



**REPUBLIC OF KENYA**

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

**ELC NO.237 OF 2013**

**TOM MBOYA OCHIENG** (Suing as the legal Rep. of the estate of  
**FATNATO OCHIENG OMBETE** alias **FOTONAYA OCHIENG**  
**OMBETE.....APPLICANT**

**VERSUS**

1. AHMED OGWEL AUMA
2. WERE OGUTU DEMBO
3. BENARD ONYANGO OBURE
4. GEORGE ODONDI ELIKANA.....DEFENDANTS

**RULING**

1. The plaintiff – **TOM MBOYA OCHIENG** – filed this suit here on 16/9/2013 alleging that the defendants – **AHEMED OGWEL AUMA, WERE OGUTU DEMBO, BENARD ONYANGO OBURE** and **GEORGE ODONDI ELIKANA** – had trespassed into land parcel No. **CENTRAL KARACHUONYO/KOGWENO KAWUOR/25** belonging to his deceased father – **FATNATO OCHIENG OMBETE**.

2. With the suit was also filed a Notice of Motion seeking, inter alia, restraining interlocutory orders. The Notice of Motion is the subject of this ruling. It was brought under Order 40 rule 1, Order 51 rule 1 of Civil Procedure Rules, Sections 1(a) 1(b) and 3A of Civil Procedure Act (Cap 21), and other enabling law.

3. Four prayers were asked for but prayers 1 and 2 are moot at this stage. For consideration now therefore are prayers 3 and 4, which are as follows:

**Prayer 3:** That pending the hearing and determination of this suit, this Court be pleased to issue a temporary injunction restraining the defendants, either by themselves, their servants, agents, employees or any of them from cultivating, constructing any building or in any other way interfering with the plaintiff's quiet possession and enjoyment of the land parcel afore stated.

**Prayer 4:** That the costs of this application be in favour of the plaintiff.

4. The grounds advanced in support stipulate, inter alia, that the parcel of land (suit land hereafter) is registered in the name of plaintiff's late father; that the defendants have trespassed and started some construction there; that the interests of justice require that the defendants be stopped; that the

application is made in good faith; and that the defendants stand to suffer no prejudice if the orders are granted.

5. The affidavit sworn in support of the application provides some background and history. The defendants have trespassed, it was reiterated, and repeated demands to make them vacate have not been heeded. The plaintiff undertakes to pay damages if unsuccessful and depones that he is bound to suffer irreparable loss if the defendants are not stopped.

6. The response to the application came via a replying affidavit filed here on 27/11/2013. The 4th defendant swore the affidavit and stated that he did so for himself and the other defendants. He deponed, inter alia, that the suit land belonged to the late father of the plaintiff. The father had 3 wives one of who was Elizabeth Obiero. Elizabeth had no children and when her husband died life became difficult. She then approached one Johnson Odidi Onyango, a locally known land agent, to look for a buyer for her portion of land in order to alleviate her suffering.

7. That is how the defendants came into the picture. They were approached to buy the land; but they insisted that other family members be involved in the purchase transaction. The eldest son in the late Fatnato's family explained to the various buyers that their late father had given out land portions to all the family members and each therefore had the right to do as they wished with their respective portions.

8. With this undertaking, the defendants then purchased portions of land from Elizabeth Ochieng, Dedan Ochieng, and Enos Magero Ochieng. In the course of time, Elizabeth passed on. The plaintiff and his family had designs on Elizabeth's land but could not do anything when Elizabeth was alive. This suit is meant to realize those designs. They reckon that if they get Elizabeth's land, they can kick out the defendants.

9. The 4th defendant's response elicited a further affidavit from the plaintiff. The plaintiff faulted the 4th defendant for not showing the authority of the other defendants allegedly granted to him to make a response. The plaintiff averred that it is a lie to say the late Elizabeth was suffering; he was supporting her, he said, and Elizabeth could not also sell land to anybody as the land did not belong to her.

10. The plaintiff also asserted that his late father had not sub divided the land. There has not been any succession too; therefore any alleged sale was illegal and void ab initio.

11. On 13/3/2014, it was agreed that submissions be filed in lieu of hearing. To this effect, the plaintiff filed submissions. To-date the defendants have not filed submissions.

12. The plaintiff's submissions are generally a recap of what the application and the affidavit availed in support thereof contain. Part of it also is a rebuttal of the defendant's averments in the replying affidavit. The plaintiff asserted that the defendant's averment that they bought the land cannot stand as the alleged seller had no Locus Standi to sell. It was stated too that the plaintiff has established a prima facie case and might also suffer irreparable loss.

13. I have considered the material laid before me by both sides. I agree with the plaintiff that the 4th defendant cannot purport to be acting for the others. He didn't avail authority to do so. Under Order 1 Rule 13(1) and (2) of Civil Procedure Rules 2010, such authority needs to be shown and it must be in writing.

14. I note too that the 4th defendant has attempted to avail sale agreements to demonstrate purchase of the land. I have looked at the agreements. They are two. The defendants are four. The agreements therefore do not tell the whole story; they do not show the whole picture.

15. It is crucial to note too that the defendants have not filed submissions. This omission gives the plaintiff an unassailable edge. Add to this the fact that the plaintiff has undertaken to pay damages. The plaintiff has the upper hand. He has met the requisite standards of proof.

16. When all is considered therefore, it is necessary to grant the plaintiff the prayers he is seeking. Accordingly, I grant the plaintiff the restraining order he is seeking in prayer 3. I also award him costs as sought in prayer 4.

**A.K. KANIARU – JUDGE**

**19/3/2015**

**19/3/2015**

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

Oyuko (absent) for plaintiff

Umaya (absent) for defendants

interpretation – English/Kiswahili

**COURT:** There is a notice dated 10/3/2015 to deliver the ruling herein today. Accordingly, ruling on application filed here on 16/9/2013 is read and delivered in open **COURT**.

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**19/3/2015**

AKK/vaa