



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.61 OF 2008

DR. AJUOGA JOHN EDWIN

MILLICENT ABONYO OMOLO.....PLAINTIFFS

VERSUS

GEORGE ODERO MALANO

ELLY OCHILEN ODERO.....DEFENDANTS

R U L I N G

1. This is a ruling on a Notice of Motion filed here by the plaintiffs – **DR. AJUOGA JOHN ALWAR** and **MILLICENT ABONYO OMOLO** – on 22/10/2010. The application is brought against the defendants – **GEORGE ODERO MALANO** and **ELLY OCHIENG ODERO**. It is anchored on Section 3A of Civil Procedure Act and Order XXXIX rule 1 and 2 of Civil Procedure Rules.
2. The plaintiffs seek to have the defendants evicted from land Parcel No. **KISUMU/KOGONY/3511** registered in their names. It is sought that the police help in enforcing the order of eviction. The plaintiffs have also asked that costs be in the cause.
3. The grounds advanced postulate that the defendants have refused to heed eviction notices; and that the land belongs to the plaintiffs, and the defendants are trespassers.
4. The supporting affidavit shows, inter alia, that the plaintiffs bought the land from the defendants and went into possession. They fenced the land after survey but noted later that the defendants had gone into the land and constructed a house.
5. There were consultations during which an agreement to resurvey was reached. The resurvey was allegedly done and it was found that the defendants had encroached into the land. The defendants are said to be acting with impunity. The plaintiffs intention to develop the land is said to be hampered by the defendants interference.
6. The defendants filed grounds of opposition and stated, inter alia, that the suit is still pending and the rights of the parties are not yet determined; that the surveyor felt that the court should deal with matter and the court has not yet done so; and that the application is premature, misconceived and defective.
7. Both sides have filed submissions on the application.

The plaintiffs asked the court to grant the prayers sought. In deciding the application, the court was asked to look also at the other pleadings in the case. The defendants were said to be trespassing into the plaintiffs land.

8. The defendants submitted that an order of eviction is sought in the main suit. The suit has not yet been heard. It is therefore yet to be determined that the defendants are trespassers. The application is said to be seeking to obtain final orders at interlocutory stage. The court was asked to dismiss the application with costs.
9. I have looked at the application and the grounds of opposition. I have had a careful look at the submissions. I have looked too at the pleadings. To my mind, this is a misplaced and unmerited application. It is anchored on order XXXIX of Civil Procedure Rules. This order, as it existed then, dealt with injunctive reliefs. No injunctive relief is sought in the application. This is one of the reasons why the application is misplaced. The order sought and the law invoked are misaligned.
10. I also note that what is sought is an eviction order. The same order is sought in the main suit and the defendants have pointed this out. I think the plaintiff are trying to be ingenious in the irrational way. As counsel for the defendants has pointed out, the plaintiffs are trying to get final orders at the interlocutory stage. This comes perilously close to abuse of court process. One is tempted to believe that the plaintiffs are upto some mischief or that competence has eluded them.
11. No competent court of law would be quick to issue eviction order in a land matter before judgment is given. It is hard to understand why the plaintiffs should waste time seeking such an order at interlocutory stage, having sought it as a final order in the first place.
12. And looking at the pleadings, I note that the contention between the parties revolves the issue of what was sold to plaintiffs, which is 2 acres according to defendants, and what actually went to the plaintiffs ultimately, which is said to be about 4 ½ acres. This is a serious contention requiring canvassing by way of evidence. The plaintiffs are therefore trying to jump the gun by trying to obtain an eviction order before trial.
13. From the pleadings too, I note that the defendants have filed a defence and a counter-claim. I don't see reply to that defence and defence to counter-claim. As things stand therefore, the defendants still have the upper hand at this stage technically as the counter-claim is undefended.
14. When all this is considered, it is easy to realize that the plaintiffs are not only labouring under serious misdirection, but also that the application is misplaced, misguided, and completely lacking in merit. I hereby dismiss the application with costs to defendants.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

Before A.K. Kaniaru – Judge

Diang'a G. - Court Clerk

Parties absent

Onsongo for Respondent

Abuodha absent for Applicant

Interpretation: English/Kiswahili

COURT: Ruling on application filed on 22/10/2010 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

29/1/2015