



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 33 OF 2018 (O.S)

IN THE MATTER OF REGISTERED LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF LAND PARCEL NUMBER EAST GEM/RAMULA/206

AND

IN THE MATTER OF ADVERSE POSSESSION OF ALND PARCEL NO. EAST GEM/RAMULA/206

AND

IN THE MATTER OF JOAN LUDIA SAKA, DENNIS OCHIENG SAKA

AND JASSON WILFRED MUMBO SAKA

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

BETWEEN

1. JOAN LUDIA SAKA
2. DENNIS OCHIENG SAKA
3. JASSON WILFRED MUMBO SAKA.....PLAINTIFFS/APPLICANTS

VERSUS

1. PAMELA GERTRUDE OTIENO.....1ST DEFENDANT/RESPONDENT
2. HABAKUK ONYANGO ABOGNO.....2ND DEFENDANT/RESPONDENT
3. ESTATE OF ABUOR NYASEME
alias AGER NYASEME(DECEASED).....3RD DEFENDANT/RESPONDENT

RULING

There are 2 applications in this matter which I believe have largely contributed to the delay in the hearing of the case. The 1st application was filed on 17/3/2020 wherein the applicant Archbishop Habakuk Onyango Abogno prays for a temporary injunction restraining the plaintiffs from trespassing onto and interfering with applicant's rights to use and occupy the portion of the suit land herein designated as East Gem/Ramula/206 and be restricted to a portion of one acre given to them in Kisumu Succession Case number 148 of 1999. The applicant prays for an order that this court be pleased to review and or vary its orders of 26/7/2019 on terms that the applicant herein be only restrained from evicting the Plaintiffs/Respondents from the only one acre of the suit herein designated as EAST GEM/RAMULA/206 measuring 4.4 hectares which the Court ordered the applicant to give them in Kisumu Hcc Succession Cause Number 148 Of 1999.

He claims that the issue of ownership of the suit land herein was long determined by court in Kisumu HCC Succession Cause Number 148 Of 1999 in favour of the applicant herein. That consequent upon the delivery of the ruling that granted ownership of the entire suit land herein measuring 4.4 Hectares to the applicant herein, the court persuaded the applicant to exercise some level of magnanimity and allow the applicant to grant the respondents herein, one acre from the suit land which they had hitherto been using and occupying.

The plaintiffs/respondents were therefore granted, upon the applicant's acceptance, only one acre of the suit land to enable them occupy and use with the result that the applicant herein, being a lawful title holder, would then be at liberty to use and occupy the remaining portion uninterrupted.

According to the 2nd defendant, the plaintiffs/respondents did not appeal or challenge the finding of the trial Judge in the said succession cause and only surprised all and sundry with the present proceedings.

That whereas the plaintiffs/respondents in their application moved this court to restrain the applicant herein from evicting them from the suit land herein measuring 4.4 Hectares, and whereas this Court granted the orders restraining the applicant from evicting the plaintiffs on 26th July 2019, the plaintiffs have interpreted the said orders to suggest that they are completely at liberty to use and occupy the entire suit land to the exclusion of the applicant.

The applicant, being a title holder, and having agreed to grant the plaintiffs one acre of the suit land to use and occupy, and while respecting the orders granted on 26th July 2019, exercised his rights and interests by only using and occupying the portion of the suit land that he is entitled to.

The Plaintiff's, with impunity and wanton abandon, have completely misconceived and misapprehended the effect and tenor of the orders that were granted on 26th July 2019 and have frustrated the applicants freedom and rights to sue and occupy his lawful portion of the suit land by continuously trespassing onto the applicant's portion of land and daily encroaching into the same with a view to completely locking out and denying the applicant access to his land that was lawfully acquired and whose rights were duly granted by court.

The 2nd defendant believes that unless the orders are accordingly reviewed and/or varied accordingly, it has potential of gross misinterpretation and violation and therefore occasion grave injustice, loss and damage to the applicant.

In the replying affidavit the 1st Plaintiff/respondent Joan Luda Saka states that the application is an abuse of the court process as the court has not determined the issue of ownership. He states that it is the plaintiffs who in occupation of the suit parcel for land. The application is meant to evict the plaintiffs.

The plaintiffs have equally filed an application seeking orders to restrain the 2nd Defendant from wasting, damaging, alienating and or from harassing the plaintiffs or threatening the plaintiff's peaceful occupation of land parcel number East/Gem/Ramola/206.

The application is based on the grounds that the applicants are in full occupation of land parcel number; East Gem/Ramula/206, which is 4.4 hectares and unless the 2nd Defendant/Respondent herein is restrained, the originating summons dated 6/7/18, is likely to be rendered nugatory and that the Plaintiffs/Applicants herein obtained a Court order dated 26/7/19 and or restraining orders against the Defendants/Respondents in the Origination Summons dated 6/7/18, individually or collectively their agents servants and or by whatsoever name called, from evicting the plaintiffs/Applicants herein and other beneficiaries of the state of Abuor Nyaseme alias Ager Nyaseme-deceased from land parcel number East Gem/Ramula/206.

The plaintiff allege that the 2nd Defendant/Respondent herein, Habakuk Onyango Abongno, has been interfering with the plaintiffs/applicants peaceful occupation of land parcel number East Gem/Ramula/206 and that the 2nd Defendant/Respondent herein, Habakuk Onyango Abogno, has also been sending certain people to disturb the peace and or to dig electrical pole holes within the suit land parcel number East Gem/Ramula/206, without the due leave and or permission of this Honourable Court and or without the permission or consent of the Plaintiffs/Applicants herein.

The plaintiffs lament that on 21/4/2019, when certain persons invaded the suit land and the 2nd and 3rd Plaintiffs/Applicants herein Dennis Ochieng Saka and Jasson Wilfred Mumbo Saka, attempted to inquire about what was going on, the agents and or servants of the 2nd Defendant/Respondent herein brutally attacked the 2nd and 3rd plaintiffs/Applicants who sustained grievous injuries resulting in hospitalization of the said Dennis Ochieng Saka and Jasson Wilfred Mumbo Saka at Chulaimbo Health Centre and Jaramogi Oginga Odinga Teaching and Referral Hospital, in Kisumu, respectively.

That the incident of 21/4/19, was subsequently reported to Yala Police station on 10/5/19 vide OB no. 10/01/05/19 at 10.30 hours after hospitalization.

That on 1/5/19, the Defendants/Respondents herein also sent people to disconnect the power supply to the homestead of the 1st Plaintiff/Applicant herein, Joan Ludia Saka, leaving the 1st Plaintiff/Applicant without any electric power supply completely to date.

The 2nd Defendant/Respondent, using Agents and or servants has also cut, damaged and or destroyed some trees and the natural vegetation cover including some exotic and indigenous trees in land parcel number: East Gem/Ramula/206 and ferried the timber to his home and or burnt charcoal for his own personal use.

That on 12/5/2020, during the Corona Virus pandemic restrictions, the 2nd Defendant/Respondent hired people and or Agents to destroy maize, millet and sorghum crops planted by the 1st plaintiff/Applicant, Joan Ludia Saka, either by cutting or grazing cows, and or sheep on the said maize, millet and or sorghum crops and or totally uprooted the crops by tilling the planted areas, which incident was reported to Yala police vide OB no. 10/12/05/2020 and also to the area Assistant Chief Ramula Sub location, Assistant County Commissioner, Gem Division, (ACC) and to the Deputy County Commissioner, Yala (DCC), for intervention and subsequently the police issued a warrant of arrest against the said agents and or perpetrators.

The 2nd Defendant/Respondent on 23/6/2020, brought to the suit land surveyors to survey the land in issue which exercise was subsequently suspended and or called off upon the plaintiffs/Applicants proving that there was an existing Court case on land parcel number: East Gem/Ramula/206.

That the above malicious actions of the 2nd Defendant/Respondent amount to an attempt to evict the Plaintiffs/Applicants herein contrary to the orders of this court dated 26/7/19.

That unless restrained by this Honourable Court, the 2nd Defendant/Respondent will continue with his harassments and or constant interference with the Plaintiffs/Applicants peaceful occupation of Land parcel number: East Gem/Ramula/206. The Defendant/Respondents herein will suffer no harm or injury if the orders sought are granted.

The balance of convenience tilts in favour of the Plaintiffs/Applicants who are in full occupation of land parcel number: East Gem/Ramula/206.

That in the unlikely event the Originating Summons dated 6/7/18, is not successful the 2nd Defendant/Respondent can easily be appeased with the award of damages.

That the Plaintiffs/Applicants' originating summons dated 6/7/18, has overwhelming chances of success.

I have considered both applications and do find that the 2nd Defendant has misconceived the decision of Justice Majanja dated 7/11/2016 to have awarded the Plaintiffs part of the land. The Learned Judge merely hoped that the Plaintiffs would accept the 2nd Defendant's magnanimous offer of land. The Judge further observed that the Plaintiffs were in occupation and their removal from plot No. 206 which they occupied was not imminent.

I do find that the plaintiffs are in occupation of plot number 206 and granting the orders sought by the 2nd Defendant would amount to evicting the Plaintiffs without hearing their case.

Application dated 16/3/2021 has no merit as is dismissed with costs. Having dismissed the application this court confirms that on the 26th July 2019, it issued an order of temporary injunction against the defendants individually, collectively, their agents and servants from evicting the plaintiff from the suit land pending the hearing and determination of the Originating Summons.

The Order is still in force. For avoidance of doubt, this court reiterates the said order and in addition grants an order that pending the main hearing of the Originating Summons dated 6/7/18, the 2nd Defendant/Respondent herein is restrained from harassing the Plaintiffs/Applicant's and or threatening the Plaintiffs/Applicants' peaceful occupation of land parcel number: east Gem/Ramula/206, in any way.

DATED AT KISUMU THIS 5th DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE