



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND & ENVIRONMENT NO.55 OF 2012

PATRICK A. MONDOH MCRYMBOH.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF KISUMU.....DEFENDANT

RULING

This is a ruling on a Notice of Motion dated 25/9/2013 which was filed contemporaneously with the suit on 26/9/2012.

The motion is brought under Order 40 Rules 1,2 and 4 of the Civil Procedure Rules and Sections 1A, 3A and 53(e) of the Civil Procedure Act and all other enabling provisions of law.

In the main, the order sought is that pending hearing and determination of this suit a temporary restraining order do issue restraining the defendant/respondent, their servants, agents and all such persons claiming title from them from trespassing, entering, encroaching or in any way interfering with the plaintiff's use, possession and occupation of Land parcels Nos. **KISUMU/KANYAKWAR/'B' 1399**. Provision for costs of the application is also asked for.

The basis for the application is that the plaintiff/applicant is the registered owner of the two parcels of land aforesaid (suit land hereafter) and the defendant applicant has entered there and is cutting down trees and destroying crops thus interfering with the plaintiff's/applicant's right to peaceful use, occupation and ownership. The aim of the defendant is stated to be grabbing of the plaintiff's land which is a breach of the law and a violation of the applicant's rights. The ultimate effect would be eviction thus rendering the plaintiff homeless and causing him irreparable loss and damage.

The supporting affidavit depones, inter alia, that the suit land actually belongs to the plaintiff; and that the plaintiff has been using, cultivating, and occupying the same since childhood.

The defendant then went there on 18/9/2012 and started clearing bushes, cutting down trees and trampling on growing crops.

When asked why that was happening, one Absalom Ayany, expressed intention to take over the land and give it to third parties. He also asked the plaintiff to go to their offices for further information. The plaintiff later went to the defendant's offices and was told that his land was earmarked for a take over to be allocated to other parties allegedly to ease housing problem in Kisumu and its environs.

That necessitated the filing of this case. The defendant filed a replying affidavit through a Mr. Christopher Rusana, stated to be its town clerk.

In the affidavit, it was deponed, inter alia, that the suit land was compulsorily acquired by the government way back in 1976 vide legal Notice No.3400 on behalf of and for the County Council of Kisumu. That being the case, no freehold title, such as shown by plaintiff, can issue over the land and, in any case, all the people then on the land were compensated.

The plaintiff's titles were said to have been issued recently in 2009, which is over 30 years since the suit land became trust land.

According to the defendant, the titles were acquired fraudulently. An assertion was made that the orders sought were of equitable nature and as the plaintiff had not explained how he had acquired the land, he was not entitled to those orders.

The suit land was said to have been acquired for public interest and thus, it was argued, private interests cannot override public interest.

The Court heard the application inter parties on 23/4/2013. Odongo was for the plaintiff/applicant while Omondi M. appeared for the defendant/respondent. The argument by both counsel were largely a restatement of what the application and the replying affidavit contain.

But it is useful to point out that the plaintiff/applicant had filed a supplementary affidavit which attempted to address areas of concern raised by the replying affidavit. For instance, on allegation that the titles annexed were only issued in 2009 thereby pointing to the possibility of fraud, the plaintiff explained that the titles derived from an earlier title – **KISUMU/KANYAKWAR/460**.

The plaintiff also took issue with the gazette notice mentioned and annexed by the defendant. He pointed out that a proper reading would show that not the whole area of Kanyakwar was put under compulsory acquisition. No maps, the plaintiff argued, was availed to show the extent of the land compulsorily acquired and therefore the defendant cannot be entertained to assert that the suit land was part of the area so compulsorily acquired.

That the plaintiff has title deeds to the suit land is not very much in doubt. The two title deeds were annexed. Prima facie therefore, the plaintiff has absolute, and exclusive rights of use, possession and occupation.

The defendant feels the land is its own. And the basis for that is that the land was compulsorily acquired for it by the government way back in 1976.

BUT I have to ask myself what options the defendant had when it found the plaintiff in occupation of the land. In my view, entering the land in a show of force was not the way. It behoved the defendant to try to find out why the plaintiff was on the land.

The defendant should have expressed its position to the plaintiff and upon disagreement, it was open to the defendant to subject the plaintiff to due process. It can not be gainsaid that the defendant is a powerful entity. Raw demonstration of force to a hapless citizen is intimidating and traumatizing. This is what the defendant is alleged to have done to the plaintiff.

The Court has looked at the gazette notice referred to by the defendant. The extent of the area said to be compulsorily acquired is stated in loose terms. The specifics are not pointed out, and the details of the boundaries are left out to be indicated in a map that was not availed here.

When the plaintiff therefore asserts that the area compulsorily acquired does not include the suit land, he makes a point that the defendant fails to adequately counter.

When the plaintiff then shows his two titles to the suit land, he established a prima facie case which, in absence of clear extent of the area claimed by the defendant, is hard to displace.

The plaintiff also expressed his position that he has lived on the suit land for over 50 years. He therefore has grown up there, and derives his livelihood from there. His claim of loss and damage is therefore not idle.

It was argued that private interests cant override private interests. That may be so but it has not been shown well that public interest apply to the suit land. Fraud has been alleged but it has not been demonstrated. It was only insinuated and that is not enough. It was also suggested that the plaintiff has not explained how he acquired his two titles. But the plaintiff's supplementary affidavit explains that the two titles were derived from an earlier title.

Applications of this nature are governed by the decided case of **GIELLA VS CASSMAN BROWN & CO.LTD: (1973) EA 358**. The case enjoins that the applicant has to show a prima facie case with a probability of success; that the applicant has to demonstrate he will suffer irreparable injury; and that when the Court is in doubt it will decide the application on a balance of convenience.

The plaintiff here, as pointed out earlier, has demonstrated a prima facie case in the circumstances. He has also demonstrated a likelihood of suffering irreparable damage if the defendants wanton interference continues.

This is therefore a deserving case where a restraining order should be given.

Accordingly, prayer 4 in the application, which is as stated at the beginning of this ruling, and costs of this application, are granted to the plaintiff/applicant.

A.K. KANIARU – JUDGE

27/6/2013

27/6/2013

A.K. Kaniaru – Judge

Dianga – C/C

No party present

Interpretation – English/Kiswahili

Lore for Omondi for defendant/respondent

Olel for Odongo for Plaintiff/applicant

Court: Ruling on application dated 25/9/2013 and filed on 26/9/12 read and delivered in open Court.

Right of appeal – 30 days

A.K. KANIARU – JUDGE

27/6/2013