



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 361 OF 2016

PATRICK OTIENO OYUGI

(Suing on Behalf of KENNEDY KAUNDA OYUGI)PLAINTIFF/APPLICANT

VERSUS

EMILY MWATSUMA.....DEFENDANT/RESPONDENT

R U L I N G

1. This is a Notice of Motion dated 30th December 2016. The same is brought under Order 40 Rules 1 and 2; Order 22 Rules 22, 25 and 67 as well as Sections 3A, 1A, 1B, 63(c) and 78(B) (sic) of the Civil Procedure Act. The Applicant Patrick Otieno Oyugi suing on a donated Power of Attorney granted by his brother Kennedy Kaunda Oyugi prays for orders:-

1.(spent)

2. THAT the Honourable Court be pleased to issue a temporary injunction order restraining the Respondent by herself, her servants and or agents and employees from further occupation, staying, living, using, interfering with the applicant's two parcels of land know as 130 in Malindi and No. 4 Lake Kenyatta 1 Settlement Scheme in Lamu District together with the developments erected thereon pending hearing and determination of this application and or suit.

3. THAT the Honourable Court be pleased to stay all the proceedings under No. 40 of 2015 filed in the Principal Magistrate's Court by the Respondent in Lamu pending the outcome of this application and or suit.

4. THAT the Honourable Court be pleased to give a vesting order of the two properties to be managed by the applicant pending further orders from this court.

5. THAT the Honourable Court be pleased to issue eviction orders to the Respondent and leave vacant possession of the suit properties to the applicant.

6. THAT the OCS Lamu Police Station be ordered to enforce Orders 4 and 5 above.

7. THAT the costs of this application be provided for.

2. The Application is supported by the annexed affidavit of the Applicant sworn on 30th December 2016 and is premised on a number of grounds which may be summarized as follows:

(i) That the Respondent who is said to be an employee of the Applicant herein has gone to court in Lamu Principal Magistrates Court No. 40 of 2015 and has obtained orders of injunction denying the Applicant access to his properties by giving unfounded reasons and misleading the court on the true state of facts.

(ii) That the said Lamu Principal Magistrates Court has no jurisdiction to hear cases of land and (other) properties.

(iii) That the applicant has invested a lot in the two properties in dispute and this court should uphold the Rule of Law by granting the orders sought.

3. The Respondent Emily Mwatsuma however opposes the grant of the orders sought. In a Replying Affidavit (wrongly headed “Supporting Affidavit”) sworn on 23rd January 2017 and filed herein on the same date, the Respondent avers that the suit filed herein and by extension the Notice of Motion before me are baseless, unfounded, inept, fatally defective and an abuse of the court process.

4. The Respondent further avers that contrary to the Applicant’s assertions, she has not acquired the properties illegally but the same are in her custody by virtue of the fact that she is legally married to the Plaintiff/Applicant who presently resides in Germany. In addition the Respondent avers that she procedurally filed Lamu Principal Magistrates Court Case No. 40 of 2015 and lawfully obtained orders of injunction after the Plaintiff/Applicant hired people she describes as “goons” who threw her out of the Matrimonial property in Mpeketoni which property is one of the two which form the subject matter of this dispute. Ultimately the Respondent accuses the Applicant of failing to disclose to this court the fact that he appealed the Lamu Principal Magistrate’s Court’s Ruling in Garsen High Court Civil Case No. 57 of 2016 where his appeal was found to lack merit and was accordingly dismissed.

5. I have perused the Complaint filed herein on 30/12/2016 and the application before me as well as the Replying Affidavit in response thereto. I have also carefully considered the oral submissions of the Applicant acting in person and Mr. Omwanja, Learned Counsel for the Respondent.

6. One of the grounds upon which the Applicant seeks a temporary order of injunction herein is his assertion that the Respondent has gone to court in Lamu and obtained a temporary injunction denying him access to his properties. It is the Applicant’s case that the Respondent obtained the said orders, in his own words, “by giving unfounded reasons and misleading the court”. The Applicant is further aggrieved by the fact that in his view, and again in his own words, “the court in Lamu has no jurisdiction to hear cases of land and properties.”

7. At paragraph 6 of his Supporting Affidavit, the Applicant has indeed annexed a short ruling of the Lamu Principal Magistrate’s Court dismissing the issue of the jurisdiction raised by the Applicant’s then counsel one Mr. Onger. The short Ruling by the Honourable Principal Magistrate J.W. Onchuru delivered on 9th February 2016 reads in part as follows:

“The Respondent herein raised a Preliminary Objection that this court has no jurisdiction to entertain this issue since the same is an employment matter and that the subject matter exceeds Kshs 30 Million (pecuniary jurisdiction) thus it should be heard by the employment court. The Preliminary Objection was opposed by the Applicant. I have looked at the reliefs sought in the Applicant’s Complaint and Notice of Motion dated 28th December 2015. It is my considered view that the court has jurisdiction to hear and determine the Notice of Motion dated 28/2/2015 and (the) main suit as per the reliefs sought. Let the Notice of Motion be set down for hearing on a priority bases. The Objection by the Respondent is thus dismissed with costs to the Applicant.”

8. While the Applicant does not state in his pleadings what happened after this Ruling, a reading of the

Respondent's Replying Affidavit reveals that the said application dated 28/2/2015 was eventually heard and was allowed by the Honourable Principal Magistrate in a Ruling delivered on 7/3/2016. Aggrieved by the said Ruling, the Applicant filed an Appeal at the High Court in Garsen it being High Court Civil Appeal No 57 of 2016.

9. Having considered all the issues raised in the Appeal, the Honourable Justice Asenath Ongeru found it lacking in merit and dismissed it on 19th December 2016. It is evident from the record herein that shortly after the dismissal of the said Appeal, the Applicant moved to this court on 30th December 2016 and filed a fresh claim complete with the Notice of Motion presently before me for consideration. Interestingly as the respondent states in her replying affidavit, the Applicant makes no mention of the Appeal filed in the Garsen High Court either in the Complaint or in the application before this court.

10. In *Aviation & Airport Service Workers Union (2014) eKLR -vs- Kenya Airport Authority & Another*, Mbaru J., aptly commented that: -

“When a party comes to court on an application supported by an Affidavit under Oath and fails to outline and disclose matters that are material to the granting of the orders, such a party is acting in a manner suggesting that they are peddling falsehoods while under oath.”

11. In my view, it was incumbent upon the Applicant to make a full and fair disclosure of all material facts. Material facts are those which are material for the Judge to know in dealing with the application as made and not those that the Applicant wants the court to know. The failure by the Applicant herein to disclose the existence of Garsen HCCA No 57 of 2016 in this case filed barely two weeks after the dismissal was in my view meant to conceal material facts and to mislead this court into granting orders which the Applicant had been denied elsewhere.

12. In my considered view the application filed herein and the suit upon which it is based amount to a gross abuse of the court process. While the Applicant contends that the Lamu Court has no jurisdiction to hear the dispute, it is evident from the record of Appeal filed in the High Court in Garsen as well as in the Ruling of the Honourable Justice Ongeru dismissing the Appeal that the Applicant has not only filed a defence but also an elaborate counterclaim seeking the determination of a number of issues, including the injunction being sought herein. The case in Lamu is still pending as only the application dated 28/2/2015 was dealt with. Abuse of the Court Process includes a situation where a party improperly uses the Judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the proper administration of justice.

13. This court has inherent powers to stop its process from being abused. Accordingly, this application and the suit filed herein are hereby struck out with costs to the Respondent.

Dated, signed and delivered in Malindi this 5th day of May 2017.

J. O. OLOLA

JUDGE