REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 100 OF 2010

1. DAMARIS AKINYI NONDI
2. CHARLES DUCE OPONDO*[Suing as* ....PLAINTIFFS/ APPLICANTS
administrators and personal representatives of JAMES OPIYO OPONDO, deceased]

VERSUS

ASGAR KHANABHAI...DEFENDANTS/ APPLICANTS

RULING

Against the background of a suit-by-plaint dated ***7th April, 2010*** and filed on ***8th April, 2010***, the plaintiffs moved the Court by Chamber Summons of the same date, brought under Order **XXXIX,** Rules 2, 2A and 9 of the Civil Procedure Rules. The main prayer for resolution at this stage is for:

"an order of temporary prohibitory injunction….restraining the defendant either by himself, his servants, agents and/or otherwise from trespassing onto the land situate at Kabenderani, Mariakani known as Plot No. 1B Kawala Adjudication Section, obtaining title thereto, developing or disposing of the same or in any other manner whatsoever and howsoever from interfering or intermeddling with the ownership, possession, quiet enjoyment and use of the said parcel of the land which forms part of the estate of the late *James Opiyo Opondo* ***pending the hearing and determination of the suit herein."***

The application is founded on grounds which are set out in some detail:

(i) the suit plot, which measures 2.4 acres, is and has been the property of the late ***James Opiyo Opondo****, as from* ***1989;***

(ii) the deceased had constructed a house, and planted trees on the suit property;

(iii) the defendant, unless restrained by order of injunction, will proceed with construction works on the suit property and obtain title thereto, and the deceased's estate will, in consequence, suffer irreparable

loss not compensable in damages;

(iv) the plaintiffs have a prima facie case with a probability of success against the defendant;

(v) the defendant has no interest in the suit property and is a trespasser thereon;

(vi) the balance of convenience favours the issuance of an order of injunction in favour of the plaintiffs, for the suit property is likely to go to waste if the defendant continues with acts of trespass;

(vii) the plaintiffs are willing to give an undertaking as to damages if ordered by the Court to do so, as a basis for grant of injunctive relief at this stage;

(viii) it is in the interests of justice that the application be allowed.

In the supporting affidavit, 1st plaintiff depones that she is widow to the deceased, and co-administratrix of the estate, the deceased having died on ***7th November, 2007***. The deponent avers that the land with the suit property had earlier belonged to one ***Juma N. Dzombo,*** but in 1985 he subdivided the same into plots, which he sold off; he sold Plot No. 1B to one ***John Walter Odiwuor***, who, on ***3rd August, 1989*** sold the suit property to the deceased, for the sum of Kshs. 250,000/=.

The deponent averred that the suit property is part and parcel of the estate of the late ***James Opiyo Opondo***, which is being administered jointly by herself and ***Charles Duce Opiyo***, a son of the deceased. The deceased, before his death, had constructed a site-house on the suit premises, which is occupied by a security guard, and had planted trees and deposited building blocks on the land. The deponent deposes that, sometime between ***January*** and ***March, 2010*** the defendant demolished the said site-house, and carried away the building blocks which had been deposited by the deceased; and the defendant then brought in his own building materials, and began digging for the construction of a foundation; the defendant went further, and erected a site-board which reads: "***PRIVATE PROPERTY. THE PLOT IS NOT FOR SALE. TRESPASSERS WILL BE PROSECUTED***".

The defendant filed no replies to the plaintiffs' application but, instead, came up with his own application, by Notice of Motion dated ***20th April, 2010*** and brought under Orders **XXXIX** (Rule 4), L (Rules 1, 2 and 7) of the Civil Procedure Rules, and ss. 3A, 1A and 1B of the Civil Procedure Act (Cap. 21, Laws of Kenya). On ***23rd April, 2010***, ***Mr. Justice Azangalala*** directed that the defendant's application be treated as the reply to the plaintiffs' application.

The defendant's application seeks to reverse the interim orders which the plaintiffs had obtained, on the basis of their application; and the grounds the later application are:

(i) that, the defendant is wrongly sued, since "he has no proprietory interest in the suit property";

(ii) that, the defendant be granted leave to defend;

(iii) that, the defendant is likely to be committed for contempt, in relation to matters in which he has no control;

(iv) that, the justice of the case demands that the parties be heard on the merits.

In his supporting affidavit, the defendant deposes that he is not the owner of the subject land; he had only served as caretaker, on behalf of a ***Mr. Noordin*** and a ***Saufudin***, in "*checking on any likely trespass to the property*"; he has not cut any trees, or demolished any property on the suit land.
To the defendant's application and evidence, 1st plaintiff herein swore a replying affidavit, on ***22nd April, 2010***, deponing that the act of trespass complained of has been committed by the defendant; that it was essential to bring the suit for injunctive relief "*against the very person who…..has always been instrumental in the commencement and execution of the deeds complained of…..in the suit property*."

The 1st plaintiff depones that while it is not possible to ascertain formal title to the suit land, for the reason that it is not registered under any land registration system, the history of its ownership shows it to be part and parcel of the deceased's estate.

The deponent avers that the defendant herein has been personally involved in altercations with her, over ownership of the suit land, and that this defendant is invoking the names of one ***Mr. Noordin*** and one ***Saufudin*** in vain, as these are unknown and unidentified people who have never expressed any claim to the suit land. The 1st plaintiff avers that if such undisclosed owners of the suit land exist, they have "*not deemed it appropriate to disclose how they came to be owners of the suit property*".

Learned counsel for the plaintiffs urged it to be significant that the defendant had filed neither grounds of opposition nor a replying affidavit, to their application of ***7th April, 2010***; but instead, the defendant filed a competing application, by way of Chamber Summons dated ***20th April, 2010***; and when the time came for hearing the defendant's application, a consent was reached between counsel: "*The plaintiffs' … application [of]* ***7th April, 2010*** *be heard within thirty days, and the defendant's [application] [of]* ***20th April, 2010*** *be used as a replying affidavit*".

Counsel submitted that the success of the plaintiffs' prayers, at this stage, was subject to the test in ***Giella v. Cassman Brown*** [1973] E.A. 358: (i) whether the applicant has laid out a ***prima facie*** case with a probability of success; (ii) whether the plaintiff/applicant might suffer irreparable injury if the injunction is not granted; (iii) in case of doubt, the balance of convenience determines the question.

Counsel urged that the plaintiffs have, by the application, the supporting affidavit and the plaint, established a ***prima facie*** case with a probability of success against the defendant: the plaintiffs, being the administrators of the deceased's estate, have exhibited their grant of letters of administration intestate, showing their right to institute legal proceedings on behalf of the estate of ***James Opiyo Opondo***, deceased; and the plaintiffs have annexed to the supporting affidavit a report from a panel of elders submitted to the Senior Resident Magistrate's Court on ***11th July, 1985*** – indicating that the deceased was the owner of the suit property. It also emerged from the affidavit evidence, that the deceased, prior to his death, haddeveloped the suit property, constructed a house thereon, planted it with trees, and deposited thereon building materials.

Counsel urged that if the defendant is not restrained by an order of injunction from developing the suit property, then the deceased's estate will suffer a loss that cannot be compensated by an award of damages.

As to balance of convenience, counsel submitted that the defendant would suffer no inconvenience if an order of injunction were to be issued in favour of the plaintiff; but if such an order is not issued, then the defendant will continue to trespass onto the suit property, develop the same, obtain title, and render the plaintiff's suit nugatory.

Learned counsel invoked the authority of several High Court cases, affirming the position that a party is not to be allowed to make significant structural changes to a property in respect of which the

determination of lawful ownership is still a pending question before the Court: ***Peter Nzioka Kithongo v. Maria Mwende Mulandi & 3 others,*** Machakos HCCC No. 170 of 2001 (***Nambuye, J***); ***Kangangi Trading Company v. The Kiambu Municipal Council***, Nairobi MCCCC No. 533 of 2001 (***Onyango Otieno, J***); ***Kenya Tred Limited & Another v. National Bank of Kenya Limited***, Nairobi MCCCC No. 1449 of 2000 (***Onyango Otieno, J***).

Counsel submitted that the instant proceedings were not in any manner deficient, even if the defendant considered that other parties should be joined: by virtue of s. 1A (1) and (3) of the Civil Procedure Act, it is an overriding objective to bring about the just, proportionate and affordable resolution of the dispute; and in this behalf, the Court may grant the orders sought.

For the defendant, the main basis of contest to the applicants' prayers is that "*the subject land requires setting apart…..as provided in ss.13 and 53 of the Trust Land Act (Cap. 288, Laws of Kenya) and ss.115 and 177 of the [1969] Constitution*"; and it is contended that: "*No evidence of compliance with the said sections is produced*".

Counsel also urged that the plaintiffs have failed: to produce any evidence of payment of the balance [of purchase price] to support the claim; to produce an allotment letter, nor title, "*so as to establish interest in the land despite lapse of over 22 years….since [the] date of [the] agreement…..*"

On the foregoing grounds, counsel submitted that "*the plaintiffs have failed to establish a prima facie case….*"
Counsel submitted that the plaintiffs were not entitled to injunctive relief because damages had also featured in their prayers, and in this regard, the following earlier decisions were invoked: ***Esso Kenya Limited v. Mark Makwata Okiya***, Civil Appeal No. 69 of 1991 in which the following passage appears:

"The respondent having pleaded breach of the agreement and prayed for damages, the Court ought to have denied him injunction and the order of reinstatement because his claim could have been quantified and……compensated by the award of damages……";

Kenya Ports Authority v. Triton Petroleum Company Limited, Civil Application No. Nai. 228 of 2007; and ***Mureithi v. City Council of Nairobi***, Civil Appeal No. 5 of 1979.

The significance of the three authorities will be apparent only insofar as they ***are*** pertinent to the facts of this case; I am afraid, however, that they are not. The facts herein consist in the firm averments that the deceased had purchased the suit property, and had initiated thereon, certain common symbols of ownership – such as planting the land with trees, and depositing his building materials thereon; and these symbols followed in the wake of a formal contract of purchase, and of a panel of elders advising the Court that the deceased was the person entitled to ownership.

The defendant, by his evidence, states unequivocally that he has ***no claim*** to the suit land, and that he is only claiming on behalf of some ***unidentified persons***. Firstly, a claim so surreptitious and obfuscated, is not a claim of ***equity*** and does not stand up before this Court.
The defendant is, in my opinion, engaged in a vain enterprise when, after he fails to show that he has any claim at all to the suit land, he devotes himself to disclosing perceived legal weaknesses of the plaintiffs' claim. Besides, the defendant pleads the intended claim of other unknown parties, when there is, even at this interlocutory stage, incontrovertible evidence that ***he*** has personally engaged in challenges to the plaintiffs' claim of ownership; he is not speaking candidly to the Court, and, even on this ground alone, his claims are not to be entertained.
More significantly, there is evidence that the ***defendant*** is engaged in acts that, if not restrained, will create ***new physical structures on the suit property*** and could become a factor in the eventual ***determination of the true owner***. Such a course of conduct is an ***impairment of the sovereignty of the Court,*** in applying ***rules of the judicial process*** to arrive at a correct finding on the ownership question. Therefore, the defendant's position is not to be sustained.

The defendant has invoked several authorities improperly to sustain the contention that the plaintiff seeks damages and so, should not be granted an injunction; I have looked at the plaint dated ***7th April, 2010***, and come to the conclusion that prayer (d), for "*damages for trespass onto the estate of the deceased*", is only a ***secondary prayer***, and that the main prayers are for declaration of ownership, and for ***permanent injunction*** against the defendant, in relation to "*disposing or developing the [suit land] or in any other manner whatsoever and howsoever interfering or intermeddling with the ownership, possession, quiet enjoyment and use thereof…..*"

This is a straightforward case, especially in view of the facts brought before the Court. I will make Orders as follows:

(1) The plaintiffs' application by Chamber Summons dated *7th April, 2010* ***is allowed with costs.***

(2) The defendant's application by Notice of Motion dated *20th April, 2010* ***is disallowed, with costs to the plaintiffs.***

DATED and **DELIVERED** at **MOMBASA** this ***27th*** day of ***May, 2011.***

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J. B. OJWANG

JUDGE