



**REPUBLIC OF KENYA**

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

**LAND CASE NO.33 OF 2013**

**EUNICE OMWANZA.....PLAINTIFF**

**VERSUS**

**THE MUNICIPAL COUNCIL OF KISUMU.....DEFENDANT**

**RULING**

1. The Plaintiff/Applicant (Applicant hereafter) – **EUNICE OMWANZA** – filed this application here against the defendant/Respondent – **THE MUNICIPAL COUNCIL OF KISUMU** (Respondent) – on 7/2/2013. Together with the application was filed a suit, which forms the substratum.
2. Essentially the Applicant seeks a restraining order against the Respondent whom she accuses of illegally wresting ownership of Land Parcel: **KISUMU MUNICIPALITY L.R. NO.21610** and **L.R 136203** measuring 0.1379Ha from her. The restraining order is sought to restrain the Respondent, by itself, its agents, employees or any other person deriving authority from it from entering, wasting, damaging, alienating, claiming, sub-dividing, allocating, repossessing, or in any way interfering with Applicant's quiet possession, ownership, and occupation of the parcel aforesaid, which is situated along Kanyakwar area along **KISUMU/MIWANI** road. It is also sought that O.C.S – Kondele police Station do assist in compliance of the order and that costs of the application be provided for.
3. The application is premised on the grounds that **KISUMU MUNICIPALITY L.R.NO.21610** and **I.R. 136208** (hereafter the suit land) is registered in the name of the applicant; that the Respondent has entered purporting to repossess, sub divide and allocate it to third parties without Applicant's permission; that if the Respondent is allowed to do that the applicant will suffer irreparable loss; and that the respondents actions amount to interference with the Applicant's property.
4. The applicant swore a supporting affidavit where she states, interalia, that she owns the suit land; that the Respondent entered the suit land in December (year not stated) without her permission, and purported to sub divide it and allocate it to 3rd parties; that the suit land was awarded to her by Commissioner of land, and the Respondent therefore lacked authority to do what it purported to do; that the Respondents acts are illegal and amount to interference with private property; and that she stands to suffer irreparably if the restraining order is not granted.
5. The Respondent opposed the application vide Replying affidavit filed on 27/2/2013 and dated 26/2/2013. It was stated, interalia, that the suit plot was repossessed from the Applicant for failing to develop it for over 18 years; that the Respondent, after a council meeting, resolved to dispossess her and thereafter advertised the suit land for allocation to other parties; that the plaintiff's application is overtaken by events, is an abuse of court process, and is lacking in merit; that the Applicant has not shown any building plans to show attempt to develop the land; and that the Commissioner of Lands lacks Locus to reinstate the Applicant vide this suit as the matter was

- procedurally gazetted.
6. The application is being disposed of by way of written submissions. No hearing therefore took place. The Applicant's submissions were filed on 24/9/2013 while those of the defendant were filed on 27/5/2013. A look at the submissions is necessary.
  7. The Applicant's submissions state, inter alia, that the applicant is the owner of the suit land, having so become after the Commissioner of lands allocated it to her and issued her with the requisite documents. Besides, she has been paying all the rates to the Respondent.
  8. Then come December 2012 and the Respondent purported to repossess the suit land in the mistaken belief that it owned it. The applicant's argument is that since the Respondent is not the allotting authority it cannot purport to dispossess.
  9. And the Commissioner of land's office is said to have had correspondence with the Respondent clearly stating that the Respondents purported exercise of authority to repossess plots in that general area was without legal basis and therefore illegal. The court was therefore asked to allow the application.
  10. The Respondent pointed out the requirements necessary for in applications for injunctive relief. The requirements are that there be a prima facie case with a probability of success, that the applicant demonstrate the possibility of suffering irreparable harm and ultimately that the court considers the balance of convenience in case of doubt as to the fulfillment of the first two. The requirements, it was pointed out, were well articulated in the decided case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 258**. The Respondent herein emphasized the need for sequential consideration of the requirements. That would mean that you don't go to the second without considering the first and you don't consider the final one without considering the first two.
  11. It was pointed out that the Applicant was allocated the suit plot in 1994 and one of the conditions was that she had to develop it. She had to do so within 2 years failing which she risked being dispossessed. The applicant didn't develop the land for more than 20 years.
  12. That being the case, the Respondent became legally entitled to repossess the suit land. Due process was then followed and the Applicant was dispossessed.
  13. The Respondent was also said to be a local authority and therefore a government entity. No injunction therefore can easily issue against it.
  14. An argument was also advanced that the Applicant should have had recourse, if at all, against the Respondent by way of judicial review. Her application is termed inept, vexatious, frivolous and an abuse of court process. The decided cases of **NATIONAL HOUSING VS NAIROBI CITY COUNCIL & ANOTHER HCC NO.404/1998** and **ALI & 3 others VRS CITY COUNCIL OF NAIROBI: HCC NO.820/03** were availed as suitable guides.
  15. I have considered the application as filed, the replying affidavit, submissions of both learned counsel, and the decided cases availed. I have also looked at the plaint and the statement of defence.
  16. I have had occasion to consider past applications of this kind concerning suit parcels situate in the same general area as the suit land herein. In particular, I considered such application in **RICHARD OYARO WOFA VS PHILIP ANAYO & 2 others: HCC NO.145/2012, KISUMU**, and **RISPER AUMA OKOTH VS ANGELINE AUMA ODERA: HCC NO.140/12, KISUMU**. In both cases, I held that damages would be an adequate remedy.
  17. These matters seem to be on all fours with this one and no good reason has been proffered by the applicant to warrant a departure from the position espoused in the two cases.
  18. Besides, I am persuaded by the cases availed by the Respondent that the Respondent's decision which is being challenged should invite a judicial Review application, not proceedings that seem not to appreciate that the Respondent is a public entity.
  19. It is also not lost on me that the Respondent is a government body and injunctive orders are not easily to be issued against it.
  20. I have also considered the circumstances as emerging in what was availed. I give also due consideration to the arguments availed by both sides. I am constrained to observe that the applicant does not appear to have made out a prima facie case. She has not demonstrated too that damages would not suffice as a remedy. I am not also persuaded that the balance of convenience is in her favour. She appeared to have treated the allocated land as one for keeping, not development.

21. Bearing all this in mind, the applicant's application herein is found unmeritorious and the same is dismissed with costs.

**A.K. KANIARU – JUDGE**

**29/5/2014**

**29/5/2014**

A.K. Kaniaru – Judge

Dianga George – Court Clerk

Plaintiff – Present

Defendant – Absent

Interpretation – English/Kiswahili

Rodi for Respondent

Lakewa for Ken Omolo for applicant

**COURT:** Ruling on application filed on 7/2/2013 read and delivered in open COURT.

Right of Appeal – 30 days

**A.K. KANIARU – JUDGE**

**29/5/2014**