REPUBLIC OF KENYA

High Court at Kisumu

Environmental & Land Case 99 of 2012

1. SCHOLARSTICA ATIENO OYWER

2. JOSEPH WILLIAM NTHIGA NYAGAH.....PLAINTIFF/APPLICANT

VERSUS

SYNO HYDRO CORPORATION.....DEFENDANT/RESPONDENT

RULING

This is a ruling on two applications Viz: a Notice of Motion filed and dated 13/11/2012 and another, also a Notice of Motion which is a logical sequel to the first, filed and dated 23/11/2012.

The application of 13/11/2012 in which the plaintiffs are applicants was brought under a certificate of Urgency and sought, inter alia, interim orders to restrain the respondent – **SYNO HYDRO CORPORATION** – and/or its servants, employees, agents from entering upon, taking up possession, remaining, carrying out construction, digging, excavating or trespassing onto plots No.**469E, 472E, 470E, 471E/KISUMU/KANYAKWAR/KISUMU MUNICIPALITY,** first until the hearing and determination of the application and, second, until the hearing and determination of the suit.

Provision for costs of the application is also sought. The Court is also asked to give any other fitting order when the application was brought, an interim restraining order was granted ***EXPARTE.*** That interim order gave rise to the second application in which the defendant is the applicant. That application seek to set aside that interim order.

What followed thereafter was a series of events, with the defendant filing a replying affidavit to the application of 13/11/2012 and the plaintiff's filing a replying affidavit to the application of 23/11/12.

When that was done, there was mention of land parcel No. **KISUMU/KANYAKWAR B/1398** with the defendant saying that that is where it was digging and excavating murram for road construction while the plaintiffs insisted that that activity was being done on their plots which are in a totally different area.

In the course of time, the court decided to hear the two applications simultaneously. It also decided to do a site visit.

Simultaneous hearing of the two applications took place on 6/12/12.

The site visit took place on 10/12/12.

During hearing, Ochuka for plaintiffs explained that the two plaintiffs were alloted Plots Nos.**469E, 470E, 471 E and 472E/KISUMU/KANYAKWAR/KISUMU MUNICIPALITY** by the Municipal

Council of Kisumu. That is where, Ochuka argued, the defendant was digging and excavating murrum thus aggrieving the plaintiffs. Ochuka argued that the structure and texture of the plots would be altered, with the soil being exposed to erosion.

On the second application, Ochuka noted that a new dimension namely: Land parcel **KISUMU/KANYAKWAR/1398**, had been introduced but asserted, contrary to the views of the defendant, that the land is totally different from the plots mentioned by the plaintiffs.

The Court was asked to grant the prayers sought in the first application and to dismiss the second application. Olel took his turn for the defendant and said he relied entirely on the replying affidavit filed as a response to the first application. He asserted that murram was being excavated from land Parcel **KISUMU/KANYAKWAR/1398** owned by **PATRICK A. MONDO** and not the plaintiffs.

The court was told the plaintiffs had not established a prima facie case as the title to that land belongs to a different person.

The allotment letters held by the plaintiffs as proof of ownership were described as alien to new land Laws. The balance of convenience was also said not to tilt in the plaintiff's favour bearing in mind that the defendants was doing public work for the greater good of the public. This, Olel said tilts the balance in favour of the defendant. Olel also said the defendant, was incurring daily losses running into millions of shillings because of the temporary restraining order that is in force.

He pointed out that the defendant was capable of compensating the plaintiff in damages of need be.

Two decided authorities were cited, one by Ochuka for plaintiff and the other by Olel for defendant.

Ochuka cited **SAMUEL MWANGI VS JEREMIAH M. ITOBU** 2012 e KLR (High Court at Nyeri Civil Appeal No.264/07). This was cited in response to assertion by Olel that the letters of allotment mentioned as proof of ownership by the plaintiff are alien to the new Land Law Statutes and therefore not valid.

The authority is meant to show that a possessor can sue for trespass even where he has no title. The argument seems to be that even if the allotment letters can be assumed to be invalid, the fact of the possession of the plots by the plaintiffs entitles them to sue.

Olel cited **OWNERS OF THE MOTOR VESSEL "LILLIAN -S- CALTEX OIL (Kenya) LTD. (1989) 2 KLR: PP 38-42.**

Olel had alleged misrepresentation on the part of the plaintiffs for alleging that excavation was taking place on plots **469E, 470 E, 471E and 472 E** while it was actually taking place on a different piece of land. The authority is meant to show that where there is misrepresentation or failure to make full disclosure, an injunction will not issue, and if already issued will be discharged.

And now a word about the site visit. The court visited the site in the afternoon of 10/12/2010. With the court were two surveyors, among other people. There was the District land Surveyor, Kisumu, to show the court parcel number 1398. There was the municipal Council Surveyor, Kisumu, to show the court plots number **469E, 470E, 471E and 472E**.

The interest of the court was to know whether the stated plots and the parcel of land are on the same site as Olel alleged, or whether they were on separate sites as Ochuka alleged. It was also meant to know whether the plaintiffs owned the plots and whether the plots were at the site of murram excavation.

While at the site, the District Land Surveyor showed where parcel No.1398 was. It was clear that no murram excavation was going on there.

The Municipal Council Surveyor took the Court to what he was calling BLOCK E. When the Court asked to be shown plots 469e, 470E, 471E and 472E, this official was unable to show. He said that the plots had not been marked as there were no beacons. He also said the process of marking the plots was incomplete. It was, he said, an on-going process.

At that stage, the 2nd plaintiff, Joseph, took over. He showed the Court the general area where the plots are alleged to be. He even showed a place where he had dug a toilet and a well. It was not clear specifically whether the toilet and/or well was in plot 469E,470E, 471E or 472E or jointly two or more of them. Asked whether he could confirm the plaintiff's to be the owners, the Municipal Council Surveyor was non-committal saying only that it was impossible to tell who the owner was, as the process was incomplete. It was clear however that there had been murram excavation at the site where the second plaintiff showed.

The court has this to say: the court would easily allow the plaintiff's application of 13/11/2012 if it is satisfactorily shown that the plaintiffs as applicants, own the plots in question; that the respondent/defendant is committing the acts complained of; that the plaintiffs have a prima facie case against the defendants; that the case has a high probability of success; that damages are not an adequate remedy and/or that, failing all else, the balance of convenience lies in the plaintiff's favour.

In the course of hearing the application, it emerged that the plaintiff's claim of ownership is based on letter of allotment issued by the relevant office of Kisumu Municipal Council. One of the reasons why the court involved that office in the site visit is to practically demonstrate and authenticate that ownership. But the official representing that office, did not meet his expectation. He was clear that the process of allocation was still going on. He couldn't tell where the plaintiff's alleged plots were situated. It was clear that no plots in the general area shown had been marked and, in his own words, no claim of ownership could be authenticated as the process of allocation was still incomplete.

This was a big let-down to the plaintiffs since as the Court left the site, it was not clear to it that the plaintiffs owned the plots in question or whether even the area shown by the 2nd plaintiff is where the plots were situated.

BUT even assuming that ownership had been proved, the plaintiff would still have to show that damages are not an adequate remedy. The plots alleged seem to be for residential or commercial purposes. Excavation of soil or murram to the extent the court saw wouldn't render the plots useless for construction. It would be different, however if the plots were for agricultural purposes.

It would appear to the Court that the plaintiffs can adequately be compensated by way of damages. This is more so, when it is considered that the defendant is undertaking public work for the greater good of general public and is not making any claim of title on the alleged plots.

Ochuka availed an authority showing that possession even without title would entitle the plaintiffs to the remedies sought. But the court is constrained to observe that the suit as brought is based on ownership not possession, and the letters of allotment were meant to prove the former, not the latter.

BUT more crucial to the Court is inability to prove ownership coupled with yet another inability to show exactly where on the ground the said plots are, their measurements, beacons, sizes and general outlay

BUT the Court would be loathe to grant the second application filed by the defendant. The interim order challenged have a short legal life of two weeks generally.

A fleet footed counsel would make haste to make quick and articulate response to the application and seek an early date. An application of the kind that was brought only helps to complicate matters because, in essence, it purports to supersede the urgency of the other while at the same time seeming to cut procedural corners. It is not helpful to counter granted interim orders by way of another application. There is no procedure for that provided in law. You respond by challenging as provided by

law the very application that led to the issuance of the orders. You then follow that up by taking a very near date. So what then for the two applications herein? The first application is dismissed with costs for failure by the plaintiff to satisfactorily prove ownership and exact location of the plots they mention and also for failing to satisfy the conditions necessary in law to grant injunctive relief.

The defendants application, which is the second one is dismissed because it is brought in circumstances that throws procedural caution to the wind and because it seems to seek unprovided for shortcut to justice.

A.K. KANIARU – JUDGE
23/1/2013