REPUBLIC OF KENYA

High Court at Kisumu

Environmental & Land Case 151 of 2012

DENNIS NDHINE ONYINO.....PLAINTIFF

VERSUS

MARTIN ONDIEK AYUB

NOAH OYANGE AYUB

GEORGE AGWENGE AYUB.....DEFENDANTS

R U L I N G

The main suit herein was filed on 20/12/2012. Contemporaneously with it was also filed a Notice of Motion which is the subject of this ruling. The motion was filed under a certificate of urgency and invokes Order 40 Rules 1,2 and 3, and Order 51 Rule 3 of the Civil Procedure Rules together with article 159 of the Constitution of Kenya, 2010, as the applicable laws.

What is sought is a temporary order of injunction restraining the defendants – **MARTIN ONDIEK AYUB, NOAH OYANGE AYUB** and **GEORGE AGWENGE AYUB** – whether by themselves, their agents, servants or proxies from entering, occupying, remaining on, cultivating, developing or in any other way using or interfering with Land Parcel No.3351 – **KAWINO ADJUDICATION SECTION** or any portion thereof or doing anything else which may restrict, curtail, diminish or interfere with the plaintiff's quiet possession, use, enjoyment of the said parcel until the suit herein is heard and determined.

The basis for bringing the application is that the plaintiff is the recorded and adjudicated owner of Land Parcel No.3351 -**KAWINO ADJUDICATION SECTION** (hereafter the suit land) and the defendants have entered that land and destroyed the plaintiff's sisal, mature trees and a pit latrine besides clearing it for cultivation of crops. The defendants actions are said to be intended to deprive the plaintiff of his title to quiet and exclusive possession, user and enjoyment of the suit land.

The Plaintiff's supporting affidavit has much that is stated in the grounds in support of bringing the application. But it also contains information concerning consent from the adjudicating authority and gives express willingness to give an undertaking as to damages should it become necessary.

The defendants responded by way of a joint replying affidavit. From the affidavit, it emerged that the plaintiff and their late father had dispute over the suit land, with their father emerging the winner each time. According to them, their father put them into the land and they have not trespassed into it.

The court heard the application inter parties on 21/2/2013. Counsel for the plaintiff, Orengo M,

reiterated much that is in the application and the supporting affidavit accompanying it. He also gave a brief history, pointing out that the defendants are the sons of the late Ayub, who was the plaintiff's brother. Ayub and the plaintiff were disputing over the suit land. The land was awarded to Ayub but the plaintiff is challenging it in Court. The details of the case in Court however were not availed.

Orengo pointed out that as matters stand now, the land is still in the names of the plaintiff at the adjudication office. The defendants responded by saying inter alia, that the land was awarded to their late father after a protracted dispute. The defendants desired that the restraining order be denied, that the Court directs the lands office to register the land in the names of their late father, and that an eviction order be issued against the plaintiff.
A reply to defendants response revealed that the defendants are currently living on another piece of land, which is parcel number 3354.

No side directed its mind to the applicable principles in matters of this kind. The principles are in the decided case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358.** The requirements are that the applicant has to establish a prima facie case with a probability of success. The applicant needs to show also that he might suffer irreparable damage and finally, where the Court is in doubt, it will decide the application on a balance of convenience.

These principles have been cited with approval in various cases, an example being **KENYA COMMERCIAL FINANCE CO. LTD VS AFRAHA EDUCATION SOCIETY (2001) IEA & 6** where, additionally, the Court emphasized the need for sequential consideration of the principles. This makes it improper to consider the second or third principle without considering the first.

In **AMIR SULEIMAN VS AMBOSELI RESORT LIMITED:HCC NO.1078/03, NAIROBI Ojwang J** (as he then was) was probably expanding the law when he observed that the Courts should opt for the lower rather than the higher risk of injustice.

Looking at the application, the responses filed and the arguments of both sides during hearing, it became clear that the suit land had been the subject of dispute at more than one forum.

The dispute was between the defendant's late father and the plaintiff. The defendant's father always emerged the winner.

The plaintiff is clinging, first, to the adjudication record showing him as the owner and, second, to the fact that he is challenging the win of the defendant's father in court. The defendants themselves are claiming the land on the strength of their late father's win in previous disputes. They seem to be saying that they have the defence of **JUS TERTII.**

Given the situation as it is, it is difficult to say that the plaintiff has established a prima facie case. I think he has not and, that being the case, it is necessary to consider the second principle namely: Will the plaintiff suffer irreparable loss? Will damage not be an adequate remedy?

The plaintiff didn't show how any loss suffered would be irreparable. But it is necessary to note that he himself offered to pay damages should it become necessary to do so. The defendants didn't give such an undertaking. It is difficult to tell the economic or financial well being of the defendants but I saw them here in Court. They were unrepresented and I think that it is not their wish to proceed that way, particularly given that the other side has services of a counsel. They seemed to me as rustic rural folk of humble circumstances. It is doubtful that they can afford to pay damages if ordered to do so. This, then, means that even if damages may be an adequate remedy, the plaintiff may not get such damages from the defendants. This option then also has to be abandoned. I will then, go to the third namely: Where does the balance of convenience lie?

The defendants are not denying that they are on the suit land. They are there, they say, on the strength of the awards made to their father in previous disputes. But it is also clear that they are not yet the administrators of their late father's estate.

What is more, their actions on the land seem to be detrimental to the plaintiff. They are said to have destroyed sisals, mature trees, and a pit latrine. This might cause trouble. There is no telling for now who will be the eventual registered owner of the suit land. But before that stage is reached, it is necessary that there be peace on the ground.

Considering all this, the balance of convenience lies obviously in the plaintiff's favour. I therefore allow the application to the extent of Prayer 3, which is for a restraining order as stated at the beginning of this ruling. Costs of the application however must await the eventual outcome of the main suit.

A.K. KANIARU
JUDGE
20/5/2013
A.K. Kaniaru – Judge

Dianga G. - Court Clerk

No party – present

Orengo M. for Plaintiff/applicant

Defendants in person

COURT: Ruling on application filed on 20/12/2012 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU
JUDGE
20/5/2013

AKK/vaa