



No. 186

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 195 OF 2012

GRACE OBUYA OKUMU.....
PLAINTIFF/APPLICANT

VERSUS

EMELDA OTIENO ODIEMBO..... 1ST
DEFENDANT/RESPONDENT

JOHNSON MIJUANG'A ODHIAMBO..... 2ND
DEFENDANT/RESPONDENT

SOUTH NYANZA SUGAR CO. LIMITED.....
...3RDDEFENDANT/RESPONDENT

RULING

1. What is before me is the Plaintiff's application dated 6th June, 2012. In the application, the plaintiff has sought two principal prayers namely, a temporary injunction restraining the defendants' from cultivating sugar cane, harvesting sugar cane and/or in any other manner interfering with all that parcel of land known as **LR. No. South Sakwa/Kogelo/473** (hereinafter referred to only as "**the suit property**") pending the hearing and determination of this suit and a temporary injunction to restrain the 3rd defendant from paying for the sugar cane harvested by the 1st and 2nd defendants purportedly from the parcel of land known as **LR. No. South Sakwa/Kogelo/468A** (hereinafter referred to only as **Plot No. 468A**) which sugar cane has actually been harvested from the suit property. When the application came up for hearing on 11th July, 2013, the Plaintiff's advocate informed the court that he intended only to pursue the application as concerns the prayer that seeks to restrain the 3rd defendant from paying to the 1st and 2nd defendant the proceeds of sugar cane harvested from the suit property. The Plaintiff's application was supported by the affidavit of the Plaintiff sworn on 6th June, 2012. The Plaintiff's application was brought on the grounds that the Plaintiff and one, Obadiah Ambar Okumu, deceased were and are still the registered proprietors of the suit property. The Plaintiff who was the wife of the said Obadiah Ambar Okumu is the duly appointed administrator of the estate of the said Obadiah Ambar Okumu (hereinafter referred to only as ("**the deceased**"). At all material times, the deceased had engaged the 1st defendant as his care taker on the suit property. The Plaintiff has claimed that without the deceased and/or the Plaintiff's consent, the 1st defendant purported to lease the suit property to the 2nd defendant who in turn illegally without the Plaintiff's and/or the deceased's consent proceeded to enter into a sugar cane growing partnership arrangement with the

- 3rd defendant under which the 2nd defendant would grow sugar cane on the suit property and supply the same to the 3rd defendant. The Plaintiff claims that despite her protests the 1st and 2nd defendants have continued to trespass on the suit property and to harvest sugar cane therefrom which they supply to the 3rd defendant. The Plaintiff claims that the defendants' said activities on the suit property amounts to a violation of her right to peaceful and quiet enjoyment of the suit property.
2. The application was not opposed by the 1st and 2nd defendants. The 3rd defendant however filed grounds of opposition in response to the application. In its grounds of opposition, the 3rd defendant contended that the Plaintiff's application is incompetent, fatally defective, unmerited, frivolous and an abuse of the process of the court. During the hearing of the application, the plaintiff's advocate submitted that the plaintiff and the deceased have never sold the suit property to a third party. He submitted further that when the plaintiff visited the suit property, she found that the 1st and 2nd defendants had planted sugar cane thereon without their permission and that the 1st and 2nd defendants had been contracted by the 3rd defendant to deliver sugar cane harvested from the suit property to the 3rd defendant and that the 1st and 2nd defendants are being paid for the cane delivered under Plot No. 468 "A". He submitted that the 1st defendant who was only a caretaker of the suit property had no right to lease the suit property to the 2nd defendant. The Plaintiff's advocate submitted further that the arrangement that the 2nd defendant has entered into with the 3rd defendant under which the sugar cane harvested by the 2nd defendant from the suit property is supplied to the 3rd defendant was not approved by the Plaintiff. Counsel submitted that in the circumstances, it is only fair that the proceeds from the sugar cane harvested from the suit property and from Plot No. 486A be withheld pending the hearing and determination of this suit. Counsel submitted further that the sugar cane from the suit property was being delivered to the 3rd defendant under the pretext that it was coming from Plot No. 468A. He pointed out that the 3rd defendant had not sworn any affidavit to refute the existence of the contract between the 2nd defendant and the 3rd defendant for the supply of sugar cane. He submitted also that the 3rd defendant had not indicated that it had already released all the payments that were due to the 2nd defendant. The Plaintiff's advocate Mr. Onyango urged the court to grant payer 4 in the application.
 3. Mr. Nyambati, advocate who appeared for the 3rd defendant submitted that the Plaintiff's application did not meet the conditions set out in the case of **Giella vs. Cassman Brown**. He submitted that the Plaintiff had failed to demonstrate that she is the proprietor of the suit property and that the property is actually in existence. He submitted that a copy of the Land Certificate for the suit property that the Plaintiff had exhibited was insufficient for the purposes of proving ownership of the suit property. The 3rd defendant's advocate submitted further that the Plaintiff had failed to show the ownership of Plot No. 468A and to demonstrate that there was a contract between the 1st and 2nd defendants on the one part and the 3rd defendant on the other part under which the 3rd defendant was to receive sugar cane from Plot No. 468A. The 3rd defendant submitted further that the Plaintiff had not shown that the sugar cane allegedly supplied by the 2nd defendant to the 3rd defendant was from the suit property. He submitted that the orders sought are being sought in vacuum and as such the same should not issue. The 3rd defendant submitted that the plaintiff's application has no merit and that the same is merely intended to interfere with the 3rd defendant from discharging its obligations to its customers. He urged the court to dismiss the application with costs.
 4. I have considered the Plaintiff's application and the grounds of opposition filed in opposition thereto by the 3rd defendant. I have also considered the respective submissions by the advocate for the Plaintiff and the advocate for the 3rd defendant. The principles to be applied in applications for interlocutory injunction are well settled. An applicant for such order has to establish a prima facie case with a probability of success and has also to demonstrate that he will suffer irreparable loss unless the order sought is granted. If the court is in doubt as to the above, the court would decide the application on a balance of probability. See the case of, **Giella -vs- Cassman Brown & Co. Ltd. (1973) E.A. 358** that was cited by the 3rd defendant's advocate. It is not in dispute that the

Plaintiff is the registered proprietor of the suit property. The Plaintiff has exhibited a copy of Land Certificate dated 21st July, 1982 for the suit property in the names of the Plaintiff and the deceased. The said certificate shows that the Plaintiff and the deceased were registered as the proprietors of the suit property on 20th July, 1982. There is no material placed before this court which casts doubt on the Plaintiff's proprietorship of the suit property. As the proprietor of the suit property, the law accords the Plaintiff certain rights and privileges which cannot be taken away save as provided by law. **See, sections 24, 25 and 26 of the Land Registration Act, 2012 and Article 40 of the Constitution of Kenya, 2010.** The Plaintiff has claimed that the 1st defendant has unlawfully leased the suit property to the 2nd defendant and that the 2nd defendant has planted sugar cane on the suit property which it supplies to the 3rd defendant on maturity. As a result of these activities, the Plaintiff has claimed that the 1st and 2nd defendants have deprived her of possession, use and enjoyment of the suit property in violation of her rights aforesaid. The 1st and 2nd defendants have not filed any affidavit in response to the plaintiff's application. The Plaintiff's claim that the 1st defendant has unlawfully leased the suit property to the 2nd defendant and that the 2nd defendant has planted sugar cane thereon which it is supplying to the 3rd defendant under Plot No. 468 A is not controverted. The 3rd defendant did not also file any affidavit to controvert the Plaintiff's claim that it has a contract with the 2nd defendant for the supply of sugar cane under Plot No. 468 A. The 3rd defendant only filed grounds of opposition which merely raised points of law but did not answer the factual averments contained in the Plaintiff's affidavit in support of the application. Due to the foregoing, I am satisfied that the Plaintiff has demonstrated that the 2nd defendant has unlawfully entered the suit property and planted sugar cane thereon which it is harvesting and supplying to the 3rd defendant under Plot No. 468A. Since the Plaintiff is the registered proprietor of the suit property, the Plaintiff is entitled to possession of the suit property together with all developments thereon which includes the crops grown thereon together with the proceeds of the sale of such crops. It follows therefore that the injunction sought herein to restrain the 3rd defendant from releasing the proceeds of sugar cane supplied to it by the 1st and 2nd defendant which are harvested from the suit property but are being supplied under Plot No. 468A is well founded. Such injunction will preserve the proceeds of sale of the sugar cane said to have been harvested from the suit property pending the determination of the issue as to whether the said sugar cane originated from the suit property or otherwise and if it is from the suit property, whether the 1st and 2nd defendants had the right to plant sugar cane on the suit property. I am persuaded that if the injunction sought is not granted, the Plaintiff would suffer irreparable harm and the proceeds of sugar cane harvested from her parcel of land, the suit property, would be put beyond her reach.

5. The upshot of the foregoing is that the Plaintiff's application dated 6th June, 2012 is well merited. The same is allowed in terms of prayer 4. The 3rd defendant shall however be at liberty to recover from such proceeds any expenses that it may have directly incurred under the agreement that the 3rd defendant may have entered into with the 1st and 2nd defendant. The Plaintiff shall have the costs of the application.

Delivered, dated and signed at KISII this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Odhiambo h/b for Onyango for the plaintiff

N/A for the 3rd defendant

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE