



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.106 OF 2012

MAURICE JOHN SIJENJE.....1ST PLAINTIFF

VERSUS

ERICK JECKONIAH SIJENJE.....1ST DEFENDANT

PAMELA AKINYI SIJENJE.....2ND DEFENDANT

EMILY ATIENO SIJENJE.....3RD DEFENDANT

MONICA AWUOR.....4TH DEFENDANT

ROSELINE ADHIAMBO SIJENJE.....5TH DEFENDANT

MARGARET ATIENO OMOLLO.....6TH DEFENDANT

R U L I N G

On 16/4/2013, there was interpartes hearing here of the application dated 13/3/2013. The application is a Notice of Motion brought under sections 1A, 1B, 3A, 63(e) of Civil Procedure Act (Cap 21), order 40 rules 1(a), 4 and order 51 rule 1 of civil Procedure Rules, 2010, and all enabling provisions of law.

The applicant is the 5th defendant and is seeking the following orders:

- That pending the hearing of the suit or further orders of the Court, the Court be pleased to issue an order of interim temporary injunction directed at the respondents and restraining them, either by their agents, employees or any person claiming to derive title and authority from them from trespassing upon, remaining upon, occupying, using, or in any other way interfering with the applicant's business conducted within the suit property **KISUMU MUNICIPALITY/BLOCK 5/253** in any way inconsistent with 5th defendant/applicants as the lawful tenant.
- Cost of the application be provided for.

The basis for the application is that the applicant has been evicted by the respondents from the suit property; that she has, as a result, suffered bodily harm and mental anguish from the beatings visited upon her person by respondents; that the respondents attempt to lay claim on the suit property was unlawful as the Court order given by Court on 28/11/2012 is still in force; and that the applicant might suffer irreparable loss and damage.

In the Supporting Affidavit, the applicant stated that she was assaulted by 2rd, 3rd and 6th defendants assisted by **CLEMENT OKEYO SIJENJE**, who is also named as a respondent. She reported the matter

to police but that didn't deter the 6th defendant from coming to the premises with a gang of 15 men who forcefully evicted her.

The application was responded to by only 3 respondents – **MARGARET ATIENO OMOLLO** (6th respondent), **CLEMENT OKEYO SIJENJE** (named only as respondent) and **MAURICE JOHN SIJENJE** (1st plaintiff/respondent). The others – **MARGARET OBIMO APUNDA SIJENJE** (2nd Plaintiff/respondent), **ANDUL OMONDI SIJENJE**

(3rd Plaintiff/respondent), ERIC JECKONIA SIJENJE

(1st Defendant/respondent), PAMELA AKINYI SIJENJE

(2nd defendant/respondent), EMILY ATIENO SIJENJE

(3rd defendant/respondent), and MONICA AWUOR

(4th defendant/respondent) – didn't respond

Margaret Atieno Omollo termed the application as a thinly veiled move by the applicant to frustrate hearing and disposition of the suit while the applicant herself enjoys financial benefits accruing from the business premises.

She explained that on 2/3/2013 she was at her place of work at the reception at the suit property in the company of one of her sisters - **PAMELA AKINYI** (2nd defendant). The applicant came with about 10 young men and demanded that Margaret vacates the premises.

There was an altercation and the applicant attempted to eject Margaret and Pamela. This was resisted and the applicant called police.

According to Margaret, the solution to the problem is in appointing a third party who is not a family member and who would be collecting rent from the suit premises and depositing it in an agreed account from where the monies would be shared out to all beneficiaries.

Clement wondered how his name appeared in the application yet he is not a party to the suit. He termed as unlawful, irregular and wrong the procedure adopted in including him in the application. He however confirmed being called by Margaret on 2/3/2013 with information that the applicant had gone to the suit premise in company of rowdy young men who wanted to forcefully evict Margaret. He rushed to the scene to find a quarrel already going on. Like Margaret, Clement said the application here is meant to delay the hearing and determination of the main suit. Clement also craved that his name be struck out from the suit.

Maurice John Sijenje termed the application as mischievous, full of lies and untruths as none of the plaintiffs was involved in the alleged fight with 5th defendant. He also denied that the 6th defendant – **MARGARET** has evicted the applicant. The applicant was termed as mischievous, untrustworthy, and a busybody whose timing of the application is suspect as she has not been remitting rent as ordered by Court and was in fact using it for her own selfish needs.

As pointed out at the beginning of this ruling, the Court heard the application on 16/4/2013. During hearing, it was clarified that the tussle leading to the application was essentially between Margaret and the applicant and the background to it is the consent order recorded in Court on 28/11/2012.

By that order, the applicant was made a tenant in the suit premise for a monthly rent of 60,000/=. In spite of that, Margaret went to the suit property and took over the management. She went ahead and started collecting rent.

Margaret was said to be undermining Court process and was being dishonest to everyone else.

BUT while the tussle was said to be essentially between Margaret and the applicant, it was further clarified that it was also against all the respondents as they are all supporting Margaret.

Counsel for the plaintiffs said the application is mischievous, displaced, and abuse of the Court process. He said the plaintiffs are not named in the tussle yet they were served with Court orders.

The Court was also told to note that counsel for the applicant was formerly acting for the other defendant/respondents. By the applicant's application; he had turned against the others and there was a conflict of interest. It was also pointed out that the applicant was not remitting rent as ordered by the Court on 28/11/2013. the applicant therefore had not come to Court with clean hands.

The respondents went on to assert that she has no superior or greater right than the others and her representation by the same counsel who represented the other defendant earlier on poses a possible conflict of interests. The applicant was also faulted for bringing on board **CLEMENT OKEYO SIJENJE**, who is not party to the suit.

This is a case that involves members of the same family. There is an earlier application of the same nature as this one filed by 1st plaintiff on 23/11/2012. it seeks to restrain the respondent/defendants, who include the applicant herein, in more or less the same way that the applicant herein is seeking to restrain the others.

It would be of interest to consider how the counsel for the applicant herein, who was counsel for all the respondents including the applicant at the time, sought to oppose the earlier application.

The counsel's grounds of opposition were filed on 28/11/2012 and dated 27/11/2012. He termed that earlier application as misconceived and an abuse of the Court process for the reasons that the 1st plaintiff/applicant lacks standing as the property belongs to deceased persons.

He also stated that the suit property is not under registered ownership of the plaintiff and thus no irreparable loss can be anticipated and none has been proved.

Now the boot is in the other foot in this application. Counsel is now acting for the applicant who was respondent in the earlier application. If his point in the earlier application was that the applicant in that application lacked standing as the property belonged to deceased persons, doesn't that also apply to the instant applicant? Has the property ceased to belong to deceased persons? What has changed? Where does the applicant in the instant application get her standing?

And if the other point was that the 1st plaintiff/applicant couldn't suffer irreparable loss over property that is not under his registered ownership, how does the applicant in the instant application suffer irreparable loss over the same property that is not in her registered ownership?

These are self-defeating points raised earlier without knowledge that the applicant would later come to court with a similar application. **BUT** that is not all: The applicant in this application seeks to restrain all the respondents including the 1st plaintiff/applicant in the earlier application. She herself is also sought to be restrained in substantially the same manner by 1st plaintiff/applicant in the earlier application.

Every other party in this suit has the potential and capacity to file a similar application to restrain the others. If the Court encourages this trend, the net effect would be a proliferation applications and that would inevitably delay the hearing of the main suit.

BUT lets even look at a scenario where the court allows both applications already filed. The net effect would be to exclude all the parties from the suit premises including the applicant herein. That would be an ugly eventuality. No party possibly wants to be excluded from the suit property. But some would rather have themselves included in matters of the suit property to the exclusion of all the others, yet all are siblings of the same father and are entitled to fair treatment over or concerning the suit property.

It was alleged that the applicant is mischievous and untrustworthy. It was pointed out that she was not remitting rent from the suit property as ordered earlier by the Court. I am unable to establish how truthful this is but I note that she had not remitted all the rent as required by the time the hearing of the application was taking place.

The issue of possible conflict of interests was raised. The Court does not want to delve deep into this issue at this stage. I think it is an issue which, if conclusively tackled at this stage, also has a possible bearing on the main suit. And I am not dealing with the main suit at this stage.

Counsel for the plaintiffs also pointed out that the application was incompetent as the applicant didn't have a suit with a prayer for permanent injunction.

Counsel for the applicant however countered that reasonably well by pointing out that the applicant, who is a defendant, couldn't possibly have such a prayer.

But I need to point out that a careful reading Order 40 in Civil Procedure Rules does not make it mandatory to have such a prayer in all suits. It is only mandatory to have such prayer if the application is brought under Order 40 Rule 2. If the application is brought under order 40 rule 1, there is no requirement for such prayer.

The instant application is brought under order 40 rule 1 (a) and 4. These rules do not require a prayer for permanent injunction. Besides, other saving provisions are cited and that argument therefore cannot prevail.

An issue was raised by Onsongo for some of the respondents as to the appropriateness of including **CLEMENT OKEYO SIJENJE** as respondent. This is a pertinent issue. A reading of order 40 of Civil Procedure rules would show that the only parties sought to be affected are those named as defendants or plaintiffs in the suit. Of course a stretch of this requirement would include those acting at the behest or direction of the parties to the suits. Ordinarily, these ones are not named but are included in the prayers as servants, agents, assignees etc.

But when a person is named in the application as a respondent, such a person is included there in his or her own right. **CLEMENT** is therefore not included as an agent of any of the parties. He is actually included as a party. This was wrong. It is not allowed that a person who is not party to the proceedings can be brought on board as a party in interlocutory proceedings.

No leave of the Court was sought to include Clement in the application. The Counsel for the plaintiff should have first sought leave to include Clement as a party and only after granting of such leave would he then be entitled to include him in the suit as well as in the application.

In the Court's view the inappropriate and sudden inclusion of Clement in the application rendered it improper and defective. Overall then, this application must fail for the reasons that the same counsel representing the applicant sought to defeat an earlier similar application with points or reasons that would themselves defeat this application.

The Court does not also wish to encourage proliferations of applications of this kind as that would delay fair trial of the action. It was also improper for counsel for applicant to join a total stranger – **CLEMENT OKEYO SIJENJE** – to the application without seeking leave of the Court.

All this, coupled with all else the Court has highlighted, impels the Court to dismiss the application. And the application is hereby dismissed with costs.

A.K. KANIARU - JUDGE

20/6/2013

AKK/va