



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO. 77 OF 2008

BERNANDETA ATSIENO WESONGAPLAINTIFF

V E R S U S

JOSEPH M. SAKWA1ST DEFENDANT

HUMPHREY N. MAPESA2ND DEFENDANT

JUDITH U. KIMANYALA 3RD DEFENDANT

DORICE A. ODERO 4TH DEFENDANT

AMBROSE A. OPESO5TH DEFENDANT

JAMES A. OPESO6TH DEFENDANT

NEREA A. ODOCK7TH DEFENDANT

R U L I N G

The plaintiff herein filed her application dated 14.12.2012 seeking several orders including orders for injunction restraining the defendants from dealing with the suit properties. The application was filed under certificate of urgency and on 31.1.2013 the same was listed for hearing for 27.2.2013. The application was granted as prayed ex-parte in terms of prayer (b), (c) and (e). This triggered the filing of two applications dated 14.3.2013 and 20.3.2013 respectively by the defendants. The two applications were heard together.

The applications seek to set aside the ex-parte orders made by the court on the 27.2.2013. Mr. Fwaya, counsel for some of the defendants argued both applications on behalf of his clients and those of Mrs. Chungu advocate. The plaintiff filed a replying affidavit sworn on the 6.5.2013 opposing the applications. It is contended that the matter was listed for mention and not hearing and therefore counsels for the defendants did not attend court as the matter was not cause listed. Some of the defendants were not original defendants and had been enjoined through the application for amendment of the plaint and therefore were not parties to the suit yet an order of injunction as granted against them. The plaintiff acknowledges that the defendants are in possession. There is also a court order by the same court issued on the 9.10.2010 allowing the defendants to enter into contracts with cane millers which order has not been set aside. The plaintiff did not disclose that to the court. There is also the decision of the Land Disputes Tribunal that was in favour of the defendants and the plaintiff filed Judicial Review No. 17 of

2012 trying to quash the decision of the tribunal but the same was dismissed. There are also some orders issued by the court in Mumias in favour of the defendants which have not been set aside. The defendants contend that they had filed a replying affidavit and a proper ruling ought to have been made. The matter was listed for hearing by consent on 10.6.2013 and all the parties were aware about that date. The plaintiff does not reside on the suit land.

Mr. Masheti, counsel for the plaintiff, relied on the replying affidavit. Counsel maintains that the application dated 14.12.2012 was filed under certificate of urgency and given a date of 27.2.2013. The defendants and their counsels were properly served and no replying affidavit was filed. The matter proceeded ex-parte as the defendants were not in court. It is admitted that the defendants were served and they opted not to attend. The matter was listed for hearing and not for mention as alleged. One of the orders inhibits the defendants from selling the property.

I have gone through the pleadings and the submissions by both counsels and it is clear to me that the dispute is contentious. Parties have litigated for many years and yet the matter has not come to final conclusion. It is also clear to me that the defendants are the ones in occupation of the suit property. I have seen the order of the court issued on the 12.10.2009 allowing the defendants to enter into contract with Mumias Sugar Company. It is clear that there are conflicting orders issued by the court.

Although counsel for the applicants maintains that they had filed a replying affidavit and the court ought to have considered the application and make a proper ruling, the court record shows that the replying affidavit drawn by Elizabeth Chunge Advocates was filed on the 8.3.2013. The replying affidavit by Mr. Fwaya Advocate that was served upon the Mr. Masheti Advocate does not clearly show when it was filed and was not part of the court record. The application came under certificate of urgency and was given a date of 27.2.2013. The defendants were duly served and ought to have enquired from the court the status of the certificate instead of opting not to attend. The court was therefore entitled to deal with the matter as it was not a mention but a hearing. The dated had been given by the court.

Given the pleadings herein I do find that the dispute is highly volatile. The defendants are in occupation and restraining them from dealing with the land will cause them loss and damages. It is the same court which allowed them to cultivate the land and sell sugar cane to Mumias Sugar Company Limited. It will therefore be unjust for the court to stop them from dealing with the same land without hearing them. My advice to the parties is that the dispute herein cannot be determined by way of applications. The best way forward is to finalize all the requirements before a matter is heard and thereafter fix the case for full hearing. I do find that it will be unfair to allow the orders granted ex-parte on the 27.2.2013 to continue. I will exercise my discretion and set aside the orders issued on 27.2.2013. However, the order of inhibition as per prayer **(d)** of the application dated 14.12.2012 shall be retained for purposes of safeguarding the suit land. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 19th day May 2014

SAID J. CHITEMBWE

J U D G E