REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.81 OF 2012

PHILIP OKWAMA ADOGO.....APPLICANT

VERSUS

1. MICHAEL T. ADEDE
2. CLERK TOWN COUNCIL OF AHERO.....RESPONDENTS

RULING

This is a ruling on a Notice of Motion filed here on 22/10/2012 and dated 17/10/2012. It is brought under order 40 Rules 1 & 2 of Civil Procedure Rules and Sections 1A,1B and 3A of Civil Procedure Act.

At this stage, it would appear that only prayers 3 and 4 are sought. Ordinarily, prayer 2, which seeks a restraining order against the second respondent – **TOWN COUNCIL OF AHERO** and/or its clerk – would need to be included but the prayer as worded shows it is to run for the duration of the application, not the suit. That means the prayer would be considered spent when this ruling is delivered.

Prayers 3 and 4 are as follows:-

Prayer 3: That a temporary injunction be granted restraining **Michael T. Adede** (1st respondent), his employees, servants, agents and/or representatives from encroaching , developing and interfering with Land Parcel No.23 Onjiko/Otho market until the suit is heard and determined.

Prayer 4: The cost of this application be provided for.

The basis of the application is that the 2nd respondent – Town council of Ahero – has blatantly disregarded the applicant's rights and started converting Plot No.23 Onjiko/Otho (Suit property hereafter) to the name of 1st respondent – **MICHAEL T. ADEDE**. The 1st respondent himself is said to be intent on encroaching on the suit property to the detriment of the applicant. The applicants rights to peaceful use and occupation of the suit property are therefore allegedly being interfered with.

The applicant stated that he inherited the suit property from his father – **PHILIP OTHWERE ISAKA MBECHE** – upon his demise but the respondents have interfered with his rights and the 1st respondent in particular has even started construction on the suit property.

The 1st respondent replied vide a replying affidavit filed on 20/12/2012. He stated that the suit property has been in his possession since 1956 and originally belonged to his grandfather – **ISAKA MBECHE ORAGE**. He has been paying rates, he said, in his grandfather's name until 1992 when the suit property was transferred to his name vide 2nd respondents planning minute 9/92, Council minute No.28/92 with a certificate issuing to that effect on 15/6/1993. All along, the 1st respondent has been paying rates but the applicant has never paid rates as the plot does not belong to him.

The 1st respondent averred that he is aware that the applicant's father had been claiming ownership and actually filed a succession cause for the estate of 1st respondents grandfather where he claimed the suit property as his own.

The Succession cause however was allegedly filed after the suit property had already been transferred to applicant's name. The 1st respondent also said that that Succession cause was challenged and the outcome is still awaited.

The 1st respondent stated further that he and the applicant are cousins, being grandchildren of **ISAKA MBECHE ORAGE**, and that the applicant is aware that their grandfather divided his property among his 3 sons and the suit property didn't go to applicant's father – **PHILIP OTHWELE ISAKA MBECHE** or the applicant.

The 2nd respondent also filed a replying affidavit and stated the suit property belongs to 1st respondent. The records held by 2nd respondent, it was deponed, show that the suit property was originally alloted to **ISAKA MBECHE ORAGE** in 1950 before being transferred to the 1st respondent in 1992.

The 2nd respondent said there are no records showing transfer to any other party. It was stated further that the documents – POA1 – availed by applicant purporting to show ownership differs from the official records held by 2nd respondent.

In the Court records there are two supplementary affidavits and one further supplementary affidavit from the applicant. The 1st supplementary affidavit is dated and filed on 24/10/2012. It stated that the suit property did indeed revert to applicant's father – **PHILIP OTHWELE MBECHE**. It is not clear whether leave of Court was sought to file this affidavit.

The second supplementary affidavit was filed on 3/1/2013 and dated the same. This affidavit alleged that the defendant (presumably 1st respondent) tried to fraudulently transfer the plot to his name in 1998 but was discovered by the Council (2nd respondent). He was summoned to appear before the council but didn't appear.

The applicant disputes that any transfer occurred in 1992 as his grandfather was dead by then. He asserted too that his own father was the sole administrator of the estate of his late grandfather.

It appears clear that the 1st respondent decided to respond to the applicant's supplementary affidavits with his own supplementary affidavit dated 31/1/2013. He stated, inter alia, that the applicant's claim of ownership is not tenable as the suit property didn't belong to his late father. The claim is said to be based on succession cause No.12 of 1998 which concerns the estate of **ISAKA MBECHE ORAGE**. That estate, it was said, has not been distributed as the grant issued on 2nd June 2004 has not been confirmed.

And in spite of lack of confirmation, the applicant has proceeded to list the suit property as that of his late father in succession cause No.98/2008 and proceeded to have this letter of grant confirmed. This is said to amount to taking over property whose ownership is disputed and which is yet to be distributed.

The 1st respondent deponed that the suit plot is still in his name and the applicant cannot use a flawed process to claim ownership.

The supplementary affidavit of 1st respondent necessitated a further supplementary affidavit from the applicant. That affidavit was filed on 12/2/2013. It reiterates much that the 2nd supplementary affidavit contained and stated, inter alia, that the applicant's claim of ownership is based on Succession Cause number 101/08 and the 1st respondent no longer owns the suit property.

The applicant said that the 2nd respondent actually reversed ownership of the suit property to the successor – **PHILIP OTHWELE ISAKA MBECHE**. The 2nd respondent, it was deponed, should

amend its records accordingly.

This application never went for hearing. The parties filed submissions instead. The applicants filed two sets of submissions which are actually similar on their first pages but are different in their inside pages. The first submissions were filed on 15/5/2013 and dated the same. The Court is urged to grant the prayers sought as a prima facie case is made out; there is possible occasioning of irreparable loss to applicant; and that the balance of convenience is in applicant's favour.

Cases cited are as follows:

i. **GIELLA VS CASSMAN BROWN & CO LIMITED (1973) EA 358**
ii. **NIAZ MOHAMED VS COMMISSIONER OF LANDS AND ANOTHER: HCC NO.23/96, MOMBASA**

The second set of submissions were filed on 29/5/2013 and dated 28/5/2013. Like the first set, the Court is urged to find for the applicant.

Giella's case (supra) was cited and the same applicable principles articulated.

In these submissions the other cases cited are different. They are the following:

(i) SAMSON KHASIANI AMUSIBWA VS ALPHOSE MUSOTSIAMBALI & 2 OTHERS: (2005 eKL)

(ii) KAMAU MUCHUHA VS THE RIPPLES C.A Application No.186/92, NAIROBI

(iii) CYNAMID VS ETHICON LIMITED (1975) 1 ALL E.R AS CITED IN MUREITHI VS CITY COUNCIL OF NAIROBI 1981 KLR 332 (some bit of confusion here. Not sure which case referred to the other).

The respondents filed submissions on 23/4/2013. The submissions are dated 19/4/2013.

The Court was told the applicant is not the registered owner of the suit property. The respondents also submitted that the applicant refers to the suit property as his yet the correct position is that it supposedly belongs to his late father and, as such, the applicant does not have any rights or loss he is likely to suffer since his purported rights are yet to be established.

The respondent cited the following cases:

(i) GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358.

(ii) CHRISTIAN BROTHERHOOD NKIBWE CHURCH TRUSTEE VS BROTHERHOOD GOSPEL CHURCH & 3 OTHERS: CIVIL APPEAL NO.75/2005: HCCA, MERU.

Going by the contents of the application, the second respondent is not sought to be injuncted at this stage. It is something of an oddity as to how the 1st respondent was injuncted exparte yet there is no prayer in the application to injunct him that way. The prayer to injunct him as stated in the application is meant to run until the suit is heard and determined. Whether that was the real aim of the applicant or was a mistake inadvertently made is hard to tell.

But it seems more like the latter because there are a few more things that don't gel. It is apt to point to point out some of them. The application is dated 17/10/2012. It was filed on 22/10/2012. A look at both sets of the applicant's submissions show the application as dated 22/1/2012. The respondent themselves submitted on an application said to be dated 30/10/2012. Procedural propriety was not adhered to. After filing of the application, a supplementary affidavit was filed. After sometime, another supplementary affidavit was again filed. It is unusual to file two supplementary affidavits. And that is not all, there are

also two sets of submissions. The two submissions look similar on the first page but are actually different in the inside pages. Again this does not usually happen.

Overall then, things look muddled. Issues are obfuscated. The Court has to rummage through a jumble of documents filed irregularly. The exercise to untangle the issues is like a wander into the miasma of uncertainty and confusion. The only thing that makes the court certain that it is dealing with the right application is that at this stage, this is the only application in the court file.

The court has tried to boil down the contents of what was availed for and against the application.The applicant's claim to ownership is based on some Court documents relating to succession matters and on documentary material said to emanate from the 2nd respondent.

The second respondent has disputed material attributed to it and has asserted that its records show the 1st respondent as the owner. The 1st respondent has stated he is the registered owner and has availed various receipts to show payments of rates.

The Court thinks that the respondent's arguments have more weight. Ownership of the suit property at this stage is not a matter of Court documents. It is a matter of who appears as owner in the office charged with responsibility of issuing documents of ownership. That office is that of 2nd respondent. The 1st respondent has not only got the backing of2nd respondent but has demonstrated dutiful payment of rates for a long period. The applicant has not demonstrated any payment of rates. This being the position then, the court finds that the applicant has not established a prima facie case.

The next step is to consider whether the applicant can be compensated in damages. It is alleged the applicant has a sentimental attachment to the plot. This is not convincing. The plot is not the applicant's ancestral land. And there is no personal history of continuous or constant contact with the suit property or unique dealing with it to develop the alleged sentimentality. The fact of the matter is that sentimentalism must have a basis. That basis is not demonstrated here. It is also not persuasive to say the plot is prime. There are many prime plots obviously in the area and this aspect is not attractive only to the applicant but to everybody interested in plots anywhere.

The suit property in this case has a known market value and the applicant can be compensated in damages. In the alternative it is possible for the applicant to be allocated another plot somewhere should that become necessary. The applicant therefore can be adequately compensated in damages.

The court will not consider the balance of convenience. The resort to balance of convenience only arises when the court is in doubt. The Court is not in doubt here. It has already found that damages would suffice for the applicant.

Considering all the highlights and analysis heretofore, it all boils down to a finding of want of merit for the application herein. The Court therefore holds that the application is unmeritorious and the same is dismissed with costs.

A.K. KANIARU – JUDGE

31/7/2013

31/7/2013

A.K. KANIARU – JUDGE

Roseline O. - Court clerk

No party present

Interpretation – English/Kiswahili

Odhiambo for M/s Opondo for respondent

Ogone for Mwamu for applicant

COURT: Ruling on application dated 17/10/2012 and filed on

22/10/2012 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013