



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND CASE NO. 59 OF 2014

JANE AKINYI SIMBIRI.....PLAINTIFF

VERSUS

LAWRENCE ORAO RABURU.....DEFENDANT

RULING

1. On 20/3/2014 the defendant herein – **LAWRENCE ORAO RABURU** – filed a Notice of Motion, the subject of this ruling, challenging orders issued in plaintiffs application filed here on 10/3/2014.
2. The plaintiff - **JANE AKINYI SIMBIRI** – had earlier on filed a suit and contemporaneously with the suit had also filed an application seeking, inter alia, temporary injunctive redress against the defendant. The court entertained the application Ex parte and granted a restraining order on 11/3/2014. That is the order that the defendant is challenging.
3. The defendants application is brought under Section 1A, 1B, 3 and 3A of Civil Procedure Act (cap 21), Order 40 Rule 7 of Civil Procedure Rules and other enabling law. Three prayers were sought but prayer one is now spent. That leaves prayers 2 and 3, which are as follows:

Prayer 2: That pending the hearing of the plaintiffs application dated 10/3/2014, the court be pleased to discharge, vary, or set aside its order given on 11/11/3/2014.

Prayer 3: That costs of this application be borne by the plaintiff.

4. It is clear that the defendants beef with the order is that enforcement is liable to render him and his family destitute and homeless. The disputed land is **KISUMU/KORANDO/219** (Suit Land). The defendant said he is in occupation yet the order issued outlaws even such occupation. The defendant averred that he and his family live on the suit land.
5. The defendant further said that the order was granted because the plaintiff withheld material information from court, in particular the fact of his open, peaceful, and uninterrupted possession of a portion for decades. He averred that he has overriding interests protected by law.
6. The plaintiff responded saying, inter alia, that she made full disclosure and that the defendant has no rights over the suit land.
7. The plaintiff said further that the defendant went to live with her family as an orphan then aged about 10 years. He, along with other children, were assisted by her parents.

He was not occupying any portion of the suit land and it is only in 1997 that she appointed him a caretaker. The defendant is said to hail from Karatenga where his mother was buried and where his family has land.

8. The defendant is said not to have a home on the suit land. What he has is a cluster of houses, some of which he rents out. And the defendant's occupation, the plaintiff further said, has all along been as an agent taking care of the land in plaintiff's absence. And being such, the question of acquiring prescriptive rights does not arise. All this is clear both from the responses made by both sides and from the submissions.
9. Two cases were cited by the defendant to guide the court. One is the local case of **PATRICK WEKESA MACHICHI VS RUTH NASAMBO WANYONYI: E& L No.361, NAIROBI** which dealt, inter alia, with the issue of non-disclosure. In the case Warsame J (as he then was) observed that a restraining order granted to an applicant can be discharged if the conduct of such applicant fails to meet the approval of the court that granted it. The other case was a Nigerian one, **UNIVERSAL TRUST BANK LIMITED VS DOL METSCH (NIGERIA LIMITED): Supreme Court of Nigeria: SC No.80/2002**, where the court highlighted circumstances in which the court can discharge or vary temporary restraining orders.
10. The plaintiff on the other hand took the position that the defendant has violated the restraining orders that were issued. And being in violation, he does not deserve to be granted audience by the court. The decided case of **MAWANI VS Mawani {1977} KLR 159** was availed to illustrate this legal position.
11. I have considered the materials availed, which include the application, the defendant's replying Affidavit, defendant's submissions and further submissions and also the plaintiff's submissions.
12. It is clear that the plaintiff is the registered owner of the suit land. The defendant was on the land through permissive arrangements but now claims to have acquired prescriptive rights. Such prescriptive rights however have not yet been declared as such by a competent court of law. Such rights therefore do not rank in pari-passu with those of a registered owner. They are secondary unless a court of law declares otherwise.
13. The plaintiff was faulted for not disclosing that the defendant lived on the land. But a careful reading of the plaint shows that the fact of the defendant being on the land is not hidden.

The plaintiff discloses that the defendant is on the land as a caretaker but is engaging in activities that are inconsistent with that role.

This same position is again clear in the plaintiff's affidavit sworn in support of her application.

14. But it is true that there is a manifest problem with the way the restraining order is worded. This is so given that the defendant and his family live on the suit land. The order as worded prohibits the defendant from remaining on the land and outlaws his entry and re-entry. This is obviously bound to cause hardship to the defendant given that he obviously has to go out and come back to his house.
15. When all is considered, the appropriate thing to do is not to discharge the order; it is only necessary to vary it so as to remove the aspects that cause hardship to the defendant. Accordingly, the order is varied by removing the aspects of **“entering” and “remaining upon”**. The defendant's application is successful to that extent. Otherwise, all other aspects of the order remain unchanged. Costs of the application will be in the cause.

HON. A.K. KANIARU

ENVIRONMENT & LAND JUDGE

30/6/2015

30/6/2015

A.K. Kaniaru J.

N.O. Oyugi court clerk

No party present

Interpretation English/Kiswahili

Onyango C. for plaintiff

Aboge for defendant

Court: Ruling on application filed on 20/3/2014 read and delivered in open court. Right of appeal 30 days.

HON. A.K. KANIARU

ENVIRONMENT & LAND JUDGE

30/6/2015