REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.6 OF 2013

ARTHUR ATHANASIUS MOODY AWORI.....PETITIONER/APPLICANT

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE COUNTY DIRECTOR OF HOUSING, KISUMU.....2ND RESPONDENT

THE PERMANENT SECRETARY MINISTRY OF HOUSING...3RD RESPONDENT

R U L I N G

1. This is a ruling on a Notice of Motion filed contemporaneously with the suit herein on 18/4/2013. The suit concerns Land Parcel No: **KISUMU MUNICIPALITY/BLOCK II/136** which the respondents – **THE HON. ATTORNEY GENERAL** (1st Respondent), **THE COUNTY DIRECTOR OF HOUSING, KISUMU** (2nd Respondent), and **THE PERMANENT SECRETARY MINISTRY OF HOUSING** (3rd Respondent) – are said to be hellbent on wresting from the petitioner – **ARTHUR ATHANASIUS MOODY AWORI.**
2. The application is meant to forestal any such move before the suit is determined. Prayer 1 is already spent. What is relevant presently are prayers 2,3 and 4, which are as follows:

Prayer 2: A conservatory order in the nature of injunction be issued to stop the Respondents from evicting the petitioner from Land Parcel number **KISUMU MUNICIPALITY/BLOCK II/136** (hereafter the suit property) pending the hearing of the application/**PETITION.**

Prayer 3: A mandatory injunction do issue by way of conserving the petitioners right to property and directing the 2nd and 3rd Respondents to stop further issuance of any vacation notices to the petitioner in regard to the suit property pending the hearing and determination of the petition herein.

Prayer 4: Costs of this application be borne by the Respondents.

3. The application is premised on the grounds that the petitioner is the registered owner of the suit property and he has been issued with a vacation notice requiring him to move from the suit property.
4. There is a supporting affidavit accompanying the application in which the applicant depones, interalia, that the respondents move violates the applicant's property rights guaranteed under the Constitution of Kenya, 2010.
5. Articles 20,22 and 23 of the Constitution of Kenya 2010, Sections 7 and 19 of the 6th Schedule in the Constitution and Rules 20 and 21 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual High Court Practice and Procedure Rules, 2006) are invoked in bringing the application. But the main suit itself covers

broader aspects of the Constitution.

6. The response of the Respondents was through one **MICHAEL BEN OSEWE,** County Director of Housing, whose replying affidavit was filed on 26/6/2013. He deponed, interalia, that the suit property is still in the register as government property and that it has never been sold.
7. The applicant filed a supplementary affidavit reiterating his ownership of the suit property and explaining how he acquired it, a process he said was procedural and above board.
8. There was no viva voce hearing of the application. Submissions were filed instead. The applicant's submissions were filed on 7/11/2013 while the Respondent's submissions were filed on 24/2/2014.
9. The applicant submitted, interalia, that he has demonstrated his ownership of the suit property. He has also been paying rates. He urged the court to find he has established a primafacie case. The conservatory order sought is meant to ensure that the fundamental freedoms of the applicant, particularly as concerns property rights, are not rendered nugatory before interpartes hearing. To buttress this assertion, the applicant availed the case of **GLADYS BOSS SHOLLEI VS JUDICIAL SERVICE COMMISSION & 3 others: HCC NO.421/2013**. Also availed for further effect is **MILCAH JERUTO T/a MILCAH FAITH ENTERPRISES V FINA BANK LTD & Another: HCC NO.332/2012, NAIROBI**. Both these cases dealt with issuance of conservatory orders but in vastly different circumstances.
10. The respondents submitted that the suit property is owned by the government. The applicant was faulted for not showing the procedure he followed to acquire the property in question. In particular, the permanent Secretary, Treasury, is not shown to have sanctioned such acquisition, which is a mandatory prerequisite. The court was told that when the applicant was requested to avail his documents, he refused to do so. He also has not shown, it was asserted, that the acquisition was above board.
11. And the respondent is capable of compensating the applicant in case of loss, it was further asserted.
12. As things stand, the applicant has certificate of title and has demonstrated that he has been paying rates. The certificate was issued way back on 17/12/1998. Over 15 years down the line, the respondent is emerging to contest ownership. On the face of it, there seems to be indolence on the respondents part.
13. The respondent alleges that the applicant has not demonstrated that the process he followed to acquire ownership was above board. But I seem to see the applicant explaining in his supplementary affidavit how he acquired the property and asserting that the process followed procedure and was above board.
14. Looking at the situation, this is a case that would require maintenance of status Quo awaiting the outcome of the main suit. I am persuaded by the applicant's averments both in the application and in submissions that the matter is deserving of an injunctive conservatory order to run until hearing of the petition. The respondents arguments do not successfully counter the applicants averments. A primafacie case is well made out by the applicant. He has the title.
15. The respondent argued that the government is in a position to pay damages. I don't doubt that. But is it always the case that an injunction will never issue where damages can be paid? In **MUIGAI VS HOUSING FINANCE CO. OF KENYA LTD & Another (2002) 2KLR 332 Ringera J** (as he then was) made a finding that it was not an inexorable rule of law that where damages are an appropriate remedy, an injunction should never issue.
16. In **STEVE OUMA's** book "A commentary on the Civil Procedure Act Cap 21, **"SECOND EDITION,** Page 440, the author observes **"It is not settled, however, that where damages may be an appropriate remedy, an interlocutory injunction should never issue."**
17. In my view that is as it should be. If the issue of damages was to be held to override other considerations, rich institutions and entities like the government would never have restraining orders issued against them. They are almost always in a position to pay damages. This submission by the respondent is therefore rejected.
18. The applicant's erudite arguments however only suffice to grant prayer 2, which is for a restraining order to stop the respondents from evicting him during pendency of the suit in court. The applicant is not equally persuasive on the issue of mandatory injunction. True, he tried to urge a case for granting of this kind of injunction but its clear that considerations for granting this kind of injunction are different. The applicant must show a very real possibility of future

infringement of his rights and, in addition, also demonstrate that the ensuing damage would be of very serious nature. The applicant did not show this is my view.

19. In addition to the above, our local jurisprudence on mandatory injunction has set very high standards. In **BOYANI VS MWAGHOTI (2002) 2KLR 774,** it was held that a mandatory injunction at an interlocutory stage is granted only when the plaintiff's case is clear and incontrovertible.
20. In **SHOWRIND INDUSTRIES LTD VS GUARDIAN BANK LTD & Another: (2002) 2KLR 378,** it was again held that a mandatory injunction at interlocutory stage is granted very sparingly and only in exceptional circumstances such as where the applicants case is very strong and straightforward.
21. I have looked at the petition filed. I have also been able to glean the position of the respondents. It is not possible to say that the applicant's case is **"clear and incontrovertible" or "very strong and straightforward".** It is clear the applicant has a fairly serious contestation from the respondents.
22. The upshot is that while I am well persuaded to grant prayer 2 in the application, I am not equally persuaded to grant prayer 3, which is for a mandatory injunction. I therefore grant the applicant prayer 2 which is for a restraining order to stop eviction but decline to grant a mandatory injunction as prayed in prayer 3. Costs of this application have to await the outcome of the main suit.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

Before A.K. Kaniaru – Judge

Diang'a G – Court Clerk

No party present

Interpretation – English/Kiswahili

Lore for Hayanga for petitioner

M/s Esedi (AG's office) Absent

COURT: Ruling on application filed here on 18/4/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

29/1/2015