



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT BUSIA**

**ELC CIVIL CASE NO. 187 OF 2017**

**JOSPHAT OBARASA EKISA** (suing as the

Legal administrator of the Estate of

**SANTRINO MADOLA** (the administrator of Estate of

**SABASTIANO EKISA NGEGE.....PLAINTIFF/RESPONDENT**

**= VERSUS =**

**BARASA EKAPOLON AUKO.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**OSIKUKU BARASA EKAPOLON.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**MAXIMINUS EMODO BARASA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**GRIPAS ISOKAA BARASA.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**AND**

**BENJAMIN PAMBA EKISA.....INTENDED 3<sup>RD</sup> PARTY/RESPONDENT**

**BENARD EKISA.....INTENDED 3<sup>RD</sup> PARTY/RESPONDENT**

**JACKLINE SANTRINO.....INTENDED 3<sup>RD</sup> PARTY/RESPONDENT**

**EVERLIVE JOSEPHAT.....INTENDED 3<sup>RD</sup> PARTY/RESPONDENT**

**RULING**

1. The present application is brought by the defendants/applicants under the provision of Order rule 1 & 10, Order 3 rule 1, Order 10 rule 2 and Sections 1A, 3 & 3A of the Civil Procedure Act. The applicants pray for orders that;

**1. Spent**

**2. That pending the hearing and determination of the application herein inter parties, the Honourable Court be pleased to**

allow the enjoinder of the Intended Plaintiffs/Respondents as named above to be Plaintiffs in the substantive suit and Plaintiffs/Respondents in respect of the application instant.

3. Spent.

4. That pending the hearing and determination of the application herein, a temporary injunction do issue to restrain the Plaintiffs/Respondents, their assignees, agents and such other persons acting on their behalf including from encroachment and trespass, into and occupation/possession of any part of Land Parcel No. SOUTH TESO/ANGOROMO/705.

5. That the Plaintiffs/Respondents and the intended Plaintiffs/Respondents acts of 8<sup>th</sup> October 2019 of forceful entry and taking up possession and occupation of land parcel No. SOUTH TESO/ANGOROMO/705 before determination of the suit herein is unlawful, illegal and therefore null and void.

6. That the Plaintiffs/Respondents including the Intended plaintiffs/Respondents are hereby ordered to vacate Land Parcel No. SOUTH TESO/ANGOROMO/705.

7. Those costs of this application be provided.

2. The motion is supported by several grounds listed on its face inter alia;

*(a) That the Defendants/Applicants are the registered absolute legal owners of all that is comprised of Land Parcel No. SOUTH TESO/ANGOROMO/705.*

*(b) That the Plaintiff/Respondent herein filed the instant suit claiming ownership of the said land on the basis that at adjudication and registration of the land which was done in 1969, the 1<sup>st</sup> Defendant/Respondent got fraudulently to register himself as the bona fide owner of the land.*

*(c) That after the Court proceedings of 18<sup>th</sup> September 2019, and allegedly on the advice of their advocate, the Plaintiff/Respondent with the help and involvement of the Chief Ochude Location, Assistant County Commissioner Chakol Division, and assistant Chief Olepito Sub-Location, the Plaintiff/Respondent and the Intended Plaintiffs/Respondents convened a meeting on 7<sup>th</sup> October 2019 to discuss the issues pertaining to the land the subject matter herein.*

*(d) That thereafter the group proceeded to Land Parcel No. SOUTH TESO/ANGOROMO/705 and started constructing therein a semi-permanent structure that is almost complete and ready for occupation.*

*(e) That at Paragraphs 4D, 4E, 4G and the substance of the prayers encompassed in the Amended plaint dated 18<sup>th</sup> September 2019, the Plaintiff/Respondent claim is clear that the Defendants/Respondents occupation and use of the land the subject matter herein has denied him user and occupation of that land and therefore he is seeking remedy from the Court.*

3. The application is further supported by the affidavit of Maximinus Emodo Barasa which affidavit reiterated the facts set out in the grounds set out in the face of the application. Mr. Emodo deposed further that he learnt of a meeting convened on 7/10/2019 by the assistant chief of Olepito sub-location which discussed the dispute concerning L.R. No. SOUTH TESO/ANGOROMO/705 as shown in the minutes annexed as 'OO5'. That these minutes discussed forceful eviction of the Applicants from the suit land.

4. That pursuant to this meeting, the plaintiff and the 3<sup>rd</sup> parties invaded the land and started constructing semi-permanent structures. The Applicants stated that they reported to the area chief and later to the OCS Adungosi Police station, but the OCS advised that he can only act on a Court order hence the present application.

5. The application was served on all the parties. However only the plaintiff filed a response in opposition. The plaintiff filed grounds of opposition dated 18/10/2019 listing the following;

*1. That the Application violates the provisions of the Civil Procedure Rules on addition of parties to a suit.*

**2. That a Defendant can only add 3<sup>rd</sup> Parties to a suit as provided for under Order 1 Rule 15(1)(b) of the Civil Procedure Rules as opposed to additional plaintiffs as prayed in the Application.**

**3. That the Applicant therefore seeks orders against parties who have not yet been properly enjoined into the suit.**

**4. That the Defendant/Applicant has not filed a Defence to the Plaintiff/Respondent's claim which would be a basis for grant of temporary orders to the Defendant pending the hearing and determination of the main suit.**

**5. That substantive orders of eviction cannot be granted through an Application in the manner and style purported by the Defendant/Applicant in prayer 6 of the Application.**

**6. That the Applicant's contention is therefore against acts of 3<sup>rd</sup> parties who have not yet been enjoined in this suit.**

**7. That the Application is therefore devoid of any merits, is scandalous, frivolous and otherwise an abuse of the court process and the same ought to be dismissed.**

6. The plaintiff's counsel also filed an affidavit sworn on 30/10/2019. He deposed to allegations of advising his client raised in the Applicants' submission. He denied issuing such advice to his client who is the Plaintiff/Respondent. Learned Counsel deposed that he does not represent Emanuel Ekisa whom he stated he does not know.

7. Parties elected to argue the application by filing written submissions. The Applicants filed theirs on 30/10/2019 while the Plaintiff filed his on 31/10/2019. The plaintiff quoted the provisions of Order 1 rule 15 which required the defendants to obtain leave of the Court before adding 3<sup>rd</sup> parties. That the Applicants have not complied with this requirement; consequently prayer 2 & 3 of the application cannot issue. Similarly the plaintiff submits that prayer 6 which is seeking eviction orders cannot be granted through an interlocutory application. He therefore urged the Court to dismiss the application with costs.

8. From the record, on 24/10/2019 when the matter was set aside for hearing at 2.30pm it was reported to Court by Mr. Makokha counsel for the Applicants that Mr. Okeyo learned counsel for the plaintiff had no objection to the intended parties being joined to this suit as 3<sup>rd</sup> parties and not plaintiffs. The confirmation was made by Mr. Bogonko learned Counsel holding brief for Mr. Okeyo. Mr. Okeyo advocate cannot therefore submit on non-compliance of Order 1 rule 15 unless he applies to set aside the consent which he has not done.

9. On whether Order 6 of the application can be granted, no replying affidavit was filed to contradict the facts on how and when the parties against whom the eviction orders are sought entered the suit land. In the minutes of 7/10/2019 annexed by the applicant, it is not in dispute that all the Respondents attended this meeting. Minute 05 clearly proposed that the family were to seek Court orders to advise Mzee Ekapolon Auko to vacate the land until when the case is heard and determined in Court. That the family accepted to use the right channel to repossess the said land in question.

10. Since there is no rejoinder that the Respondents invaded the land on 8/10/2019 and constructed semi-permanent structures thereon and in light of the pendency of this case where the Applicants title is yet to be cancelled, the actions by the Respondents promote anarchy and are intended to defeat the cause of justice. The plaintiff's submission that eviction orders as sought cannot be granted at an interlocutory stage seems to encourage the proposition that parties who take law into their own hands should be protected by the same law they are intent on breaking.

11. It is in circumstances such as this that the law allows for mandatory orders to be granted at an interlocutory stage. In the Case of *Esther Wanjiku Mwangi & 3 others Vs Wambui Ngarachu (2017) eKLR*, J. G. Kemei quoted the Case of *Nandan Pictures Limited Vs Art Pictures & others Air 1956, Cal 428* which discussed the scope of mandatory injunction thus;

**“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the Defendant does that act and thereby alters the factual basis upon which**

**the plaintiff claimed his relief. An injunction issues in such a case in Order that the Defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the Defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit."**

**In *Shepherd Homes Limited Vs Sandahm Homes Limited V. Sandahm [1971] 1 CH. 34*, Megarry, J. stated:**

**"it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in Order to enforce a contractual obligation"**

12. The two decisions demonstrate that this court indeed has jurisdiction to grant orders couched in mandatory terms at interlocutory stage. The holding in the Nandan Pictures and Shepherds Homes Case was quoted with approval by the Court of Appeal in the Case of *Lucy Wangui Gachara Vs Munidi Okemba Lore (2015) eKLR* where the Court of Appeal stated that such orders should only be granted in the clearest of cases as it amounts to determination of issues in dispute in summary. In this case, the non-response by the 3<sup>rd</sup> parties in spite of being served means they have not raised any issued for determination by the Court. Further the orders are intended to restore the existing status quo as at the time when this suit was filed. The orders will restrain the plaintiffs and the 3<sup>rd</sup> parties from stealing a march.

13. In conclusion, I am satisfied that the applicants have made out a *prima facie* case to warrant the grant of the orders sought. Accordingly, I do allow the application in terms of prayer;

(4) Pending hearing and determination of the suit, an injunction is issued to restrain the Plaintiffs/Respondents, their assignees, agents and such other persons acting on their behalf including the 3<sup>rd</sup> parties from encroachment and trespass, into and occupation/possession of any part of Land Parcel No. SOUTH TESO/ANGOROMO/705.

(5) The plaintiff and the 3<sup>rd</sup> parties acts of 8/10/2019 of forceful entry and taking possession and occupation of L.R. No. SOUTH TESO/ANGOROM/705 before determination of suit is unlawful, illegal and null and void,

(6) The plaintiff and the 3<sup>rd</sup> parties are hereby ordered to vacate L.R. No. SOUTH TESO/ANGOROMO/705 within 21 days of this order or be forcefully evicted,

(7) Costs of the application awarded to the defendants/Applicants.

**Dated, signed and delivered at BUSIA this 11<sup>th</sup> day of December, 2019.**

**A. OMOLLO**

**JUDGE**



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