



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NO.21 OF 2021 (0.S)

EDWARD ODUOR1ST PLAINTIFF

FREDRICK INDIRI2ND PLAINTIFF

MADALINE ATIENO.....3RD PLAINTIFF

DAMARIS AKETCH.....4TH PLAINTIFF

WAYNE MORIO.....5TH PLAINTIFF

MONICA AKINYI OMONDI.....6TH PLAINTIFF

JANET OWALA.....7TH PLAINTIFF

ABRAHAM OMONDI ONYANGO.....8TH PLAINTIFF

EDWIN JUMA.....9TH PLAINTIFF

VERSUS

GEORGE A. ODHIAMBO.....DEFENDANT

RULING

1. Within the provisions of **Sections 1A, 1B & 3A, 63(c) & (e)** of the **Civil Procedure Act** and **Order 40 Rule 2 (1) & (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules**, the plaintiffs filed a motion dated 19/01/2022 seeking several reliefs against the defendant. Prayers 1 and 2 are spent and the main prayer pending determination is as follows;

a) An interim order of injunction be issued restraining the defendant, his servants, agents, heirs and assignees and/or any other persons acting on his behalf from evicting the plaintiffs, demolishing structures, interfering, selling, charging, disposing and alienating or interfering with land parcel number EAST GEM/NYAMNINIA/736.

2. The motion is supported by grounds on the face of the motion together with a supporting affidavit of the 1st plaintiff sworn on 19/01/2022.

3. In response, the defendant filed a replying affidavit dated 28/01/2022 in which he contended: The suit was *res judicata* having been heard and determined in **Kisumu High Court in Civil Case No. 197 of 1992** and was at the execution stage and that the plaintiff's application for leave to appeal against the decision of **Kisumu High Court in Civil Case No. 197 of 1992** was disallowed by the **Court of Appeal in Kisumu Court of Appeal Civil Application No. E 056 of 2021**.

Plaintiffs' written submissions

4. The plaintiffs filed written submissions dated 31/01/2022. They submitted that they had met the principles stipulated in the case of **Giella vs Cassman Brown and Another [1973] E.A.358**. On the 1st principle of establishing a *prima facie* case with probability of success, they contended that they had been in open, notorious and uninterrupted occupation of the suit property for a period of over 12 years. They placed reliance on the case of **Mrao Limited v First American Bank of Kenya Limited [2003] eKLR**. On the 2nd principle of whether the applicants could be compensated by an award of damages, they contended that they had been born and raised on the suit property and held a sentimental value to it and hence they could not be compensated by an award of damages. On this they relied on the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR**. On the third principle of balance of convenience, they

contended it tilted in their favour and on the last principle they asserted that the suit was not frivolous, vexatious, embarrassing or intended to delay fair trial.

Defendant's written submissions

5. The defendant did not file written submissions to the motion.

Analysis and determination

6. Having considered the motion, supporting affidavit, annexures, replying affidavit and plaintiff's submissions, this court is of the considered view that the only issue falling for determination is whether the application is an abuse of the court process.

I will proceed to analyze the legal and jurisprudential framework on the single issue.

7. The black law dictionary defines abuse of process as thus;

"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope"

8. The plaintiffs filed a motion dated 8/10/2021 seeking leave to amend the originating summons dated 15/04/2021 on the ground that it was tainted with inadvertent defects and typographical errors. The parties compromised the motion and allowed the plaintiffs to file an amended originating summons. Contrary to the provisions of **Order 8 Rule 7** of the **Civil Procedure Rules**, the plaintiffs filed fresh originating summons by substituting all the plaintiffs in the suit as opposed to an amended originating summons.

9. Shortly thereafter, they filed the instant motion. Save for the plaintiffs, the motion is a replica of a motion dated 15/04/2021 that has never been prosecuted by the plaintiffs to date.

10. The mere addition of parties in a suit does not render the previous motion moot. For as long as the motion had not been withdrawn or determined, the plaintiffs were barred from moving the court in a similar motion. The underpinnings of civil process are to ensure the just determination of civil actions in a manner that are not unjust, delayed and expensive.

11. The plaintiffs have presented the same issues which are the subject of litigation and it may lead into a bad scenario of not only having parallel proceedings on the same issues but also a great risk of issuing conflicting orders and in the circumstances the court finds that the instant motion is an *abuse* of the court process, *frivolous* and *vexatious and I need not say more*. It is trite law that costs follow the event and in the absence of intervening circumstances, I award costs to the defendant. *Ultimately I make the following disposal orders;*

a) The Notice of Motion dated 19/01/2022 is hereby dismissed with costs to the defendant.

b) Matter to be mentioned for directions on the 10/05/2022.

12. It is so ordered.

RULING DELIVERED VIRTUALLY. DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MARCH 2022

In the presence of:

Mr. Ochieng h/b for Odinga for the respondent

Mr. Sala for the applicant

Court assistant; Ishmael Orwa

HON. A. Y. KOROSS

JUDGE

17/3/2022