



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 122 OF 2015.

AGGREY OTIENO WIRE1ST APPLICANT

HENDRICA NABWIRE KARANI.....2ND APPLICANT

VERSUS

LINUS WABWIRE1ST RESPONDENT

AUGUSTINE ONYANGO BULUMA.....2ND RESPONDENT

RULING

1. The application under consideration is a Notice of Motion filed here on 23rd October, 2015 and dated the same. The two applicants – **AGGREY OTIENO WIRE** and **HENDRICA NABWIRE KARANI** – filed it against the two respondents – **LINUS WABWIRE** and **AUGUSTINE ONYANGO BULUMA**. It is brought under section 3 and 3A of Civil Procedure Act (cap 21) Order 40 Rule 1 & 4 (1) (2) and 3 of Civil Procedure Rules and any other enabling provision of law.

2. The parties are disputing over land parcel NO. BUKHAYO/MUNDIKA/9691 ("disputed land" hereafter), with the applicants claiming they are purchasers and averring further that the 1st respondent has short changed them and sold the land to the 2nd respondent.

3. The application has five (5) prayers but prayers 1 and 2 are now moot as they were for consideration at the exparte stage. For consideration therefore at this stage are prayers 3, 4 and 5 which are as follows:

Prayer 3: That this honourable court do issue temporary order of injunctions restraining the respondents either by themselves, their agents, servants, assignees and/or any other person working or claiming under them from erecting any structures, tilling, trespassing, disposing off and /or tampering with the land parcel No. BUKHAYO/MUNDIKA9691 in any manner whatsoever pending hearing and determination of the suit.

Prayer 4: That the OCS Busia police station be served for compliance and effecting of the order.

Prayer 5: That the costs of this application be provided for.

4. According to the applicants, the 2nd respondent is putting up a structure on the disputed land. The 1st respondent succeeded his late father from whom the applicants have bought the land. He has failed to transfer the land to them; instead transferring it to 2nd respondent.

5. The supporting affidavit accompanying the application gives some background and history. According to applicants, the 1st respondent's late father – **ALBERT NYONGESA BARASA** – sold them portions of land parcel BUKHAYO/MUNDIKA/7694. That is the same land that later got subdivided, with the portions sold falling on land parcel NO. BUKHAYO/MUNDIKA/9691. The 1st respondent succeeded his late father but the applicants discovered this much later. They approached the 1st respondent and engaged him with a view to securing their interests. It was agreed that the 1st respondent be refunded costs for succession process. This was done and the 1st respondent was in turn supposed to ensure that each applicant got his portion of land. This was never to be. The 1st respondent reneged on this undertaking and sold the land to 2nd respondent.

6. The two respondents responded to the application vide two replying affidavits filed on 26th January, 2016. The 1st respondent denied that his late father ever sold land to the applicants. He also didn't enter into any arrangement with the applicants to give them any portions of land.

7. The 1st respondent further averred that the applicants are not entitled to any interlocutory injunctions as they have not demonstrated any irreparable loss they are likely to suffer. They can be adequately compensated as they have put a value to the portions they are claiming. It was also deponed that the applications are not in occupation or possession of the land.

8. The 2nd respondent explained how he bought the land. It was sold to him by the 1st respondent. He followed due process and the applicants are strangers to him. The position of the 2nd respondent is that he is an innocent purchaser for value without notice.

9. Both sides filed written submissions in lieu of oral hearing. The applicants submissions were filed on 2/3/2016. In some way, the submissions are a restatement of the background and history provided in the application. But the overall thrust of the submissions seem abit off-target. It focuses on the main suit instead of the application. In fact the final request is that the portions of land claimed be transferred to the applicants or the purchase money be refunded instead. One would have thought that at this stage, the submissions would be urging for granting of temporary restraining orders, not transfer of land or refund of any money.

10. The respondents submission were filed 10/2/2016. These ones are focused on the application and there is a good attempt to demonstrate that the essential principles necessary to grant a temporary restraining order have not been met by the applicants. In short it was argued that the applicants have not made a prima facie case with a probability of success. They have also not demonstrated that damages would not be adequate remedy. The balance of convenience is also said to favour the respondents, given that they are in possession of the suit land.

11. I have considered the application, the responses made, and the rival submissions. I have also considered the suit as filed. As I have pointed out already, the submissions of the applicants are focused on the suit instead of the application. It was upon the applicants to satisfy the court that they have met the threshold set for obtaining temporary restraining orders. They did not do that.

12. It is important to appreciate that an essential consideration is whether the Applicants can be adequately compensated in damages. And this is because the law is clear: You don't get a restraining order where damages are an adequate remedy. In this matter, the applicants are not on the land. The value of what they allege to have been purchasing is known or knowable. As pointed out by the respondents, damages would do.

13. It would appear to me too that the 2nd respondent explained reasonably well how he purchased the land. The applicants have not alleged or shown that the 2nd respondent was privy to what may have been going on between themselves and the 1st respondent or the 1st respondent's late father. The 2nd respondent is already a purchaser, probably just like the applicants, but he has the advantage of having gone into possession. He says he is an innocent buyer. In absence of a reasonable rebuttal from the

applicants, it appears to me abit rash to hasten to issue a restraining order against him.

14. The records availed by the Applicants also show unexplained gaps. While it is true that the parcel bought by the Applicants was originally NO.7694 before changing after subdivision to 9661, the handwritten copies of the agreements allegedly showing 1st respondents acceptance to give the applicants their portions show the portions as numbers 8167 and 9898. There is no explanation how this came about. Are these numbers for instance, reflected in the official records at the lands office? This not clear and an explanation would have clarified things.

15. And what would one make of the possible fact that the land is agricultural land and consent from of Land Control Board was required. Section 6(1) of the Land Control Act (cap 302) is clear. Where six months expire without parties to a land sale agreement obtaining the requisite consent, such agreement becomes void. The respondents raised this issue in their submissions. Their submissions were filed on 18/2/2016. The applicants submissions came much later on 2/3/2016. One would expect that such a crucial allegation would be responded to. It was not; it remained unanswered. So, how would one issue an injunction on the basis of a possibly void transaction?

16. The upshot of all these observations is that the applicants do not come across as people who merit a temporary restraining order. I therefore find that the applicants' application is unmeritorious and I hereby dismiss it with costs.

A.K KANIARU,

JUDGE.

DATED AND DELIVERED ON 28TH DAY OF APRIL, 2016

IIN THE PRESENCE OF;

1ST APPLICANT.....

2ND APPLICANT.....

1ST RESPONDENT.....

2ND RESPONDENT.....

COUNSEL – M/S MUKELE

JUDGE.