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Case Class:	Civil
Court:	Environment and Land Court at Busia
Case Action:	Ruling
Judge:	Hellen Amolo Omondi
Citation:	Raphael Onyango & 20 others v Agatha Nabwire Okello & 9 others [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Busia
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 22 OF 2020**

**RAPHAEL ONYANGO.....1<sup>ST</sup> PLAINTIFF**

**CORNEL BWIRE.....2<sup>ND</sup> PLAINTIFF**

**SELINA WAMBOI.....3<sup>RD</sup> PLAINTIFF**

**ALPHONCE MAIYAH.....4<sup>TH</sup> PLAINTIFF**

**MELKIO BANDA.....5<sup>TH</sup> PLAINTIFF**

**SAMWEL MAINA.....6<sup>TH</sup> PLAINTIFF**

**SYLVESTER OTIENO ONYANGO.....7<sup>TH</sup> PLAINTIFF**

**MICHAEL OSINYA.....8<sup>TH</sup> PLAINTIFF**

**SARAH OTWANI.....9<sup>TH</sup> PLAINTIFF**

**PAUL OKEYA.....10<sup>TH</sup> PLAINTIFF**

**DAN OCHIENG.....11<sup>TH</sup> PLAINTIFF**

**FATUMA BILLE.....12<sup>TH</sup> PLAINTIFF**

**BENARD SPENCER.....13<sup>TH</sup> PLAINTIFF**

**MONICA MUTANU.....14<sup>TH</sup> PLAINTIFF**

**ELISHA NGUGI.....15<sup>TH</sup> PLAINTIFF**

**EMMANUEL OLUOCH OKOTH.....16<sup>TH</sup> PLAINTIFF**

**WILLIAM ODHIAMBO.....17<sup>TH</sup> PLAINTIFF**

**DANIEL GICHERU.....18<sup>TH</sup> PLAINTIFF**

**OSCAR MUNYIRI.....19<sup>TH</sup> PLAINTIFF**

**GEORGE OKELLO.....20<sup>TH</sup> PLAINTIFF**

**CHARLES MWANGI.....21<sup>ST</sup> PLAINTIFF**

VERSUS

AGATHA NABWIRE OKELLO.....1<sup>ST</sup> DEFENDANT  
DENIS OGALLO OBANDA.....2<sup>ND</sup> DEFENDANT  
ROBERT ADUNGO.....3<sup>RD</sup> DEFENDANT  
CHRISTOPHER OKOU OMODING.....4<sup>TH</sup> DEFENDANT  
FLORENCE ANYANGO AYIEYE.....5<sup>TH</sup> DEFENDANT  
FLORENCE AMATI.....6<sup>TH</sup> DEFENDANT  
JACKSON ONYANGO MUBWEKA.....7<sup>TH</sup> DEFENDANT  
COUNTY GOVERNMENT OF BUSIA.....8<sup>TH</sup> DEFENDANT  
ESHIKHONI AUCTIONEERS.....9<sup>TH</sup> DEFENDANT  
  
THE HONOURABLE THE ATTORNEY GENERAL  
(sued on behalf of the Government of Kenya).....10<sup>TH</sup> DEFENDANT

**RULING**

1. For determination is the application dated 29<sup>th</sup> June 2020 brought under the provisions of order 40 Civil Procedure Rules and sections 1A, 1B, 3 and 3A of the Civil Procedure Act. The applicants seeks the grant of orders that;

**(a) That pending the hearing and determination of this suit, there be an order of injunction restraining 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants/respondents, whether by themselves, agents, servants and such other persons acting or claiming on their behalf, from trespassing onto, evicting the plaintiffs, demolishing the plaintiffs' business premises, alienating, using or in any other way interfering with the plaintiffs lawful, quiet and peaceful use and occupation of their designated business premises/stalls Numbers 62, 78, 63, 64, 65, 66, 67, 68, 77, 69, 70, 71, 72, 73, 74, 75, 79 built on parcel No. MR/61350 within Busia Town Busia County.**

**(b) That the Officer Commanding Busia Police Station to facilitate peaceful execution of this Order by the respondents.**

**(c) That the costs of this application be provided for.**

2. The application is premised on the following grounds;

*(i) That the plaintiffs are lawful occupants of business premises built on parcel number MR/61350 within Busia Town Busia County having been allocated the premises by the County Government of Busia.*

*(ii) That the plaintiffs as lawful occupants and owners of the business premises/stalls built on the said parcel of land have over the years dutifully paid to the County Government of Busia, all the charges and levies imposed by the County Government of Busia and variously secured licences and permits to carry out and operate businesses therein with the full authority and approval of the County Government of Busia.*

*(iii) That the respondents, while seeking to enforce and/or execute the order that was hitherto issued in case No. BUSIA CMCC No. 56 OF 2018, and which the plaintiffs/applicants were not party to, encroached into, initiated the process of eviction and demolition*

*of the plaintiffs' business premises that are completely beyond the limits of parcel Nos. BUSIA/MUNICIPALITY/303, 304, 305, 306, 307, 308, 310 and 311 in respect of which the orders of evictions were obtained and not the premises occupied by the plaintiffs/applicants.*

*(iv) That the actions of the defendants, who acted in concert with each other, is clearly irregular, unlawful, unjust and immoral to the extent that it has inflicted serious damage and loss to parties who were necessarily parties in BUSIA CMCC No. 56 of 2018 and whose business premises are completely beyond the confines of the parcels designated in the order obtained on 3<sup>rd</sup> June 2020 in BUSIA No. 56 of 2018.*

*(v) That the land and premises occupies by the plaintiffs does not belong to the 1<sup>st</sup> to 7<sup>th</sup> defendants/respondents and the evictions and demolitions of the plaintiffs property is therefore without basis in law and fact and the respondents are utterly in trespass and committing wanton destruction to property and have exposed the plaintiff/applicants to unwarranted loss and damage and are determined to proceed with further destruction that would escalate and exacerbate the loss and damage suffered by the plaintiffs'/applicants.*

*(vi) That in view of the above, is only fair and just that the defendants/respondents be accordingly restrained from causing further damage and loss to the plaintiffs/applicants unnecessarily on account of a matter that the applicants are not party to and the acts are no doubt malicious and executed with impunity and total disregard to the rights and interests of the plaintiffs/applicants as protected under the Constitution of Kenya 2010.*

*(vii) That the plaintiffs'/applicants continue to lose and are exposed to untold damage unless the respondents are accordingly restrained.*

3. The application is further supported by the affidavit of Raphael Onyango sworn on his behalf and on behalf of his co-applicants. He deposed that they are occupants and owners of businesses built on parcel No. MR/61350 within Busia town having been duly allotted by the 8<sup>th</sup> respondent (County Government of Busia). That the respondents while seeking to enforce the decree issued in Busia CMCC No. 56 of 2018 which case the applicants were not party to, initiated the process of evicting and demolishing the applicants' businesses' premises. That the said actions of the respondents were irregular, unlawful, unjust and immoral because the businesses premises were beyond the confines of the parcels designated in the order obtained on 3/6/2020. That it is only fair that the respondents be restrained from causing further damage and loss to the applicants. The applicants' annexed several documents were put to the supporting affidavit.

4. The application is opposed by all the respondents. The 1<sup>st</sup> – 7<sup>th</sup> and 9<sup>th</sup> respondents filed a replying affidavit sworn on their behalf by Denis Ogallo Obanda dated 15/7/2020. He deposed that they obtained an order in Busia CMCC 56 of 2018 to evict illegal occupants in their land reference numbers Busia/Mun/303 to 311. He attached a copy of the eviction order/decree. That on 22/6/2020, the auctioneer moved in as directed by the order and had the illegal occupants evicted. Mr. Ogallo deposed further that on being served with these pleadings, they wrote to the County Government through their advocates on record to ascertain the details of L.R No. MR/61350 referred to by the applicants. That the said office responded to their letter on 15/7/2020 stating that the land number does not exist in their records as per the letter annexed as *DOO4*. He stated that on account of this response, the applicants do not have a prima facie case and the orders prayed for overtaken by events as the eviction already took place.

5. The 8<sup>th</sup> respondent filed a Preliminary Objection that this suit is res judicata and grounds of opposition. The grounds stated thus;

*1) That the application herein makes reference to a purported parcel of land/plot Number MR/61350 which alleged parcel of land/plot does not exist in the 8<sup>th</sup> defendant's records.*

*2) That the suit herein is res judicata, as it is similar to BUSIA CMC ELC NO. 56 OF 2018 which has been heard and determined and the judgment delivered in the favour of the defendants.*

*3) That the application is therefore fatally defective and a pure abuse of the court process.*

*4) That the case does not disclose a cause and or any reasonable cause of action.*

6. The applicants filed a further affidavit sworn on 3<sup>rd</sup> August 2020 in response to the Respondents' pleadings. He deposed that the

land they are in occupation of is distinct from the Respondents plots as shown in the map they annexed as *ROI*. That the dispute involving the suit parcel and the parcels purporting to belong to the Respondents have been subject of intense investigations by the CID, National Land Commission and EACC as shown in the searches annexed as *RO2*.

7. The applicants and the 1<sup>st</sup> – 7<sup>th</sup> and 9<sup>th</sup> respondents filed their respective written submissions. The applicants have submitted that they have established a prima facie case because;

(a) *They were not parties to BUSIA CMCC 56 of 2018 hence the order issued therein should not affect them.*

(b) *They are occupants of L.R. No. MR/61350 allotted to them by the County Government which parcel of land is outside the boundaries of the parcels of land issued in the order.*

(c) *That it is agreed that the applicants' properties were extensively damaged in attempting to execute the eviction order.*

8. The 1<sup>st</sup> – 7<sup>th</sup> and 9<sup>th</sup> respondents on their part submitted that the application does not meet the threshold of granting an injunctive relief because the title number given does not exist hence there is no property to be protected. That the legal threshold of a prima facie case is set out under section 26 of the Land Registration Act. That there is no survey report to establish that the demolition extended into the applicants' premises during the execution of the orders issued in Busia CMCC 56 of 2018.

9. I have analysed the pleadings filed and the submissions rendered. The principles for granting an injunction are well cut out in law. It is imperative that the applicants must show that they have a prima facie case or that they are likely to suffer irreparable loss which cannot be compensated by an award of damages and/or that the balance of convenience tilts on their favour. It is pleaded that the respondents while executing a decree encroached on to L.R No. MR/61350 occupied by the applicants and which plot did not form part of the decree and that they proceeded to demolish the plaintiffs' businesses. The plaintiffs stated that their occupation of MR/61350 was with permission from the County Government sued here as the 8<sup>th</sup> respondent.

10. The documents annexed by the plaintiffs referred to allocation of kiosks built behind main market – location Township. The payment receipts from the 8<sup>th</sup> respondents and issued to the applicants are in respect of kiosks and they do not show any plot number. The sketch map attached to the further affidavit gives numbers of proposed kiosks ranging from numbers 58 to 79. The map does not indicate plot no MR/61350 neither does it show the numbers of the titles being claimed by the Respondent. Looking at this document, it is difficult to conclude that the parcel "occupied by the applicants is distinct from that of the Respondents".

11. The respondent stated in their grounds and the letter annexed as *DOO4* (in the 1<sup>st</sup> – 7<sup>th</sup> respondents replying affidavit) that the plot no MR/61350 does not exist in their records. For the plaintiffs to demonstrate that they have a prima facie case, they needed to have annexed a document showing that their kiosks were indeed built on MR/61350 not on the respondents' plots. The fact that the Respondents title are under investigation does not divest the Respondents of their rights until the investigations are concluded. Similarly, the investigations do not confer any rights to the applicants to be taken as prima facie proof of having a case with a probability of success.

12. The applicants deposed that the respondents' initiated the process of executing the decree (paragraph 5 of the supporting affidavit). In paragraph 7 of the further affidavit, Mr Onyango deposed that there was already damage suffered to their property which resulted in them making a report to the police. He also annexed pictures of demolitions that took place. The deponent fell short of disclosing to the court the extent the process reached. The pictures in my view corroborates the respondents' position that the application is overtaken by events as the eviction exercise was completed on 22/6/2020. If the eviction and or the demolitions and or destruction of the applicants' properties already took place, then there is nothing to stop pending determination of the suit. Whether the same was illegal or not can only be determined during the full hearing of this case. The applicants did not pray for mandatory orders granting any orders of temporary injunction would be an exercise of in futility.

13. Will the applicants suffer irreparable loss that cannot be compensated by an award of damages" I think not because they have pleaded specifically the loss suffered under paragraph 7 of the further affidavit and paragraph 12 of the plaint. The inference drawn is that the loss if any can be compensated by an award of damages together with an order for return to their premises.

14. On which does the balance of convenience tilt" I am persuaded to find that the balance of convenience tilts in favour of the respondents who already have a decree in their favour and which decree has not been varied and or set aside. It would be unjust to

stay the said decree through an interlocutory application however irregular or void it is.

15. In conclusion, I hold that the application dated 29/6/2020 is devoid of merit and is dismissed with costs in the cause. The interim orders earlier issued are herewith vacated.

**Ruling dated, signed and delivered at BUSIA this 17<sup>th</sup> day of September, 2020.**

**A. OMOLLO**

**JUDGE**



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