REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 91 of 2012

1. AGGREY ODHIAMBO OGUSO

2. ENOS OKOTH OGUSO

3. ROBERT ADHOLA OGUSO.....PLAINTIFF

VERSUS

JAMES MAGWANA OMONDI.....DEFENDANT

R U L I N G

The application which forms the subject of this ruling was filed on 21/5/2012 by the three applicants/plaintiffs – **AGGREY ODHIAMBO OGUSO, ENOS OKOTH OGUSO** and **ROBERT ADHOLA OGUSO.**

It is against the defendant/respondent – **JAMES MANGWANA OMONDI** – and is brought under Sections 1A, 1B, 3A of Civil Procedure Act and order 40 rules 1 and 2 of Civil procedure Rules and other enabling provisions of law.

In the main, it is seeking an order of injunction directed against the defendant, his servants, agents, employees or any other person purporting to derive authority from him restraining them from entering, remaining in, cultivating, developing, disposing or in any other manner interfering with the plaintiff's quiet possession and enjoyment of the defendant's respective portions in land Parcel No. **KISUMU/KARATENG/1084.**

It is also sought that a restriction be placed against the title of the suit property namely **KISUMU/KARATENG/1084**. The plaintiff/applicants also want the defendants to pay cost of the application.

The grounds advanced in support assert that the plaintiff's rights on the land amount to overriding interests within the meaning of Section 30 of the Registered land Act thus seeking to be registered as proprietors by reason of adverse possession. The defendant is also said to have unlawfully entered into the portions belonging to the plaintiffs and commenced cultivation together with grazing his cattle which has resulted in damage to crops, trees and bananas.

The orders sought, it was averred, are meant to obviate irreparable loss likely to be occasioned by defendant activities. Also suggested is that the defendant might evict the plaintiffs.

The application is supported by four affidavits sworn by the 3 plaintiffs and their father – **ISAKA OGUSO OKUMU.**

The affidavits tell a common story: Land Parcel No. **KISUMU/KARATENG/1084** (suit land) was, and still is, registered in the name of **SHADRACK OMONDI,** who is the defendant's father and paternal uncle to plaintiffs. The suit land originally belonged to **GERISHON OKUMU,** who was grandfather to all the parties. Gerishon is said to have expressed a wish in his lifetime that the land be subdivided to all his grandchildren.

Still in Gerishon's lifetime the suit land was registered in the name **SHADRACK OMONDI,** who is the defendant's father.

On the strength of **GERISHON**'s wish bequeathing the land to his grandchildren the two plaintiff's – **ENOS OKOTH** and **AGGREY ODHIAMBO** – put up their homes on the suit land. The defendant's father is said to have been alive at the time and raised no objection.

Later on the defendant's father died leaving the land undivided. Somewhere along the way, the defendant's father had sent the defendant and his mother away after doubting the defendant's paternity. After the death of the defendant's father, the plaintiffs own father, who was a brother to defendant's father, went for the defendant at Kanyamkago and persuaded him to come and occupy the portion of land reserved for him in the suit property.

The defendant came and, instead of occupying his portion of land only, laid claim to the whole suit land upon learning that it was registered in his late father's name. The defendant's act was ruffling and resulted in the filing of a dispute at the local land tribunal by the plaintiff's father. The plaintiff's father however lost and the suit land was awarded to the defendant.

This necessitated a further move to the superior Court by plaintiff's father to get the tribunals award, and the subordinate Court;s endorsing judgment, quashed citing lack of jurisdiction for the tribunal to make the decision it did. Ultimately, the decision was quashed vide a ruling delivered on 23/9/2011 by Justice **ROSELYNE N. NAMBUYE** (as she then was) in **HCC NO.22/2010**, a Judicial Review matter involving the plaintiff's father as applicant and the local land tribunal – **KISUMU WEST DISTRICT LAND DISPUTE TRIBUNAL** – as one of the respondents.

In the meantime, the defendant had started cultivation on the portions of land belonging to the plaintiffs and that necessitated the filing of this case.

The defendant's written response is contained in his replying affidavit filed here on 6/12/2012. In it, he depones, inter alia, that the plaintiff occupied the suit land at their fathers urging. He deponed too that during adjudication his late grandfather – **GERISHON OKUMU** – with the consensus of his children caused registration of Land parcel **KISUMU/KARATENG/1076** in the name of plaintiff's father, parcel number **KISUMU/KARATENG/1084** in the defendant's father and parcel number **KISUMU/KARATENG/1332** in his own name. Of these parcels, the defendant deponed, the plaintiff's only have a right to claim **KISUMU/KARATENG/1076** which is in their father's name and/or **KISUMU/KARATENG/1332** which is still in the name of the late **GERISHON OKUMU.** They cannot, he asserted, legitimately lay claim to **KISUMU/KARATENG/1084**, which is still in the names of defendant's father.

According to defendant, granting injunctive orders to plaintiff is giving legitimacy to plaintiff's criminal actions. And while the plaintiff's asserted they would suffer irreparable loss if not granted injunctive relief, counter -averment is made by the defendant that he himself would suffer irreparable loss as the injunctive relief sought would affect the right of access to his home.

The Court heard the application interpartes on 26/2/2013. The Plaintiff's counsel, **ABONGE,** presented his arguments substantially in terms of the 4 supporting affidavits filed to back up the application.

Perhaps the only addition is the allegation of trust arising in favour of the plaintiffs by virtue of the fact that the suit land was ancestral land. Alternatively, it was asserted that the plaintiffs are entitled to the land by way of adverse possession having occupied it uninterrupted for the requisite period.

The arguments of Anyul, the defendant's counsel, are no different. The thrust is clearly along the lines of the replying affidavit, with the only addition being a response to allegations of trust and adverse possession. The response itself is to the effect that the plaintiffs cant claim trust from the defendant and adverse possession also would not arise as it is not pleaded.

This response invited a curt reply from Abonge who said trust is specifically pleaded in prayer (b) in the plaint while adverse possession couldn't be pleaded as the mode of pleading it requires a different approach.

I have looked at the pleadings and counter-pleadings and arguments and counter arguments already on record. The applicants/plaintiffs claim to establishment of a prima facie case is based on their late grandfather's wish concerning his grandchildren and the suit land. To that is added their long un-interrupted occupation. From these two positions, trust and adverse possession are said to arise.

The defendants rejection of the plaintiffs claim is based on the fact that the land is registered in his father's name thus making him the right person to inherit it.

I understand the defendant to mean that the plaintiff, through guile and deception, are trying to invoke the law to legitimize their wrongful actions concerning the suit land. While all these arguments and counter argument focused on the issue of prima facie case, the Court was not addressed, whether by the plaintiff or defendants, on the issue of irreparable loss.

Both sides mentioned it in their pleadings but never articulated it during hearing. In this respect, the plaintiffs/applicants were more duty-bound to raise it during hearing as decided case law- see for instance **GIELLA VS CASSMAN BROWN & CO. LTD: (1973) EA 358 –** places that burden on them. Neither was the issue of balance of convenience raised by any side whether in pleadings or during hearing. Again, the burden is more on plaintiff/applicants to demonstrate it if **GIELLA VS CASSMAN BROWN** (Supra) is any guide.

This being the position then, the decision must turn on whether a prima facie case is established and the effect of failure by the plaintiff/applicants to address themselves to the other requirements of the applicable law.

BUT the Court would also take liberty to highlight other factors not raised by either side. On the issue of prima facie case, the factual and legal basis on which the applicants say they have established it have already been mentioned. But the defendant/respondent raised formidable arguments to justify his entitlement to the suit land. The court thinks that the defendants/respondent's response whittled down the merit of the applicants averments.

But the Court has other reasons for not finding a prima facie case established. First, the applicants are said to own portions on the suit land. The sizes and boundaries of the portions were not described. It would have been useful to furnish information concerning the general layout of the suit land so as to make clear where the portions are and the boundaries. Such layout would also help the court know where easements are. It would be necessary to know all this because the defendant has alleged that his right of ingress and egress would be affected if the order sought is granted. Lack of this information constricts the Court by denying it knowledge of the likely impact of its orders.

Second, it is alleged that the defendant has already instituted the legal process to become the administrator of his father's estate. The suit land forms part of that estate. It would appear that the applicants have not yet challenged that process. The point is made that they were not aware of the process but a question arises as to what they have done when they became aware of it. One of the annextures availed by the defendant/respondent is a Grant of letters of Administration Intestate. It is quite sometime since the annextures became part of documents in this case. What have the applicants done to become part of that process?

The Court is alive to a scenario where the legal process instituted by the defendant is concluded

ultimately resulting in the vesting of the suit land in him. Should such a thing arise, any interlocutory order issued would hamper implementation of a final order in a concluded legal process. Such interlocutory order, needless to say, would be on the basis of un-concluded legal process.

Bearing all this in mind, the court makes a finding that a prima facie case is not established.

And since it was not demonstrated that damages are not an adequate remedy or whether the balance of convenience would lie in applicant's favour, the benefit to these two principles cannot be accorded to the applicants.

The upshot is that the restraining order sought is not granted.

The order of restriction sought is also refused as such an order, in Court's considered view, would only lie where a prima facie case is established.

Ultimately then, the application herein is dismissed with costs.

A.K. KANIARU – JUDGE

16/5/2013