



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO.208 OF 2013

JULIANA ACHIENG OWINO.....PLAINTIFF/RESPONDENT

VERSUS

1. ROSE OBAMA.....DEFENDANT/APPLICANT

2. GORDON OBAMA.....DEFENDANT/APPLICANT

RULING

1. This ruling follows interpartes hearing of the application dated 2/9/2013 and filed on the same date. The application is a Notice of Motion brought under Order 40, Sections 1A, 1B and 3A of Civil Procedure Act (CAP 21). It is brought under a certificate of urgency and the following orders are asked for at this stage.

- While pending the hearing and determination of this application the Court be pleased to set aside, vary or discharge the exparte orders of 15/8/2013 pending hearing and determination of the application.

- While pending the hearing and determination of this suit, there be an interim order of injunction directed to the plaintiff, her agents, servants employees or whoever else from interfering with the defendants peaceful occupation of land parcel No. **KOLWA/KASULE/1572** adjudication Section.

- Costs of the application to be borne by the respondent.

2. The grounds advanced in support of the application state, inter alia, that the defendant/applicant bought a portion of **KOLWA/KASULE/1572** Adjudication Section measuring 29m X 28M X 25 X 34 on or about 4th October 1989 and built a house there in year 2000 and has been staying there without interruption. The plaintiff then obtained Exparte restraining orders preventing the defendants, agents, sympathizers or family members from stepping, entering, working, tilling, wasting, constructing, damaging, accumulating materials and/or in any other way committing any act of trespass on parcel No. **KISUMU/KASULE/2510** pending the hearing of the application inter partes but the plaintiff instead demolished and destroyed the properties of the defendant/applicant. The order issued is said not to have been served on the defendant and the demolition of the house is termed as an act of impunity, Contrary to Logic and in disregard of the Constitution.

The 1st defendant is said to be spending nights in the cold as the plaintiff has demolished her house. The Court is asked to keep its dignity and respect by refusing to allow willful and deliberate misinterpretation of its orders.

3. The supporting affidavit repeats some of what is already in the grounds advanced. It seems to be the position of the defendants that when the 1st defendant bought the land, the process of transferring it to her was never completed. She however settled on the land and put up a house. The plaintiff is said to have demolished that house purporting to be acting on court orders herein complained of. The 1st defendant depones she was never served with the said orders. The plaintiff is accused of material non-disclosure. It was also stated that ex parte orders cannot be used to evict.
4. The plaintiff filed a replying affidavit on 1/10/2013 denying the 1st defendant's allegations. She asserted that the 1st defendant was served, that she never instructed anybody to demolish the 1st defendant's house and she didn't do it herself as she was in Nairobi; that she made enquiries and got to know that the 1st defendant and her son Ray Obama demolished the house, and that that being the position the plaintiff will institute legal action against the 1st defendant for disparaging her good name.
5. The plaintiff also pointed out that her own parcel of land is **KISUMU/KASULE/2510** while the defendant talks of **EAST KOLWA/KASULE/1572 AOJ**, which the plaintiff has no interest in and which is not the subject matter of the suit.
6. The defendant was faulted for not enjoining the alleged seller of the land to her. Without that, it is alleged that the claim cannot be conclusively determined. Further, the defendant is faulted for not filing defence or any counter claim making it impossible for the court to test the suitability of the applicable principles in granting an injunction.
7. The matter was heard inter partes on 3/10/2013 with each side reiterating more or less what is already in writing. In addition however, the following decided authorities were availed.

- **REV MADARA EVANS OKANGA DONDO V HOUSING FINANCE COMPANY OF KENYA: HCC NO.262/05, NAKURU.**

This case was availed by the defendant/applicant as an example to show how the Court should treat a party who is untruthful and is guilty of material non-disclosure.

- **SULEIMAN VS AMBOSELI RESORT LIMITED (2004) 2KLR 589.** This was availed by the plaintiff to show the applicable principles in granting restraining orders.

- **GITHIEYA VS GITAU (2004) 2KLR 309.** Also availed by plaintiff/Respondent to show the applicable principles in matters of interim injunctions.

- **EAST AFRICAN DEVELOPMENT BANK VS HUNDAI MOTORS KENYA LIMITED: (2006) 2KLR.** Again availed by the plaintiff/respondent to emphasize the principles to apply in granting restraining orders.

8. I have carefully considered the material that was laid before me by both sides. The application as brought amounts to a counter application. The plaintiff was the first to make an application for a restraining order. The only recourse open to the 1st defendant was to file a response. It is wrong for the 1st defendant to file a counter – application and to purport the urgency of her application to supersede the urgency of the plaintiff's application. There was a deliberate deviation from procedures by the 1st defendant and I find her application anomalous to the extent that it seeks to counter an application of a similar nature.
9. The right thing to do in a situation like this would have been to file a swift response, and urge for a quick inter partes hearing date. In practice, the only instance known where a hearing can take place before an interlocutory application is heard is where the opposing side is raising a preliminary objection. It is not known that a filed application is countered by another application and an attempt to do this, as is the case here, comes perilously close to abuse of court process.

10. The 1st defendant/applicant made various arguments to advance the position that the applicable principles for granting a restraining order have been met. Her sale agreement is said to back establishment of a prima facie case. The fact that she had her house demolished and that she allegedly sleeps in the streets is said to cause irreparable harm and also to tilt the balance of convenience in her favour.

But I am constrained to observe that no defence is filed yet. The plaintiff has advanced formidable arguments denying allegations of demolishing the 1st defendant's house and asserting that the 1st defendant herself demolished it.

When a fact is alleged by one side and denied by the other, that fact is not proved unless the side alleging it provides something more as proof. This is not the case here. I needed to see the 1st defendant's defence.

11. It is noteworthy that the 1st defendant's land as described is different from the plaintiff's land. Curiously, the description by the 1st defendant seems to show the area as under adjudication. It would be interesting to know whether that area is still under adjudication. If it is not, it is likely that the 1st defendant is talking of an area which in law does not exist. There is therefore the possibility that the Court may give a restraining order concerning an area that no longer exists in law. The 1st defendant needed to satisfy the court that her parcel of land is still known as she described it. The plaintiff's side in contrast has no problem as a title is already put in Court records showing the plaintiff's parcel of land.

12. It is doubtful if the appropriate remedy regarding the demolished house is in the application filed. The house is already demolished. That event has already taken place. The restraining order sought is in the nature of forestalling or preventing an event that has not taken place. Will the order as prayed herein give back the 1st defendant her house? Obviously no. I think the 1st defendant would require an order in the nature of mandatory injunction which, if all is well proved, would compel the plaintiff to put up another house for the plaintiff.

13. I fear that the 1st defendant is labouring under the mistaken belief that there is an ex parte restraining order to be discharged. The plaintiff's side may also harbour a mistaken belief that it enjoys ex parte restraining orders. The law is clear. That law is in order 40 Rule 4, sub rules 2 and 3. The law is to this effect: an ex parte restraining order once given has a lifespan of only two weeks. And it lapses automatically unless extended, which must be only once, with consent of both sides.

And where such ex parte restraining order is issued, it must be served within 3 days of issue failing which it automatically lapses.

14. The order complained of here was issued on 13/8/2013. The wording of the order cannot override clear and express provisions of written law. The 1st defendant's application was filed on 2/9/2013. By then two weeks had expired. The order had not been extended. Was there an order therefore that the Court could discharge? I think the order had lapsed.

15. It is with all this in mind that, though sympathetic to 1st defendant's alleged plight, I am unable to grant the application. The application not only offends the law but also becomes unmeritorious for the reasons herein aforesaid. The application is hereby dismissed with costs.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Diang'a George – C/C

Defendant – Present

Nyamweya for plaintiff

Omondi M (Absent) for defendant

Interpretation – English/Kiswahili

Ms Oluoch for Omondi

COURT: Ruling on application dated 2/9/2013 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/013