI NJERO OTUNDO** is the Respondent.

2. The prayers for consideration are 4, 5 and 7 which are as follows:

Prayer 4: That a temporary injunction do issue restraining the respondent, his agents, employees, workers, representatives and all persons working through or under him from working, building, fencing, entering, cultivating, carrying on construction works or in any other way interfering with the applicant's possession and use of the one half of the suit land which she is occupying, cultivating, resides on pending the hearing and determination of the substantive suit herein.

Prayer 5: That an order of inhibition be issued restricting the registrar of any dealing with the suit land until the determination of the suit.

Prayer 7: That the costs of this application be provided for.

3. The applicants are embroiled in a legal tussle over ownership of land parcel No. SOUTH UGENYA/RANGALA/116 ("Suit Land") with the respondent being the registered owner while the applicants are claiming half of it by adverse possession. The applicants are seeking temporary orders because the respondent has allegedly entered the land occupied by them and destroyed trees and crops. He is said to be intent on demolishing the houses on the land. It is alleged further that the respondent has fenced the land effectively blocking or sealing off the entrance to the applicants compound. Photographs of such interference have been annexed as "A00-1(a) and 1b" respectively.

4. The applicants said they reside on the land. The respondent does not, with his home, whose

photograph was availed as “A00-2”, being in Markuny Village, Yiro East Sub-Location. The continued interference by the respondent is said to be likely to occasion irreparable loss.

5. The respondent responded vide a replying affidavit dated 21/7/2017 filed on the same date. According to him, the suit land is his, with the applicants having their entitlement in land parcel No. SOUTH UGENYA/RANGALA/77. The portion they reside on is said to be “collective land” where other members of the larger family used also to reside but later vacated to go to their own pieces of land. The applicants are said to be the only ones who refused to vacate and are now hell-bent on dispossessing the respondent. The respondent denied harbouring intentions to evict the applicants.

6. The application was heard interpartes on 24/7/2017. Manwari for the applicant generally repeated or reiterated the averments in the application. The respondent also responded with averments aligned to his replying affidavit.

7. I have considered the application, the response made, and the rival arguments presented during interpartes hearing. When this application came before me ex parte on 11/8/2017, I granted a temporary restraining order. The intention then was to tame an otherwise volatile situation in which possible danger to life and property seemed likely. The response made by the respondent verbally and in writing does not seem to displace the fact that trees were cut, crops destroyed, and a blocking fence installed.

8. It is clear that the applicants reside on the land. The respondent does not seem to reside there. By his own account, he resides in Mombasa. By the applicants account, his home is in a different village. The need to preserve the Status Quo is as pertinent now as when the restraining order was granted ex parte.

9. In **OTIENO vs OUGO & Another (No2) [1987] KLR 400**, the court held, inter alia, that injunctive relief is normally granted to preserve the subject matter pending the hearing and determination of the action. My considered view is that it is necessary to preserve the subject matter in this case. I may also add that injunctive relief is also usually granted to forestall danger or breach of peace by a party. It is therefore necessary for the court to consider all the circumstances of the case. This is the position embraced in the case of **KENYA HOTELS LIMITED vs KENYA COMMERCIAL BANK LTD and Another: [2004] IKLR 80**. All these considerations are in addition to, and not in derogation of, the principles enunciated in **GIELA vs CASSMAN BROWN & CO. LTD [1973] EA 358**.

10. I note that an inhibition order is also sought in this application. The applicants are apprehensive that the respondent might try to sell the suit land. The respondent did not respond to this. In **JAPHET KAIMENYI M’NDATHO vs M’NDATHO M’MBWIRIA [2012] eKLR**, the court observed, inter alia, that an order of inhibition is necessary where the suit property is at risk of being disposed of and where the applicant has shown that he has an arguable case. The court is required to consider whether refusal to grant the orders would render the suit nugatory.

11. In this matter, the applicants have said that the suit land might be disposed of. They have also averred that their claim might turn out to be in vain if what they fear might happen comes to pass. The respondent has not responded to these averments.

12. The upshot is that it is necessary to allow the application herein and I hereby allow it in terms of prayers 4 and 5. Costs of the application (which is prayer 7) to be in the cause.

Dated, signed and delivered at Busia this 20th day of September, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel: