REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.140 OF 2012

RISPER AUMA OKOTH...PLAINTIFF

VERSUS

ANGELINE AUMA ODERA...1ST DEFENDANT

MUNICIPAL COUNCIL OF KISUMU...........................2ND DEFENDANT

R U L I N G

The Plaintiff/applicant – **RISPER AUMA OKOTH -** filed this suit here on 13/7/2012 vide a plaint dated 12/7/2012. Filed together with the suit was a Notice of Motion which is the subject of this ruling.

Both the suit and the application are against two parties – **ANGELINE AUMA ODERO** (1st defendant/applicant) and **MUNICIPAL COUNCIL OF KISUMU** (2nd defendant/applicant).

The suit and the application concern **PLOT NO.UNS.RESDPLOT NO.33 – MIGOSI SS** (hereafter the suit plot).

The application is brought under order 40 rule 1,2,and 4 of Civil Procedure Rules and Sections 1A, 1B and 3A of Civil Procedure Act.

At this stage, the relevant prayers are (c) and (d) as spelt out on the face of the application. The said prayers are as follows:

(c) That the honourable Court be pleased to grant a temporary injunction restraining the defendants/respondents either by themselves, their agents from trespassing, developing and/or in any way interfering with the plaintiff's occupation, user, and possession of the suit plot pending hearing and determination of this suit

(d) That costs of the application be provided for.

The basis or grounds advanced stipulate that the applicant is the bonafide owner of the suit plot, having complied with all the requirements or ownership. The applicant is said to have been paying rates and rents; has submitted building plan for approval by 2nd defendants; and stands to suffer irreparable loss if the activities of the defendants of the defendants are allowed to go on.

In the supporting affidavit, the applicant depones, interalia, that **TOM OGURE OKOTH**, who is the donor of power of attorney to her, was allocated the plot by 2nd defendant and she has been paying rates for him.

The applicant then got funds to commence development and submitted a building plan to 2nd defendant. The approval of that plan is still being awaited. **BUT** while still waiting, she got to know that 1st respondent had encroached on the suit plot and intended to develop it.

She later got to know the 1st respondent was claiming to have been allocated the suit plot by 2nd respondent. The applicant said that the letter of allotment given to **TOM AGURE** has never been revoked.

The 1st respondent filed a replying affidavit deponing, inter alia, that she owns the suit plot; that the same was offered to her by 2nd respondent and she has been paying rates;and that the plot was repossessed from Applicant by 2nd respondent when the applicant failed to develop it within the stipulated period. The applicant was said to have concealed material facts to the court and the court was urged not to give her the orders sought.

The Court does not have the response of the 2nd respondent. Only submissions were filed. But the applicant filed a supplementary affidavit in which, at Para 2, she mentions having read two affidavits in reply to her application. This may imply that the 2nd respondent made a response which never found its way into the court file. The supplementary affidavit generally reiterates the unlawfulness of the 2nd respondents action of purporting to repossess the suit plot.

Submissions were filed by all parties. The applicant said she established a primafacie case. It was asserted that the 2nd respondents record still show the applicant as the owner of the plot. There is also evidence of rate payments and acceptance of such rates by 2nd respondent.

The minutes by Housing Development Committee purporting to repossess the suit plot are also said not to have approval of the full council meeting. It was also averred that the applicant has submitted a building plan and paid the requisite charges. And the Commissioner of lands, it was said, had communicated to the Town clerk terming the repossession illegal.

The applicant said there would be irreparable loss if the orders are not granted. The balance of convenience also is said to tilt in the applicant's favour.

The submissions of first defendant raised various issues. Paragraphs 8 and 9 of the supporting affidavit were faulted for deponing to information whose sources are not disclosed.

It was also pointed out that the applicant has not established a primafacie case and has not shown that there is bound to be irreparable loss. And the balance of convenience does not tilt in the applicant's favour. The decided case of **GITAO & 5 OTHERS VS KENYA NATIONAL CHAMBERS OF COMMERCE & INDUSTRY: HCC NO.1859/90, NAIROBI,** where the court dismissed an application for injunction and opined the balance of convenience favoured such dismissal, was availed here to support the position of 1st respondent. The 1st defendant is said to have followed all due process.

It would appear the 1st respondent views this as a case of double allocation. She has therefore advanced the view that the applicant can pursue another remedy namely viz: **DAMAGES.**

The decided case of **AMRITLAL VS CITY COUNCIL OF NAIROBI (1985) KLR 75** was said to endorse this view.

The 2nd respondent submitted, interalia, that the applicant failed to meet the conditions set out during allocation. The plaintiff's claim was also said to be overtaken by events and that his remedy, if any, lie in judicial review, not injunctions. And Municipal Council of Kisumu does not exist, it was said. The proper party should be City Council of Kisumu.

I have considered the application, the replying affidavit on record, and the various submissions filed. It seems clear to me that the basis of the applicant's application is that she has a primafacie case with a probability of success.

In the submissions such primafacie case is said to be established because the 2nd respondent's record still show the applicant as the owner. The applicant availed a letter of allotment. That letter of allotment should show **TOM AGURE OKOTH** as the allotee, the applicant herself being only a holder of power of attorney from Tom. **BUT** the letter shows **JOHN AGAN** and **JIMMY ODHIAMBO AGAN** as the allotees. I have tried to look for **TOM AGURE's** name in the letter but it does not appear anywhere. It is clear therefore the letter cannot be useful in establishing a primafacie case here. The other basis is payment of rates. It is true there are few annextures showing that **TOM AGURE** has been paying rates. But there is also evidence that the applicant herself has also paid rates. This being the scenario, it becomes difficult to hold one as an owner on the basis of paying rates while disregarding the claim of ownership of the other who has also been paying rates. The only fair position to take is that in the circumstances of this case, rate payment is not a demonstration of undoubted ownership.

The 2nd respondent submitted that the applicant failed to develop the suit plot. That is why the plot was repossessed. It is clear that the alleged allocation took place a long time ago. It is clear too that the plot stayed for long without being developed. It is not clear at this stage whether the procedure for repossession was properly invoked, but it seems clear that the argument for repossession is possibly not hollow.

The submissions of 1st respondent contain much that is for the main case itself but which is probably raised at this stage to show that a primafacie case with a probability of success is not established. This is also true to some extent concerning the submissions of 2nd respondent.

It appears clear that the 2nd respondent has made up its decision that the suit plot already belongs to 1st defendant.

This suit itself does not address the issue of ownership. It talks of occupation, user and/or possession.

It would appear that the 1st respondent has already gone into possession and occupation by fencing and depositing building materials on site. The court thinks that the suit as filed will not completely resolve the problem. Even if a permanent injunction is granted, the problem of unresolved ownership at the 2nd respondents office will still remain. When all this is considered, a primafacie case cannot be said to be established.

And can it be said that damages are not an adequate remedy? The applicant has not developed the plot. She does not seem to be living there. And the 2nd respondent cannot be said to be unable to pay damages.

If the plot is still undeveloped and unoccupied by the applicant what irreparable damage can she conceivably talk of?

The Court's considered view is that damages are an adequate remedy here. And the law is that primafacie you don't grant an injunctive relief where damages are a proper remedy. I don't deem it necessary to consider the issue of balance of convenience. This is because I have already found that damages are an adequate remedy. In fact, I would also not have considered the issue of damages if the applicant had established a primafacie case. I say this because the law required that the conditions for granting interlocutory injunctions be considered sequentially. The second condition cannot be considered if the first is not and the third, which is balance of convenience, cannot be considered without considering the first two.

This much is clear from the decided case of **KENYA COMMERCIAL FINANCECO. LTD VS AFRAHA EDUCATION SOCIETY (2001) EA 86**. That is a case where the judge was faulted for considering the balance of convenience without considering the other two.

In this application, the court has already made its decision that damages, which is the second condition of the applicable law, would be an adequate remedy.

In light of what the court has said in its analysis so far, it is clear that the applicant's application is for dismissal 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

Onyango P.D. For Kowino for plaintiff/applicant

Ogone for Rodi for 2nd defendant/respondent

M/s Onyango (absent) for 1st defendant/respondent

Interpretation – English/Kiswahili

COURT: Ruling on application dated 12/7/2012 and filed on 13/7/2012 read and delivered in Open Court.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013