



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 166 OF 2011

MAYFAIR HOLDINGS LTD.....APPLICANT
VERSUS
GEORGE ONDU.....1ST RESPONDENT
AUGUSTINE ABUYA OSINDE.....2ND RESPONDENT

R U L I N G

The plaintiff/applicant's application dated 6-10-2011 seeks the following prayers:-

(a) An order of permanent injunction against the defendant, their agent, representative, assigns or any other person acting through their direction from blocking the service land or in any other way interfering with plaintiff's land Parcel No. Kisumu/Municipality Block 7/214.

(b) Costs of this suit plus interest.

(c) Any other order or relief this honourable court deems fit and just to grant in the interest of justice.

The same is supported by the affidavit of **Amin Gilani** the plaintiff managing director. When this matter came up for hearing on 19-12-2011 both counsels for the parties resorted to rely on the pleadings/affidavits and their written submissions and authorities.

From the affidavits evidence before me it is clear that the plaintiff is the registered owner of land parcel No. **Kisumu/Municipality Block 7/214**. The same has been exhibited vide annexure AG1. The appellant's argument is that the defendants who are not registered proprietors of the said property have destroyed the plaintiff fence and are in the process of putting up some kiosks. They have further exhibited a letter dated 10-5-2011 warning any party from trespassing on the access road. In short the applicants are contending that they cannot make good use of their land.

The defendants on the other hand have filed a replying affidavit through one **George Ondu**. They have exhibited a letter dated 2-4-2008 titled "**Application for Partnership in Development of a SME Promotion Centre**" as well as a letter dated 6-8-2008 from the Municipal Council of Kisumu granting them use of some undescribed parcel of land behind "**Lucky Bar opposite EABS**". They went further and paid a sum of Kshs. 10,000/=.

The defendants have also exhibited some approved plans.

I have also gone through the able submission of both parties.

The issue to be determined is whether or not on the basis of the documents exhibited through the affidavits the plaintiff is entitled to the prayer sought.

There is no doubt in my mind that there is no evidence that the parcel of land known as “**Kisumu Block 7 off Oginga Street**” is registered in the names of the defendants. Further there is no evidence that the same is a public utility. The letter from the Municipal council doesn't in any way show that the same is a public utility. What is more interesting is that the letter granting license to the defendants dated 6-8-2008 mentions an application dated May 2008. No where does it mention 2-4-2008. The sum of Kshs. 10,000/= doesn't clearly from exhibit GOO4 show the purpose.

Under the provision of section 27 and 28 of the Registered Land Act chapter 300 Laws of Kenya the plaintiff/applicant is the first registered owner of the suit parcel of land. It obtained title on 7-11-2002.

Obviously it needs to enjoy equal an unfettered use of the easement, roads and other outlets as provided for. The Municipal council's letter dated 10-5-2011 seemed to have taken cognisance of this fact. The said letter was written by one **Ayany A.P.O** whom I suppose is the same **Ayany Absalom Ochieng** who wrote the defendant's letter dated 6-8-2008.

The time of ventilating these issue shall be at the trial stage. For now it is necessary only to deal with that which is interime. It is my considered opinion that based on the conflicting signals from the Municipal Council of Kisumu, as to whether or not indeed the land being occupied by the defendant is public or not, it is necessary that the plaintiff be accorded the use and enjoyment of the road access. The defendant in any event can be compensated by way of damages which undertaking has already been given by the applicant. Let the plaintiff enjoy the use of the access facility pending the formal hearing of the suit. I believe the authorities **Giella-VS- Cassman Brown [1973 {EA} 358 and American Cyanamid-VS- Ethicon Ltd [1975] 1 E.R 504** relied upon by the applicants are in all respect in support of this application. The same is allowed with costs.

Dated, signed and delivered at Kisumu this 20th day of January, 2012

H.K. CHEMITEI
JUDGE
HCK/va