



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
ELC NO. 111 OF 2016

JOSEPH AKHUNGU MAKOKHA1ST PLAINTIFF

EPERIM KIZITO MAKOKHA 2ND PLAINTIFF

VERSUS

MOSES MORRIS PAMBA1ST DEFENDANT

VITALIS BARASA NYAMBOKI 2ND DEFENDANT

R U L I N G

1. The application under consideration is a Notice of Motion dated 21/9/2016 brought under order 40 Rules 1 and 10 of Civil Procedure Rules, 2010 and Sections 1A, 1B, 3, 3A and 63(e) of Civil Procedure Act (cap 21) Laws of Kenya. The Applicants in the Notice of Motion – **MOSES MORRIS PAMBA** and **VITALIS BARASA NYAMBOKI** – are the Respondents in the suit herein filed by way of Originating Summons. They are the registered owners of lands parcels **BUKHAYO/BUYOFU/1415** and **BUKHAYO/BUYOFU/1416**.

2. The Respondents in this Notice of Motion – **JOSEPH AKHUNGU** and **EPERIM KIZITO MAKOKHA** – are the Applicants in the Originating Summons and are claiming the two parcels of land as adverse possessors.

3. The application herein is for restraining orders and seeks to restrain the Respondents, who are Applicants in the Originating Summons, whether by themselves, their agents and/or servants from meddling, tempering, trespassing and intending to cancel the title deeds in the names of the Applicants and/or any other dealings whatsoever on L.R. **BUKHAYO/BUYOFU/1415** and **1416** pending hearing and determination of the suit. That is prayer 3 in the application. It is also prayed that the OCS, Nambale Patrol Base to enforce compliance (prayer 4), that Status Quo be maintained (prayer 5), and that costs be in the cause (prayer 6).

4. According to the Applicants, the Respondents are inconveniencing them by interfering with the two parcels of land and intending to cancel the title deeds. It appears clear that the two land parcels arose from sub-division of the original parcel L.R. **BUKHAYO/BUYOFU/160** by the original owner. The two land parcels were then sold to the Applicants at different times.

5. The Respondents opposed the application vide a replying affidavit filed here on 7/11/2016. According to the Respondents, they have been living on the original parcel No. 160 since 1960. The land allegedly

belonged to their grandfather – ODIMA OPSONG – and is therefore family land. At the time of registration however, one Constant Omumia, registered himself as owner. Omumia is the one who sold the land to the Applicants. In spite of all that however, the Respondents continued to live on the land and that is the position to date. The Applicants are said not to be in occupation of the land.

6. The application was canvassed by way of written submissions. The Applicants' submissions were filed on 27/6/2017. The alleged occupation by the Respondents was denied. It was submitted that they are not adverse possessors. The court was urged to find that the Respondents do not deserve the interim orders they are asking for.

7. The Respondents' submissions were filed on 29/9/2017. According to the Respondents, they have all along been in occupation of the land. The Applicants were faulted for not showing that they will suffer damages.

8. I have considered the application, the response made, and the rival submissions. The Applicants did not address themselves to the requisite principles applicable to application for restraining orders. The principles were spelt out in the case of **GIELA vs CASSMAN BROWN & CO. LTD [1973] EA 358** and entail establishing a *prima facie* case with a probability of success, demonstrating the likelihood of suffering irreparable loss not compensable in damages and, where the court is in doubt as to these two principles, considering the balance of convenience.

9. The Applicants were duty-bound to prove all these. But the Applicants approached the application in a totally different way. In fact, the submissions filed by them dwelt largely on the issue of adverse possession. Adverse possession is not for consideration at this stage. There was no mention at all of the applicable principles. That is one serious and glaring weakness in the Applicants' submissions.

10. I have also looked at the suit as filed. The Respondents filed the Originating Summons because they felt they are adverse possessors, having occupied the land for requisite period of time. The Applicants on the other hand stated that the Respondents are actually occupying the neighbouring land. They also said that they, rather than the Respondents, are occupying the land. The court is at a loss here. It is not clear to it as to who is occupying the land. I expected that Applicants, being the ones interested in restraining orders, should have gone further to demonstrate their occupation. If they had demonstrated their occupation well and then shown that the Respondents are trespassing, they would probably have persuaded the court that they deserve restraining orders.

11. But as things stand, the Applicants did not do that. When it comes to the issue of occupation, it is only their word against the Respondents' word. They should have endeavoured to bring more certainty on the issue.

12. The court's finding, in light of all these, is that the application herein is unmeritorious. The application is therefore dismissed with costs.

Dated, signed and delivered at Busia this 29th day of November, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

1st Defendant:

2nd Defendant:

Counsel of Plaintiff:

Counsel of Defendants: