REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO.135 OF 2012

EMILY SLYVIA JUMA SONYE.....PLAINTIFF

VERSUS

MERCEY ODINDO

DR. JACK KAMIRUKA

MUNICIPAL COUNCIL OF KISUMU.....DEFENDANTS

R U L I N G

1. By an application filed on 14/12/2012 and dated 10/12/2012 the plaintiff/Applicant (hereafter applicant) – **EMILY SYLVIA JUMA SONYE** – seeks various orders against 1st and 2nd defendant/Respondents (hereafter 1st and 2nd Respondents – **MERCY ODINDO** and **DR. JACK KAMIRUKA.**
2. The orders sought at this stage are:

That pending hearing and determination of this suit an interlocutory injunction do issue restraining the 1st and 2nd Respondents by themselves, their agents, servants, employees and/or representatives or by whomsoever else from trespassing, continuing to trespass, fencing, continuing to fence, constructing, continuing to construct, damping building materials, planting trees, or erecting any structures or planting any fixtures on Land Parcel No. L.R 16622 situated within **KANYAKWAR** area within **KISUMU** Municipality.

- That the applicant gets costs of the application.

3. The application is a Notice of Motion brought under Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21) and Orders 51 rules 1 and 3, 40 rules 1(a), 2(1) of Civil Procedure rules (2010), Sections 23(1) of Registration of Titles At (Cap 281) now repealed as read together with Sections 105(b) (1)of Land Registration Act, 2012 and of Article 40 of the Constitution of Kenya 2010. It is premised on the grounds that the applicant is the registered proprietor of LR 16622 (Suit land hereafter); that the 1st respondents have trespassed upon the suit land and fenced it off. They have also started construction allegedly with the authority of 3rd respondent. The 1st and 2nd respondents are said to have exposed the applicant to irreparable loss and damage and all the principles applicable to granting of injunctive relief are said to be in her favour.
4. A supporting affidavit accompanying the application reiterates some of the grounds. It also explains that the applicant purchased the suit property from the previous owner – **MILKA AKINYI LWANDE** – after following all due process. Later on however, she was shocked to learn that someone had descended on the land, fenced part of it, constructed an iron structure, and even planted some trees.

5. The applicant first tried to involve the police to ward off the trespassers but her efforts didn't pay off. She then fenced her land and put up a site house. The 3rd Respondent is however said to have removed or ensured removal of the applicants fence and structure.
6. Investigations revealed that the 2nd respondent was behind the encroachment and had the support of 3rd Respondent. But that was not all. The 1st Respondent also emerged. She quickly started construction of flats on the suit land. She too had the support of the 3rd Respondent.

7. The applicant made efforts to stop what was going on but she was unsuccessful and hence her recourse to this **COURT.**
8. The 1st Respondent filed a replying affidavit dated 16/1/2013. She said she bought her parcel of land No.**54 SG KISUMU/MAMBOLEO** from **SAMSON OMONDI CHILO**. She bought the land, she deponed, after conducting due diligence and establishing the seller as the legal owner.
9. The 1st Respondent stated that she is an innocent purchaser for value without knowledge or notice of previous ownership. She has since been paying rates and has constructed a permanent building on the land. She, not the applicant, would suffer irreparable loss as she has developed the land by constructing a complete permanent house, fencing, and planting trees.
10. The 2nd Respondent filed his replying affidavit. The Replying affidavit is dated 16/1/2013 just like that of 1st Respondent.
11. The 2nd Respondent said he bought his parcel of land from one Collins Otieno Omollo in the year 2010. His land is parcel No.**375 SG KISUMU/MAMBOLEO**. He conducted due diligence and bought the land upon confirmation of legal ownership.
12. The 2nd Respondent said he is an innocent purchaser for value without knowledge or notice of previous ownership. He has developed the land, he deponed, and he, not the applicant, stands to suffer irreparable loss as he has developed the land by fencing, planting trees and putting up a temporary structure.
13. The 3rd Respondent, though not targeted by this application, also filed a replying affidavit. Through its clerk – **CHRISTOPHER O. RUSANA -** it deponed that the applicant, without consultation with 3rd Respondent, purchased land that had already been repossessed and reallocated. The repossession, it was explained, was done because the previous owner – **MILKA AKINYI LWANDE** – failed to develop it more than 10 years after allocation, which was contrary to terms and conditions of allocation.
14. The repossession is said to have taken place prior to the purported purchase of the land by the applicant. The 3rd Respondent is also of the view that its decision should be challenged by way of judicial Review, not injunctive suit.
15. To counter the Respondents responses the applicant filed a further affidavit on 17/4/2013. she talked of the 1st Respondent being warned against developing the suit land. She also said that 2nd respondents land is part of her land and is actually referred to by a surveyor she called to survey the land. And she faulted 3rd Respondents assertion that the challenge to ownership should come only by way of judicial review. Courts have been known, she said, to issue declarations including order of repossession of land in appropriate cases. She reiterated her readiness to develop the land.
16. This application was not heard; submissions were filed instead. The applicants submissions were filed on 19/9/2013. After stating the principles applicable in granting injunctive relief and emphasizing the need for their sequential evaluation, learned counsel for applicant said the applicant has established a prima facie case with probability of success. She demonstrated, it was submitted, that she is the registered proprietor of the suit land. She did this, it was said, by availing copy of grant, copy of transfer and customer transaction voucher for land rent payment. This being the position, her rights are sacrosanct and indefeasible. The court is then enjoined to consider whether the applicant's rights have been violated to warrant calling the respondents to make a rebuttal. The decided case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD (2003) KLR 125** was cited as articulating the position. And **DAIMA BANK LTD & 2 OTHERS VS H.K. OSMOND: NRB CA NO.82/98** was availed to show that allegations not rebuttable by way of affidavit evidence can be the basis of granting an injunction.
17. The Applicant submitted that the various documents availed show that 1st and 2nd respondents got their parcels of land after nullification of the ownership of the previous owners and subsequent re-allocation by the 3rd respondent. It was a process later disowned by Commissioner of lands.

Consideration of all this shows, it was submitted, that the applicant has established a primafacie case.

18. The applicant is also said to be likely to suffer loss which is not compensable in damages. She is the sole registered proprietor of the suit parcel. She is entitled to enjoyment of that property. The invasion by respondents has denied the applicant the chance to enjoy her proprietary rights. The resultant damage is said to be irreparable and no amount of damages can adequately compensate it.
19. The balance of convenience is also said to tilt in favour of the applicant. It is observed that the parties are making rival claims of ownership. But the 1st and 2nd respondent's derive their alleged ownership from allocation by 3rd Respondent. That allocation is said to have been disowned by the Commissioner of lands. That being the position, the balance of convenience is said to tilt in favour of the applicant.
20. The assertion that the 1st and 2nd respondents are bonafide purchasers for value without notice is faulted on the ground that their ownership is traceable to 3rd respondent and 3rd respondent had no power to nullify title to land and repossess it. The 3rd respondents action is said to be illegal and unjustifiable.
21. The 1st and 2nd Respondents' submissions were filed on 19/9/2013. It was submitted that the 1st ad 2nd respondents are the rightful owners of their respective parcels of land. Further, it was said that no evidence has been availed to confirm that the respondent's land parcels were part of or were subdivided from the suit parcel.
22. The 1st Respondent in particular is said to have put up a permanent building on her parcel of land. She is in occupation and it would not be just to restrain her in the manner asked for.
23. It was reiterated that the 1st and 2nd Respondents are innocent purchasers. They didn't participate in the repossession of the suit parcel by 3rd Respondent. A primafacie case is therefore said not to be established against them.
24. On the issue of irreparable loss the applicant is said not to have demonstrated the nature of irreparable loss she is likely to suffer. The respondents are not said to intend to dispose of the suit land or sub divide it. The suit land is said to have been lying idle before the 1st and 2nd respondents came to the scene. Nothing shows the applicant has ever attempted to develop it. The court was told therefore that there is no loss that the applicant may suffer which is not compensable in damages. If anything, the respondents further submitted, it is the respondents who are likely to suffer more as they have already developed their parcels. Their developments are likely to go to waste, it was alleged.

25. The balance of convenience is said to favour the respondents. The applicant is said not to have been paying rates and she only paid when she noticed that this suit was imminent. The respondents on the other hand have been paying rates all along. The implication here is is that the applicant has not been a dutiful rate payer.
26. The 3rd Respondent also filed submissions. The submissions are dated 19/9/2013 and filed on the same date. It was submitted that the applicant has not shown a primafacie case with a probability of success. She also would not suffer loss that cannot be compensated in damages.
27. I have considered all the material laid before me by both sides. It appears to me that the genesis of the applicant's problems is the alleged repossession of the suit plot by the 3rd respondent. The 3rd respondent alleges that the repossession took place even before the applicant came to the scene. The applicant is said to have bought the suit land from the previous owner without checking first with the 3rd respondent to confirm position as to ownership.

28. It seems to be the case that the suit land was repossessed along side others in the same general area. It seems to be the position of the 3rd respondent that repossession came about because of the previous owners' failure to develop the parcels of land. At least for the applicant, that is the reason proffered for repossession.
29. I have looked at the various grants that have been availed to prove ownership. It seems to be the position of the granting authority that the grant is not unconditional and its continued ownership by any grantee was subject to payment of requisite annual rates, subject to provisions of Government Land's Act, and subject to a raft of special conditions spelt out in the grant. One of the conditions is availing of the development plans of the land within six months of the grant and

completion of the implementation of the development plan within 24 months of the grant.

30. The applicant has not availed such development plan or shown that any such development is on site. When the 3rd Respondent therefore alleges failure to develop the suit land for over 10 years that allegation makes sense. When the 1st and 2nd respondents also alleged lack of demonstration of the requisite payment of rates by the applicant, that makes sense too.
31. The Respondents have also said that they are innocent purchasers for value without notice of possession or ownership of the suit plot by the applicant. It seems clear that repossession of the suit land took place long before the 1st and 2nd respondents became owners. Though the 3rd respondent seem to vouch for allocation of the part of land to 2nd respondent, the 1st and 2nd respondents demonstrate well that they purchased their land parcels from previous owners. The applicant seems to have no beef with the previous owners. She has not complained against them. If anything, it is such previous owners who have filed an application in this suit to be enjoined as parties in order to explain their side of the story (See the application dated 13/6/2013 and filed on the same date). The 1st and 2nd respondents therefore didn't take away the applicant's rights over the suit property. They found such rights already vested in others from whom they bought their parcels.
32. The allegation by the 1st and 2nd respondents therefore that they are innocent purchasers for value without notice therefore sounds true. They have not been shown to have colluded with the 3rd respondent and they availed copies of land sale agreements demonstrating their purchase of the land parcels.
33. It has also been alleged by the 2nd respondent that she has already developed her portion. She lives on it. She has put up a permanent house. She has fenced and planted trees. It seems to me therefore that some of the acts that the respondents are sought to be restrained from doing have already taken place. In particular, it would be difficult to apply the order against a person who is already in occupation. And such occupation has not been seriously controverted.
34. It would also appear that the 1st and 2nd Respondents have not occupied or owned the whole of the suit land. The suit land seems to have been sub-divided. Some portions of it seem to be owned by others. In fact the applicant, at paragraph 19 of her supporting affidavit, talks of 3 people having descended on her land. The restraining order as worded seem intended to apply to the whole suit parcel. A question arises: What about the portions not owned by the 1st and 2nd Respondent? Why should the owners of other portions be affected yet they are not parties to this suit?
35. Considerations of all the highlights already stated persuade the court that the applicant has not established a primafacie case. There are crucial areas of concern that are not adequately addressed or not addressed at all.
36. It would appear that the applicant is of the position that she would suffer irreparable loss if the restraining order is not grated. Both sides have advanced reasons for and against this position. I have considered the reasons. I note that the suit land was not developed in any way. The 3rd Respondent is a government entity. It can pay damages. Without any evidence of any development by the applicant on the suit land, it becomes difficult to persuade that damages are not an adequate remedy. I am not persuaded that there is any irreparable loss that would not be adequately catered for by an award of damages. I am unable therefore to accept the applicant's submissions on this issue.

37. The final considerations is that of balance of convenience. On this, I consider that even before the alleged repossession of the suit land by the 3rd respondent, the applicant's hold on the same was tenuous. I take this position because she has not shown she was dutifully paying rates and she has also not shown she had submitted development plans as required. Contrast this with the 1st and 2nd respondents who have demonstrated payments of rates, have developed their parcels of land, and have submitted development plans. It does not require much persuasion here to take the position that when all is considered, the balance of convenience does not lie in favour of the applicant.
38. The upshot, after all the observations heretofore, is that the application herein lacks merit and the same is dismissed with costs.

A.K. KANIARU – JUDGE

29/5/2014