REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 67 of 2012

JANE ANYANGO OBIER.....PLAINTIFF

VERSUS

ZACHARIA RAWAGO JALANG'O

DICKSON AMOLO SOLO.....DEFENDANT

R U L I N G

1. INTRODUCTION

The application herein, which is a Notice of Motion brought under a certificate of urgency, was filed here on 12/4/2012 and is dated 3/4/12. It was filed contemporaneously with an originating summons, which forms its substratum.

Essentially, the applicant/plaintiff – **JANE ANYANGO OBIERO** – is seeking a restraining order against the defendant/respondents – **ZACHARIA RAWAGO JALANGO** and **DICKSON AMOLO SOLO** – restraining them from interfering with or alienating plot of land title No. **SOUTH NYAKACH/KADIANGA EAST/182** (subdivisions Nos.2187, 2188 and 2189) or evicting the plaintiff or demolishing the plaintiff's residential houses and harassing the plaintiff in whichever manner.

BUT other orders are sought and they are as follows:

– That the plaintiff be declared true owner of land parcel No. **SOUTH NYAKACH/KADIAGA EAST/182** currently subdivided into Plot Nos.2187,2188 and 2189 and the first defendant be declared is holding the land in trust for the plaintiff.

– That the plaintiff be declared the owner of the same land by way of adverse possession.

– That the 2nd defendant be compelled to transfer the land parcel Plot No. **SOUTH NYAKACH/KADIAGA EAST/2189** registered in his name to the plaintiff.

– That the land Registrar, Kisumu, be ordered to facilitate transfer of title documents of Title No. **SOUTH NYAKACH/KADIAGA EAST/2189** to the plaintiff.

– That cost be borne by the defendant/respondents.

2. THE BASIS OF THE APPLICATION

The 1st defendant is said to have clandestinely sub divided the suit land (Parcel No.182) and intends to

transfer Parcel No.2189, which is one of the portions arising from subdivision, and which the applicant/plaintiff has owned for a long time.

The defendants are said to be intending to evict the plaintiff/applicant and demolish her residential house, which is on the suit property. The applicant is said to be suffering irreparably because of defendant's actions. She is still in possession of the suit property and has put up permanent residential houses there.

The applicant says she bought the suit property from the first defendant and the 1st defendant showed her the land, which was about 35X50 metres in size. At the time of sale however, the 1st defendant misrepresented the suit property as **SOUTH NYAKACH/KADIAGA/184**. Later on, the 1st defendant started subdividing parcel No.182 without regard to applicants interests in a portion of the said parcel.

The second defendant – **DICKSON AMOLO SOLO** is said to have encroached on the applicant's land and occupied it. When the applicant tries to assert her rights she is threatened with violence and eviction.

3. THE RESPONSE

A replying affidavit was filed on 21/5/2012 in which the 1st defendant avers, interalia, that he knows the plaintiff as the widow of the late **OBIERO OGEDA,** a family relation whom, on request, he allowed temporary use of a portion of the suit land measuring 16ft X40ft.

The 1st defendant later went to Malindi and Obiero died. The portion allowed to Obiero was marked with sisal boundary but the plaintiff removed the boundary and illegally extended the structure put up by her late husband. The result was an extended structure occupied by illegal tenants.

The 1st defendant later came back from **MALINDI.** He found the changes that the plaintiff had wrought on the land. To the 1st defendant, the plaintiff thought he would never return. But he returned and asserted his rights and this caused problems.

The 1st defendant denied ever receiving from the plaintiff Kshs.12000 or any other monies for sale of land or other purpose. He denied knowledge of the agreement shown as evidence of such receipt.

He further denied ever sending his son, Benjamin, to collect 15000/= from the plaintiff and asserted that he is a stranger to allegations of additional portions of land he is said to have sold to the plaintiff.

According to the 1st defendant, the plaintiff designed to perpetrate fraud against him and, in a bid to do so, co-opted Benjamin, his son, to give her photocopies of his (1st defendant's) identity card and Title deed in order to cause a fraudulent transfer.

The plaintiff is said to have caused some subdivisions and sold them to other people.

The response of the 1st defendant included a cross examination of the plaintiff regarding the affidavit sworn in support of her application. During that cross examination the plaintiff reiterated, inter alia, that she entered into a sale agreement with 1st defendant, with the defendant misrepresenting the parcel of land as number 184 while it was actually 182. She said there were witnesses when the agreement was made including an advocate called **OLAGO.**

She said too that she paid 12,000/= and two weeks later she paid 15000/=. There were other payments of 2000/=, 1000/= and some 3 tins of something valued at 240/=. It also emerged that the parties had a dispute concerning a banana that was cut in the land sold to her. The 1st defendant lost that dispute, which was before the area chief.

The plaintiff, it emerged too, had sold a portion of her alleged land to one Mathew Juma Ondiek for 15000/=.

4. WRITTEN SUBMISSIONS

The plaintiff's submissions are largely a re-statement of what is contained elsewhere in the application. In them, one finds a lot that is in the grounds spelt out on the face of the application and the supporting affidavit. For instance, at para 4 of the submissions the 1st defendant is said to have misrepresented the parcel number. That same position appears at para 5 of the supporting affidavit. Para 1 in the submissions is Para 2 in the supporting affidavit. Para 6 in the submissions is para 7 in the supporting affidavit.

The prefatory part of the submissions is actually a replica of the contents on the face of the application. The submissions therefore are a rehash or regurgation of the contents of the application. The Court finds lacking in the submissions an articulation of the well known principles that apply to obtain injunctive relief.

In contrast, the 1st defendant's submissions addressed the applicable principles. In addition, there was a clear attempt to punch holes in the plaintiff's averments in the supporting affidavit and in her responses to questions during cross-examination.

The aim was to cast doubts on the plaintiff's honesty and therefore discredit her averments. The plaintiff's counsel had the opportunity to re-examine the plaintiff but didn't do so.

3. FINDINGS

Counsel for the applicant/plaintiff was remiss in the way he handled the application right from the start.

For instance, there is no prayer for a restraining order to run during the pendency of the suit in Court yet counsel proceeded as if such prayer existed.

He was labouring under the mistaken belief that prayer (c) on the face of the application is one such prayer while in actual fact it is a prayer to run for the duration and determination of this application.

Prayer (c) was granted by the Court long ago and has been extended several times. Its lifespan ceases after this ruling is delivered.

Question is: Where is the prayer about which counsel on both sides have filed submissions? It is simply not there.

The shortcomings do not end there. In the same application, it is sought that the plaintiff be declared owner of the suit land. It is sought that the land Registrar be directed to facilitate execution of transfer documents.

Questions: How can a Court of law declare a party in a hotly contested suit as the owner on the basis of an interlocutory application? How can an order be directed to a party – in this case the land Registrar – who is not enjoined in the suit?

And are these orders interim or interlocutory? Are they not supposed to be final orders?

It is clear that the application contains so many prayers that a Court cant grant at interlocutory stages and which require different procedural approaches in order to obtain them. It is clear that some of the prayers are supposed to be considered when the originating summons is heard.

BUT that is not all. The plaintiff's counsel never addressed himself to the applicable principles for granting restraining orders. The Kernel for submissions concerning a restraining order should be an articulation of the principles with a clear attempt being made by applicant or counsel to show how such principles apply in a given case.

Contrast that with submissions of counsel for 1st defendant which highlighted the principles and proceeded to make an attempt to show how they do not apply.

When all this is considered, the following is clear:

1. The restraining order that the plaintiff is looking for is not available as the same is not asked for in the application.

2. But even if the order was asked for, what the plaintiff's counsel brought in the submissions is not enough to grant the order. The counsel missed it all in the submissions.

3. The application as brought is wanting since it asks for so many orders some of which a Court of law cant grant on the basis of an interlocutory application.

4. When submissions of the plaintiff are weighed against rival submissions, the scales tilt in favour of the latter since the latter are better articulated and conform to what is relevant for consideration.

6. DECISION

Bearing all this in mind, it is clear that the application herein lacks merit and the same is dismissed with costs.

A.K. KANIARU – JUDGE

13/5/2013

AKK/vaa