



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
ENVIRONMENTAL AND LAND DIVISION
CIVIL CASE NO. 168 OF 2011

MARTIN MAGINA OKOYO1ST APPLICANT / PLAINTIFF
THOMAS OCHIENG ONGORO2ND APPLICANT / PLAINTIFF
(Suing on their own behalf & on behalf of Yimbo Yala Swamp Farmers Society)

VERSUS

BONDO COUNTY COUNCIL1ST DEFENDANT / RESPONDENT
SIAYA COUNTY COUNCIL2ND DEFENDANT / RESPONDENT
DOMINION FARMS LIMITED3RD DEFENDANT/RESPONDENT

RULING

The application is dated 7th October 2011, praying for several orders against the defendants jointly and severally. The said application is specifically praying for interim orders of injunction to stop the defendants from interfering with Community Land measuring **3700 hacters** situated at the 1st and 2nd defendants’ jurisdiction. The same is supported by the affidavit of one **Martin Magina Okoyo**. I have perused the said affidavit sworn on 5th October 2011 together with the supporting annexures. I have further perused the replying affidavit of **Silas Odhiambo** who is the clerk to the 1st defendant sworn on 12th October 2011. I have also perused and read the replying affidavit of one **Chris Philip Abir** the director of the 3rd respondent. I have also gone through the grounds of opposition filed by the 1st defendant as well as the preliminary objection of 3rd defendant. The parties appeared before me on 18th October 2011 for the inter partes hearing.

As earlier own stated the plaintiffs /applicants basis claim is that they are the resident of Yala Swamp which is found along lake Victoria area. They are subsistence farmers as well as fishermen. Although they have no title to the suit property, they claim that the 1st and 2nd defendant hold the land in trust for them. This fact is not disputed by all the parties herein. The plaintiff contention as it can be deduced from the pleadings is that they are apprehensive that their land is being encroached by the 3rd defendant / respondent courtesy of the 1st and 2nd defendant blessings. They have further alleged that 3rd defendant has gone ahead to destroy their crops and further blocked them from using one of the road known as **Yimbo – Kadenge** road. They further exhibited some photographs showing the alleged destruction.

The defendants have opposed the application. The 1st defendant has stated that they have not passed a resolution that they should alienate more land from the plaintiff and give it to the 3rd defendant. It’s the

3rd defendant's contention that it is yet to utilize the portion already allotted to it. It claims that its at the moment utilizing the portion given to it through the memorandum of understanding. It further states that they have helped the local community through social responsibility activities by building schools and hospitals. It has further employed many other people.

So what's the plaintiff's case? The said application in my opinion is based on fear and apprehension. The 1st and 2nd respondents holds the land in trust for the plaintiffs together with others. There is no documentary evidence whatsoever that the 1st and 2nd defendant are acquiring the plaintiff's parcel of land. The plaintiff obviously have their civil leaders and if there is any such alienation they should be able to raise with their respective county councils. In the already alienated land, the Commissioner of lands who is the person donated by law to lease out such trust land has apprehended his signature in the agreement dated 25th May 2004. I suppose therefore that in the event of such alienation again, the said office is set to be involved.

The other issue which I am unable to comprehend is the situation of the land. The alleged 3700 Hactares was truly gazetted. It's not possible unless there is a survey report to ascertain from the pleadings where the plaintiffs land starts and ends. If this court were to issue the prayers sought by the plaintiffs then it shall be a blanket order which shall affect other parties who necessarily are not part of this case.

For the above reason the plaintiffs' application don't fall within the required principles to be granted an injunction. I have perused the plaintiffs photograph attached to their affidavit. The said photograph were allegedly taken on 20th September 2011. The alleged incident took place on 30th August 2011. The two dates are materially different and thus the photographs cannot aid the plaintiff case.

My attention has been drawn to the provisions of Order 1 Rule 13 (1) (2) of the Civil Procedure Rules 2010. The said portion of the law states:-

13 (1) "Where there are more plaintiffs than one, any one or more of them may be authorized by one of them to appear, plead or act for such other in any proceedings, and in like manner where there are more defendants than one, any one of them be authorized by any other of them to appear, plead or act for such other in any other proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

I have seen the document filed by the applicants on 7th October 2011 entitled "**Authorization to Act**". It states "**We the undersigned farmers authorize Martin Magina Okoyo and Thomas Ochieng Ongogo who are our vice chairman and chairman in Yimbo – Yala Swamp Framers jointly respectively to institute this suit on our behalf**".

The documents purporting to have been signed by the said farmers is titled

"Yimbo – Yala Swamp Framers Society".

P. O. Box 75 Nyamonye"

Election held 30/3/2011

Elected members."

Then it proceeds to give a long list of the farmers. This is surely not an authority to act this was an election list. I therefore find that the plaintiffs had no authority to file suit on behalf of their members and I fully agree with the defendants' counsels.

The counsel for the defendants have also pointed out the fact that prior to filing this suit the plaintiffs had filed and withdrawn similar suit namely **Kisumu HCCC NO. 141 of 2011**. This fact was never contested by the plaintiffs. This suit was filed fourteen (14) days after such withdrawal. The verifying affidavit of the plaintiffs paragraph 3 states "**That there is no other suit pending nor has there been any previous proceedings between the parties herein on the same subject matter**".

This borders on perjury. The plaintiff indeed failed to disclose the same as provided for under Order 4

(Rule 1 (i) (f) of the Civil Procedure Rules 2010 which states.

(f) “ An averment that there is no other suit pending and that there have been no previous proceedings, in any court between the plaintiff and the defendant are the same subject matter and that the cause of action relates to the plaintiffs name in the plaint”.

The upshot of this is that:-

- (a) The plaintiffs’ application dated 7th October 2011 is dismissed with costs.**
- (b) The plaintiff suit herein is struck out with costs.**

Orders accordingly.

Dated, signed and delivered this 2nd day of November 2011.

**H. K. CHEMITEI
JUDGE**

HKC/aao