



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**LAND CASE NO.175 OF 2013**

**ADONIJA OBIAYO OBARA.....PLAINTIFF**

**VERSUS**

**SAMWEL PADE ODONGO**

**ELIZABETH AWUOR ODHIAMBO.....DEFENDANTS**

**R U L I N G**

1. The plaintiff – **ADONIJA OBIAYO OBARA** – felt aggrieved by the defendants – **SAMWEL PADE ODONGO** and **ELIZABETH AWUOR ODHIAMBO** – because of some activities said to be taking place on land parcels **KISUMU/KOWE/1985** and **KISUMU/RATA/1566**. The activities are attributed to 1st defendant but the 2nd defendant is also brought on board because she is said to have sold parcel No.1566 to 1st defendant.
2. The plaintiff then decided to sue the defendants and filed a suit vide a plaint dated 4/7/2013. He then felt the need to get restraining orders and filed an application for the same on 25/11/2013. The application is dated 21/11/2013 and is brought under Sections 3,3A of the Civil Procedure Rules, Order 40 rules 1,2,3, and 4 and Order 50 rule 1 of Civil Rules, 2010.
3. Four prayers are sought in the application but prayers (a) and (b) are moot at this stage. This ruling therefore concerns prayers (c) and (d), which are as follows:

**Prayer (c): That pending the hearing and determination of the suit, there be an order of injunction restraining the defendants either by themselves, their servants and/or agents or any other person authorized by them from entering, trespassing, disposing, cultivating, cutting trees, digging stones and/or carrying out quarry work on land parcel KISUMU/KOWE/1985.**

**Prayer (d): That costs of this application be provided for.**

4. The grounds advanced in support of the application stipulate, inter alia, that the defendants have trespassed on land parcel number **KISUMU/KOWE/1985** (Suit land hereafter) and started cultivating and carrying out quarry work on it; that they are also cutting trees; that the suit land belongs to the plaintiff; and that the plaintiff stand to suffer loss and damage if the orders are not granted.
5. The supporting affidavit accompanying the application largely reiterates the grounds. But the filing of replying affidavit by the defendants prompted the filing of further affidavit from the plaintiff which, inter alia, sought to explain that this application is in lieu of an earlier application filed by the plaintiff in person. The earlier application was said to have been defective and was therefore withdrawn. The further affidavit also sought to address the issue of **RES-JUDICATA**

- raised in the defendants replying affidavit.
6. The Defendants replying affidavit is dated 3/12/2013 and was filed on 4/12/2013. It was deponed, inter alia, that this application is premature as there is another pending application dated 4/7/2013 which the plaintiff has not yet prosecuted. According to defendants, the plaintiff is trying to re-litigate the earlier application in this application while the perceived weakness of the earlier application can be remedied vide a supplementary affidavit.
  7. The defendants further said that this application is **RES-JUDICATA**; apparently because the same issues arise in the earlier application.
  8. The replying affidavit tells some history. Parcel number **KISUMU/RATTA/1566**, which is adjacent to the suit parcel, was registered in the names of **SAMSON ODHIAMBO PANDE**, who is the late husband of the 2nd defendant. When Samson died, the 2nd defendant sought for letters of administration. The plaintiff objected to this but was overruled by Court and the 2nd defendant was granted the letters.
  9. According to the plaintiff, the 2nd defendant is not a beneficiary of deceased's estate; the beneficiaries are different people. It seems to me that the defendant understands the plaintiff to be seeking restraining orders in respect of parcel No.1566 also. He depones that the plaintiff has not demonstrated proprietary interests in the said parcel and should not therefore seek such orders.
  10. The plaintiff filed his submissions on 4/6/2014. He said he owns the suit land and is also claiming parcel number 1566. He submitted that the defendants acquired this parcel fraudulently. Further, he said that his title to the suit land has not been challenged. Such title is indefeasible, he said, and he has therefore shown a case with a probability of success. It was the plaintiff's position too that the fact of trespass and encroachment by the defendants has not been challenged and he therefore deserves to get the relief sought.
  11. The plaintiff denied that this application is **RES JUDICATA**. He cited the case of **KAGAI MWANGI VS EPHANTUS NAGARI MWANGI (2014) eKLR, KERUGOYA**, and emphasized that the major consideration is whether the matter alleged to have similar issues has been decided. He posited that his earlier application was never decided and **RES JUDICATA** therefore does not arise.
  12. According to the plaintiff, the fact that the defendants are cultivating and digging stones from the suit land amounts to waste of property. This will occasion irreparable loss.
  13. The balance of convenience is also said to be in favour of the plaintiff. The defendants acts are said to be causing a lot of inconvenience to the plaintiff. Their activities on the parcels are serious. It is therefore necessary to grant restraining orders.
  14. Two authorities were availed for guidance. **PAMELA NYAMUSI OBERI VS GILBERT NYASAGARE NDEEGE & ANOTHER; HCC NO.521/2012, NAIROBI – MILIMANI** deals with the need to grant injunction while **KAGAI MWANGI's** case (Supra) is supposed to illuminate the issue of **RES JUDICATA**.
  15. The defendant's submissions were filed on 30/6/2014. It was pointed out, inter alia, that the fact of the suit parcel and parcel No.1566 being adjacent to each other would not of itself constitute proof that the two parcels belong to the plaintiff. The defendant further submitted that the fraud alleged to attend the acquisition of parcel No.1566 has not been demonstrated.
  16. And as the plaintiff has not demonstrated his proprietorship of parcel number 1566, he is undeserving of a restraining order. The decided case of **DANIEL ATIBU JASIMBA VS AINEA SANDANYI MAGANA: HCC NO.104/2013, KISII**, was cited to reinforce this assertion.
  17. The second defendant's right to sell or transfer parcel No.1566 was defended. She is the rightful beneficiary, it was said, and can pass on a good title. In this respect therefore, the 1st defendant, who bought from 2nd defendant has a good title to parcel No.1566.
  18. It was the defendant's position too that the plaintiff can be adequately compensated by damages. He therefore does not stand to suffer irreparable loss. The decided case of **OLIVER SHADRACK MBALANYA VS JOHN ATINGO AMAYI: HCC NO.306/2013, KISII**, was cited in support of this view. Both **DANIEL ATIBU's** case (Supra) and **OLIVER SHADRACK's** case (Supra) were availed by the defendants.
  19. I have considered all the material laid before me. It is clear that the plaintiff is the registered owner of the suit land. The application at hand is concerned solely with the suit land and does not seek any temporary restraining order concerning parcel number **KISUMU/RARA/1566**. In spite of this however, counsel for the defendant made heavy weather of parcel No.1566 both in his

- replying affidavit and in the submissions. It was all misplaced effort. The subject matter in the application is not this piece of land; it is parcel No.**KISUMU/KOWE/1985** – the suit land.
- 20.The encroachment or trespass into the suit land by the defendants is also not denied. No assertion is made expressly in the replying affidavit or submissions to deny the encroachment or trespass. Instead, the focus has been on other issues; particularly parcel number 1566. This omission is glaring in view of the fact that the applicant even availed pictorial evidence to demonstrate encroachment.
  - 21.The defendant's counsel also raised the issue of **RES JUDICATA**. According to him, the fact that the plaintiff had filed an earlier application for restraining orders makes this application **RES JUDICATA** since the earlier application is still pending. But counsel misses the point here. Res Judicata has to do, inter alia, with a suit or application that is already decided; not a pending one. The fact of the matter is that the earlier application was replaced by this one; and it will not be prosecuted. It is note worthy that though counsel is referring to the earlier application, he didn't respond to it; he responded to this application. The orders sought to be confirmed were not issued on the basis of the earlier application but on this one. It is impossible therefore to agree with the counsel on this issue.
  - 22.It is required that there be consideration of the principles generally applicable in deciding whether to grant or refuse a restraining order. A prima facie case with probability of success is the first consideration. The second is whether the applicant will suffer irreparable loss which is not adequately compensable with damages. The third one is optional in the sense that it only comes into play when the court is in doubt. This third one is the balance of convenience. (**See Giella Vs Cassman Brown & Co. Ltd: (1973) EA 358**).
  - 23.The position of the defendants is that none of the requirements has been met. The defendant's counsel submitted that the plaintiff has not demonstrated any proprietary interest in parcel No.1566. He has therefore not established a prima facie case. For this, the decided case of **DANIEL ATIBU JASIMBA VS AINEA SANDANYI MAGANA: HCC NO.104/2013, KISII**, was offered to make the point. I have looked at this authority. I would need to say that the plaintiff did not need to demonstrate any proprietary interest in parcel No.1566. The orders sought are not for that parcel; they are for the suit parcel herein. The defendant's counsel seems to misapprehend the situation.
  - 24.For irreparable loss and inadequacy of damages as a remedy, defendant's counsel argued that the plaintiff will not suffer such loss. His loss is compensable, he argued. Counsel then availed the decided case of **OLIVER SHADRACK MBALANYA VS JOHN ATINGO AMAYI: HCC NO.306/2013, KISII**. A look at the authority shows that though Dulu J. found that damages were an adequate remedy, his major consideration in refusing to grant restraining order was that the applicant was ingeniously trying to get final in the suit in an interlocutory application.
  - 25.Counsel for defendant made no mention of the applicability of the principle of balance of convenience.
  - 26.Counsel for the applicant said that the requirements for granting injunction have been met. He pointed out the fact that the defendants have not denied trespassing into the suit land. He further pointed out that the plaintiff is the registered proprietor of the suit land. For these reasons, counsel said, a prima facie case is established. This is particularly so, he submitted, considering that the plaintiff has availed photos to show encroachment by the defendants. I agree with this observation.
  - 27.On irreparable loss and compensation in damages, the plaintiff's counsel observed that the defendants are cultivating the suit land and also digging stones. They have already caused damage and are likely to cause more damage if not restrained. I think a good point is made here. The land is being wasted and there is no telling how much more damage will occur if a restraining order is not brought to bear on the situation.
  - 28.Counsel for the plaintiff also said that the balance of convenience tilts in plaintiff's favour considering that the damage done is serious. I consider that I should not dwell on this principle as I have no doubt concerning the first two.
  - 29.The upshot then is that the plaintiff deserves a restraining order as sought in the application since he has demonstrated a prima facie case and shown the likelihood of suffering irreparable loss. The plaintiff's counsel has also ably pointed out the weakness of defendants response and offered a convincing rebuttal to the issue of **RES JUDICATA**. These are all things on which I agree with

the counsel.  
30.The application is therefore allowed with costs to the plaintiff.

**A.K. KANIARU – JUDGE**

**19/3/2015**

**19/3/2015**

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

No counsels present

Interpretation: English/Kiswahili

**COURT:** There is a Notice of delivery of the ruling herein today. The notice is dated 10/3/2015. Accordingly, ruling on application dated 21/11/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**19/3/2015**