



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 35 OF 2016

JARED ANYIKO ETYAKORO and 6 Others.....APPLICANTS

VERSUS

CHRISTIAN WAFULA OMUSOLO and 3 Others.....RESPONDENTS

RULING

1. The application before me is a Notice of Motion dated 26/1/2017 and filed on 30/1/2017. It is brought under Order 40 rules 1, 2 and 4, Section 13 of the Environment and Land Court Act, and all other enabling provisions of Law. The Applicants – **CHRISTIAN WAFULA OMUSOLO**, and **EVALINE AKISA OMELA** - are Respondents in the Originating Summons filed here against them on 9/4/2016. They were sued by **JARED ANYIKO ETYAKORO**, **WYCLIFFE EJAKAIT OMARE**, **WILIMINA AKOL**, **FIRINGINA APALI**, **JESCA AJAKAIT ORUBIA**, **DAVID OLOGE OPURU** and **MICHAEL ERAPU RICHARD ODEKA**, who are Applicants in the Originating Summons and Respondents in this application.

2. The parties are tussling over ownership of land parcel No. **SOUTH TESO/ASINGE/377** portions of which are claimed by the Applicants in the Originating Summons through adverse possession but which the Respondents in the Originating Summons are claiming to be their own through family inheritance.

3. The relevant prayers for consideration in the Notice of Motion herein are as follows:

Prayer 3: That an interlocutory injunction do issue to the Applicant/Respondents, their servants and/or agents restraining from erecting buildings, cultivating, trespassing, alienating, charging, selling, and or depriving the 1st and 2nd Respondents/Applicants of their interest or dealing in any way in land parcel No. **SOUTH TESO/ASINGE/377** pending hearing and determination of the suit.

Prayer 4: That costs of this application be borne by the Applicants/Respondents.

4. The grounds advanced state, *inter alia*, that the Respondents in this application have erected buildings and that this may render nugatory and unenforceable the final orders of this court.

5. The Respondents in this application responded vide a replying affidavit filed on 11/8/2017 where they deponed, *inter alia*, that the Applicants seek to stop them from using the land that they have been utilizing for over 12 years. The application is said to be meant to divert attention from the main issues. The Respondents averred that the Applicants, by their own admission, are only using two (2) acres while they themselves are using the rest of the land. It was also observed that the Applicants have not sued; they are sued. And this being the position, their application is not hinged on any suit, for they have not filed any.

6. On 12/10/2017 both sides agreed that the matter be canvassed by way of written submissions. The Applicants submissions were filed on 19/10/2017. The Applicants largely reiterated what the application contains. They submitted, *interalia*, that they have a *prima facie* case and that damages would not be an adequate remedy. They cited the decided cases of **JAMES MUIGAI THUNGU vs COUNTY GOVERNMENT OF TRANS-NZOIA & 2 Others [2015] eKLR and GIELA vs CASSMAN BROWN & CO. LTD [1973] C.A. 358** to drive their message home. The Applicants blame the Respondents for allegedly taking the land forcefully.

7. The Respondents submissions were filed on 1/11/2017. The Respondents reiterated that the application is not based on any suit filed by the Applicants. According to the Respondents, the application is an abuse of the court process.

8. I have considered the application, the response made, rival submissions, and the pleadings on record generally. I agree with the Respondents that the Applicants have not sued. They are sued. When they therefore talk of having a *prima facie* case with a probability of success, it is not clear what they mean. They have not filed a case against the Respondents in the Originating Summons. They have not counter-claimed. So, where is their *prima facie* case? It would be more understandable if their submissions are based on the issue of irreparable loss or balance of convenience.

9. But that is not the only problem with the application. If one looks at the prayer for restraining order as formulated, it is meant to apply to the whole land. Yet it is clear that the Applicant's in the Originating Summons have been occupying and/or utilizing portions of the land. The Applicants in this application are on record stating that they use only two acres. Question is: How can we restrain people who have all along occupied and/or used the land? It would not be fair to do so.

10. But that is not all. The prayer for injunction seeks to restrain the Applicants in the Originating Summons from alienating, selling or charging the land. Question is: How would they alienate, sell, or charge yet they are not the title holders? They are merely claiming as adverse possessors. And they would not succeed in selling, alienating or charging without having title to the land.

11. All this goes to show that the application was not well thought through. As filed, the application raises more questions than answers. The court's findings is that this is an application that should be dismissed without much ado. The application is hereby dismissed with costs to the Respondents, who are the Applicants in the Originating Summons.

Dated, signed and delivered at Busia this 6th day of December, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Applicants:

Respondents:

Counsel of Applicants:

Counsel of Respondents: