



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO.83 OF 2012

ST. LEO SIGOTI AGRICULTURAL NUT COLLEGE(COMPLEX).....PLAINTIFF

VERSUS

JOSEPH ORIEY OWUOR & 7 OTHERS.....DEFENDANT

R U L I N G

The Notice of Motion which is the subject of this ruling was filed together with the main suit on 30/10/12 and both are dated 11/10/2012. The plaintiff – **ST LEO SIGOTI AGRICULTURAL NUTRITION COLLEGE (COMPLEX)** is the applicant.

The application is brought under Sections 3 and 3A of Civil Procedure Act, order 40 Rules 1 & 2 and Order 51 Rule 1 of civil Procedure Rules and all other enabling provisions of law.

All the defendants named in the suit – **JOSEPH ORIEYA OWUOR, CHRISPINE ODONGO OSELU, ALFEUS ODONGO OSELU, EZEKIEL OKANO AMONDE, OMONDI OKANO, JOSEPH AWITI OTULA, ENOCKA ONYANGO AMONDE and TOM ONG'ELE KABITA** – are the respondents.

What is sought is a restraining order against all respondents injuncting them, their servants, agents and/or employees from interfering with, trespassing and/or disposing of any part of land parcels

- a. SOUTH NYAKACH/EAST KOGUTA/539
- b. SOUTH NYAKACH/EAST KOGUTA/538
- c. SOUTH NYAKACH/EAST KOGUTA/540
- d. SOUTH NYAKACH/EAST KOGUTA/543
- e. SOUTH NYAKACH/EAST KOGUTA/544
- f. SOUTH NYAKACH/EAST KOGUTA/545
- g. SOUTH NYAKACH/EAST KOGUTA/546
- h. SOUTH NYAKACH/EAST KOGUTA/548
- i. SOUTH NYAKACH/EAST KOGUTA/550
- j. SOUTH NYAKACH/EAST KOGUTA/551
- k. SOUTH NYAKACH/EAST KOGUTA/552
- l. SOUTH NYAKACH/EAST KOGUTA/553
- m. SOUTH NYAKACH/EAST KOGUTA/537
- n. SOUTH NYAKACH/EAST KOGUTA/558
- o. SOUTH NYAKACH/EAST KOGUTA/557

pending hearing and determination of the suit.

It is also sought that the officer in charge of the nearest police station assist in effecting the orders and that the defendant/respondents be condemned to pay the costs of the application.

The basis of the application is that the parcels of land were acquired by way of gifts or donations by the legal or beneficial owners as part of an arrangement between the community of Sigoti and the Catholic Church dating back in 1877 and consequently the applicant through the Arch-diocese of Kisumu is the rightful owner of the said parcels and has been in actual possession of the parcels since then.

The Ministry of lands is said to have been processing the transfer of title deeds in the name of the applicant but the respondents entered the land on 8/6/2012 and halted the fencing then being done by the applicant. It is stated that the respondents chased away the applicant's workers and claimed ownership of the land.

In the supporting affidavit, it is stated, inter alia, that the plaintiff/applicant acquired the suit parcels through the arch diocese of Kisumu and went into occupation in 1967 through Rev. Father **LEO BUSTEL**, a representative of Mill Hill Missionaries.

The parcels, it was deponed, were acquired as gifts or donations as part of an arrangement between the community of SIGOTI and the Catholic church dating way back in 1877. The applicant says it has been in open, peaceful and uninterrupted occupation of the parcels since then.

The acquisition process is now said to be partially formalized with surveys and sub divisions being done in anticipation of title deeds whose mutations have so far been recorded on a map referred to as Kisumu District Map location **SOUTH NYAKACH KOGUTA EAST** Registration No.11 dated 11/7/1977. A consolidated title deed of all the parcels is also said to be in the process of procurement.

BUT the problem posed by the respondents has led to withholding of donor funding. The 4th respondent is said to be the area chief and is at the forefront of mobilizing the respondents to trespass into the suit parcels. Fear was expressed that if not restrained the respondents would continue with their acts of trespass.

The 2nd respondent – **CHRISPINE ONYANGO ODONDO** – swore a replying affidavit on behalf of herself and all the other respondents.

She started by expressing doubts as to the plaintiff's legal capacity to institute the suit. She then went on to say that as a 40 year old, she has resided on the land parcels and is not aware that the plaintiff has acquired them. She denied any awareness of the parcels being given or donated to the plaintiff in 1877, 1967 or 1977. she further stated that the parcels as described did not exist in 1967 as the adjudication process only concluded in 1974 and the register for the parcels was only opened on 14/5/1974. The second respondent stated the applicant's parcel as **SOUTH NYAKACH/EAST KOGUTA/1249**, and not the suit parcels. She then went on to mention the registered owners of the suit parcels some of whom are deceased now.

The second respondent denied any trespass and asserted that there has been problems between the applicant and the surrounding community over land in the area.

Also denied is that the area chief (4th defendant) has been mobilizing people against the applicant or that the respondents have demolished the applicants fence or baked any bricks on the applicant's land or even disrupted the learning process at the applicant's institution.

Both sides agreed to have the application disposed of by way of written submissions. The applicant filed submissions on 19/12/2012 while the respondents filed theirs on 22/1/2013. A summation of each submissions is now in order.

The applicant said it acquired the suit land through Arch-Dioocese of Kisumu as gifts or donations as part of arrangement between the community living in Sigoti and the Catholic church dating back from 1877.

It then went into occupation and such occupation has been open, peaceful and uninterrupted. The applicant has been in the process of formalizing the acquisition but the 4th defendant, who is the area chief, has been mobilizing the public against the applicant. This has led to trespass into the applicant's land, with some trespassers even starting to bake bricks.

The Court was told that the applicant has established a prima facie case as even the 4th respondent has acknowledged occupation by the applicant. The ministry of lands is also said to confirm the process of formalizing acquisition.

It was also pointed out that the applicant has complained severally to the relevant authorities regarding the respondents interference. It was alleged that there has been several acts of trespass since 2008 and the applicant will suffer irreparable loss. The balance of convenience was said also to be in favour of the applicant.

The respondents on their part demanded conclusive proof that the suit land was donated or given to the applicant. They asserted that the applicant has no legal or equitable rights over the land.

According to the respondents, the suit parcels as described, didn't exist prior to 14/5/1974, that being the date when adjudication got complete and a register opened.

The applicant's attempt at formalizing the alleged acquisition of the parcels was faulted for not having gone through Land Control Board, which, it was argued, made such attempt illegal and unenforceable.

According to the respondents, the applicants proper land is **SOUTH NYAKACH/EAST KOGUTA/1249**. The suit land does not belong to it, they said, as they have been in its possession all their lives.

The applicant was also said to lack legal capacity to sue the plaintiffs.

I have considered the application, the filed response, and the submissions made. The applicant submitted that it has established a prima facie case by virtue of its alleged occupation of the suit land; the attempts being made to formalize acquisition; and the fact that it has made several complaints to relevant authorities concerning the respondents interference.

BUT I think there are very pertinent issues raised by the respondents which the applicant needed to respond to but didn't.

For, instance, is the applicant personable? In what capacity does it bring the suit? It would have been necessary for the applicant to respond to this. It is an issue that remains unanswered. The question is: What is the statute enabling the applicant to sue? Is it the Company's Act, the Societies Act, the Education Act, the relevant University Charter or what?

Indeed, does the plaintiff/applicant have capacity to sue and, if it has, under what law?

As long as this remains unanswered, it counts against the applicant.

BUT this is not all: The applicant says the land was donated to it. It generalizes by saying that the donations or gifts were by members of **SIGOTI COMMUNITY**.

In a court of law, generalizations are more often than not unhelpful. The donors of such land must have been people with names and identities. Who are they? The plaint insinuates at Para 5 that some of the donors may be dead but those surviving them, like Anastasia Owade Owuor and Augustine Muma Odongo, are available. Where are the statements of these two? Where are the statements of the others still

living? Were the donations oral or recorded?

The Court raises all these issues because in its assessment as to the establishment or otherwise of a prima facie case, it has to look at the case as filed, the statements accompanying, other annexures, the arguments or submissions availed and the law. It is also bound to look at the defence and any annexures availed.

Here, the fact of gifts or donations is seriously contested. The attempt at formalizing acquisition is opposed and faulted for not complying with Land Control Act.

All these are very serious issues that needed a response yet the applicant has not addressed them.

Also raised as an issue is that the parcels as described only came into existence in 1974. According to applicant, the gifts or donations were made before this period. How did the adjudication that completed in 1974 bypass the applicant?

The respondents exercised due diligence and availed the names of the owners of the suit parcels of land. They revealed that some of them are now dead and others are purchasers from the original owners. Are these the donors of the parcels? If they are not, how did they come to be registered as owners over parcels allegedly already donated to applicant? And what did the applicant do upon noting they were so registered?

Looking at the application as a whole, and considering what the respondents have raised, it is plain that the applicant has revealed less than it should in order to establish a prima facie case. More needed to be offered.

As things stand, I cant tell whether the respondent is a legal personality. It is easy to see also that the Land Control Act seems to have been left out of the applicant's attempt at formalizing acquisition, which then would make any such move illegal.

It is not clear too who the donors of the land are or whether indeed the land was donated. The applicant has said it has been in possession all along. This is the same thing that the respondents say. When one party asserts a fact and the other party denies it, that fact is not proved. It behoved the applicant to go further. In fact, this is one application where a further affidavit responding to what the respondents raised in the replying affidavit would have probably served the applicant well. But such affidavit was never availed and the result is that the respondents raised weighty points which remain unanswered.

With things as they are, no prima facie case is made. It has not been shown that the balance of convenience is in applicant's favour.

The respondents have been called trespassers. But in law, the proper parties to call them trespassers are the registered owners of the suit land or any other person using the suit land with authority from such owners. The applicant has not been able to show that it is the owner or one such person.

Overall then, no case for granting the restraining orders sought is made out by the applicant and the application herein is now dismissed with costs.

A.K. KANIARU – JUDGE

27/6/2013

AKA/vaa