



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.195 OF 2013

LUCIA ADHIAMBO OWINO.....PLAINTIFF

VERSUS

JULIUS AWENDO.....1ST DEFENDANT

MILICENT MAURINE ONDIEKI.....2ND DEFENDANT

LYDIA ADHIAMBO OGAWA.....3RD DEFENDANT

DALMAS OGADA.....4TH DEFENDANT

RULING

1. **Lucia Adhiambo Owino**, the Plaintiff, filed the Notice of Motion dated 26th March 2015 seeking for the review, setting aside or discharge of the court orders of 3rd March 2015. The order restrains her from interfering with the Defendants leasehold and utilization of land parcel **Kisumu/Songhor/763** and also stops Chemelil Sugar Company from releasing any payments to her or her representatives. The plaintiff also prays for hearing dates for the application dated 16th June 2014 and 26th May 2014 and costs. The Notice of Motion is based on 12 grounds marked (a) to (L) on the application and is supported by the affidavit of **George O. Anyumba** sworn on 26th March 2015.
2. The application is opposed by **Julius Awendo**, **Millicent Maurice Ondieki** and **Lydia Adhiambo Ogana**, hereinafter referred to as 1st to 3rd Defendants through the grounds of opposition dated 6th May 2015 and replying affidavit of **James Aggrey Mwamu** sworn on 15th June 2015.
3. The application was certified urgent on 22nd April 2015 and when it came up for interpartes hearing on the 15th June 2015, Counsel entered a consent that the application be dealt with through written submissions.
4. The counsel for the plaintiff filed their submissions dated 28th September 2015 on the same date while Defendants counsel filed theirs dated 15th October 2015 also on the same date.
5. The court has considered the grounds on the notice of motion, grounds of opposition, affidavit evidence and submissions by both counsel. The court has also considered the record and it is important to set out briefly the steps so far taken in this case.

(i) The plaintiff commenced the suit through plaint dated 17th July 2013 praying for cancellation of lease agreement between the Defendants and **Fredrick Owino Ochieng**, mandatory injunction over land parcel **Kisumu/Songhor/763** and costs.

(ii) Filed contemporaneously with the plaint is the Notice of Motion dated 17th July 2013 for temporary injunction orders against the Defendants over **Kisumu/Songhor/793** and costs. The application was certified urgent on 29th July 2013 and interpartes hearing date fixed. The application is yet to be heard todate.

(iii) M/s Mwamu and Company advocate entered appearance for 1st to 3rd Defendants through the Memo dated 4th November 2013.

(iv) The plaintiff's counsel requested for interlocutory judgment through their letter dated 4th March 2014 and the same was entered by the Deputy Registrar on 5th March 2014 pending formal proof. That order has not been set aside and or vacated.

(v) The 1st to 3rd Defendants filed the notice of Motion dated 18th march 2014 seeking for temporary injunction against plaintiff from interfering with their leasehold and utilization of **Kisumu/Songhor/763** pending the hearing and determination of the suit. They also pray for costs. The application was certified urgent on 24th March 2014 and a date for itnerpartes hearing fixed for 1st April 2014 which was also the date the suit was fixed for formal poof.

(vi) That a replying affidavit of **Lydia Adhiambo Ogawa** (3rd Defendant), on behalf of 1st and 2nd Defendant and herself, sworn on 4th February 2014 was filed on 6th March 2014.

(vii) The plaintiff, **Lucia Adhiambo Owino's** replying affidavit sworn on 29th April 2014 in respect of the application dated 18th March 2014 was filed on 30th April 2014.

(viii) The 1st to 3rd Defendants filed the Notice of Motion dated 26th May 2014 seeking for temporary orders as in their earlier application dated 18th March 2014, in addition to a fourth prayer to stop Chemelil Sugar Company from paying any monies to the plaintiff or her representatives. The application was on 26th March 2014 certified urgent and the fourth prayer granted pending interpartes hearing.

(ix) The plaintiff's counsel issued notice dated 12th June 2014 to cross-examination **Lydia Adhiambo Ogawa** on her affidavit sworn on 26th May 2014. The plaintiff, **Lucia Adhiambo Owino's** replying affidavit sworn on 16th June 2014 in answer to the application dated 26th May 2014 was filed on 20th June 2014.

(x) The plaintiff filed the Notice of Motion dated 16th June 2014 seeking to stay the order of 27th may 2014 (26th May 2014) stopping Chemelil Sugar Company from paying any monies to her or her representatives.

(xi) The replying affidavit by **Lydia Adhiambo Ogawa**, the 3rd Defendant, sworn on 21st July 2014 in respect of the application dated 16th June 2014 was filed on the 21st July 2014.

(xii) The parties counsel appeared before the court on 9th December 2014 when the application was fixed for hearing on 3rd March 2015. On the 3rd March 2015 the counsel for the 1st to 3rd Defendants applied for the application to be allowed as prayed after plaintiff and her counsel failed to attend.

(xiii) That by notice of change of advocate dated 26th March 2015, M/S Odhiambo Ouma & Co Advocate came on record for the plaintiff in place of M/s Duke Onyari & Co Advocates.

(xiv) The plaintiff filed the Notice of Motion dated 26th March 2015 which is the subject matter of this ruling.

(iv) The plaintiff then filed the Notice of Motion dated 14th October 2015 with one of the prayers being for stay of orders of 3rd March 2015, which is similar to prayer 2 of the application dated 26th March 2015. The application was placed before the court on 28th October 2015 and directions issued that it be served and hearing date for itnerpartes hearing fixed at the registry

6. DETERMINATION

(a) That the copy of the title deed for land parcel **Kisumu/Songhor/763** annexed to the affidavit in support of the Notice of Motion dated 26th March 2015 shows that the land was registered in the names of **Daniel Owino** on 19th February 1999 and title deed issued on 22nd February 1999. That from the plaintiff's averment at paragraph 9 of the plaint, the said land is a subdivision from plot No.159, Songhor Settlement Scheme and vested in her as the administrater of the estate of Daniel Owino. That annexed to the plaintiff's list of documents is a copy of a certificate of confirmation of grant issued in Nairobi H.C. 580 of 1993 on the 4th march 1998 showing that the grant of representation of the estate of the late **Daniel Owino Oduor** issued to **James Odhiambo Owino** and **Lucy Owino** (Plaintiff) was confirmed and that the plaintiff was to get a fifth share of the plot **No.159 – Songhor Settlement Scheme**.

(b) That the averments in the plaint shows that one **Fredrick Owino Ochieng** was the

caretaker of the land parcel **Kisumu/Sanghor/763** and after his death on 11th November 2011, the plaintiff learnt that the deceased had purportedly leased portions of the land to the defendants where they have been growing sugar cane. That the three copies of the leases availed by the plaintiff and Defendants have similar details summarized as follows:

(i) Lease of two acres for six years to **Julius Awendo** (1st Defendant) dated 7th February 2006.

(ii) Lease of 6 acres for six years ending on March 2015 to **Millicent Maurine Ondieki** (2nd Defendant) and **Nashon Ondieki** .

(iii) Lease of 3 acres for six years ending December 2016 to **Lydia Adhiambo Ogawa** (3rd Defendant).

The total acreage under the three leases adds to 11(elven) acres out of the 32.77 hectares (about 90.31 acres) parcel. That the first two leases have since expired and there would be no basis of injuncting the plaintiff from using the portions comprising of those leases.

(c) That interlocutory judgment was entered on 5th march 2014 after the Defendants failed to file defence to the plaintiff's claim. That order has not been vacated and or set aside. The formal proof is yet to take place. The court has perused the court record and there is no application filed by the Defendants to have the interlocutory judgment set aside todate, and there appear to be nothing stopping the plaintiff from fixing the suit for hearing.

(d) That the defendants application dated 26th May 2014 in which they prayed for injunction pending the hearing and determination of the suit and order stopping Chemelil Sugar Company from releasing monies to the plaintiff was allowed on 3rd March 2015 due to her absence and that of her counsel. That is the order that prompted the application subject matter of this ruling. The court has perused the proceedings of 3rd March 2015 and noted that the court was not informed that the plaintiff had filed a replying affidavit to the application dated 26th May 2014. The court appear to have treated the application as unopposed when making the order of 3rd March 2015. Had the fact that the application had been opposed been disclosed it would definitely have made the court to consider the contents of the replying affidavit before making its ruling and would have most probably restricted the order to the 3 (three) acres subject matter of the lease agreement to 3rd Defendant, which is yet to expire.

(e) That the Defendants ought to have restricted their prayer to the acreage of land covered in the three leases and not the whole land. The plaintiff has shown that it is desirable to review the order of 3rd March 2015. To allow the order to remain in force would lead to injustice as the plaintiff should be at liberty to use and receive payments for activities on the portion of land not covered in the three leases described above.[See order 40 Rule 7 of the Civil Procedure Rules]. The case of **Uhuru Highway Development Limited – V- Central Bank of Kenya & 2 others** [1995] eKLR cited by the counsel for the Defendants in his submission actually favours the Applicant and succinctly captures the situation in

this case where the court stated;

" ...It is perfectly well settled that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage that may have already obtained by him. That is perfectly plain and requires no authority to justify it"

The ex parte order in respect of the application dated 26th May 2014 had been obtained on 27th May 2014 and effectively confirmed by the Order of 3rd March 2015. As already stated above the counsel for the Defendants did not bring to the attention of the court that though the plaintiff and her counsel were absent, the application was opposed through the filed replying affidavit. There was therefore no full disclosure and the plaintiff's application for review has merits.

7. That having found as above, the court find the Notice of Motion dated 26th March 2015 has merit and the order of 3rd March 2015 is hereby reviewed and the following orders issued;

(a) That a temporary injunction is hereby granted restraining the plaintiff from interfering with the 3 (three) acres of land parcel **Kisumu/Songhor/763** used by Lydia Adhiambo Ogawa pending the hearing and determination of this suit.

(b) That Chemelil Sugar Company limited is hereby restrained from releasing any payment in respect of the sugar harvested from the three (3) acre portion of **Kisumu/Songhor/763** used by **Lydia Adhiambo Ogawa**, pending the hearing and determination of this case.

(c) That the ex parte order of 27th May 2014 is hereby vacated.

(d) That the costs of the application will be in the cause.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **9th day of February 2016**.

In presence of;

PLAINIFF

DEFENDANTS NONE

Counsel

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016

9/2/2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Counsel absent

Court: Ruling delivered in absence of the parties and counsel.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016

Court: The Deputy Registrar to notify the parties/counsel of the delivery of the ruling.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016