



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO. 88 OF 2013

FLORENCE THIRA OCHIENG:.....PLAINTIFF

VERSUS

THE MUNICIPAL COUNCIL OF KISUMU:..... DEFENDANT

RULING

1. The Plaintiff – **FLORENCE THIRA OCHIENG** – filed her suit here on 17/4/2013 complaining, inter alia, that the Defendant – **MUNICIPAL COUNCIL OF KISUMU** – had entered her land – **KISUMU MUNICIPALITY L.R. NO. 16628** and **I.R. No. 142934** measuring 0.2624Ha at Kanyakwar along Kisumu – Kakamega road and purported to repossess, subdivide and allocate it to 3rd Parties. She is contesting the Defendant actions and is asking for various orders.
2. Together with the suit was also filed an Application of even date seeking 5 prayers. That Application is the subject of this ruling. Prayer 1 and 2 are moot at this stage, having been dealt with earlier exparte. For consideration therefore are Prayers 3, 4 and 5, which are as follows: _

Prayer 3: _That pending hearing and determination of the suit, there be an order of permanent injunction restraining the defendants/respondents either through themselves, their agents, employees, and/or any other person deriving authority from them from entering, alienating, claiming, subdividing, allocating, repossessing or interfering with Applicant's quiet possession, occupation and ownership of all that parcel of land known as **KISUMU MUNICIPALITY L.R. NO. 16628 and IR 142934** measuring 0.2624Ha at Kanyakwar along Kisumu/Kakamega road.

Prayer 4: _That the O.C.S Kondele Police Station do assist in compliance of the said order.

Prayer 5: Costs of the Application be provided for.

3. The grounds advanced stipulate, inter alia, that the land (suit land hereafter) is registered in Plaintiff's name; that the defendant has entered purporting to repossess it; that as a result of the defendants act, the Plaintiff is unable to use the suit land; and that the Plaintiff will suffer irreparable loss and damage.
4. The Supporting Affidavit accompanying the Application gives some background and history. It was deponed that the Plaintiff was allocated the land on 1/9/1991; has all along paid rates; and that the defendant entered the suit land in December 2012 and purported to sub-divide it and allocate it to 3rd Parties.
5. The Defendant was said to have no right over the suit land as the Commissioner of Land, not the

- defendant, was the allocating authority. According to Plaintiff, once a grant is issued by Commissioner of Land, the Defendant has no authority over it. Moreover, the defendant has been warned by the allocating authority that its action of trying to repossess the suit land and others in the neighbourhood was illegal.
6. The Defendant made a response vide a Replying Affidavit filed on 2/5/2013 sworn by one **CHRISTOPHER O. RUSANA**. It was deponed that the suit land was repossessed from the defendant for failing to develop it for more than 20 years. She was, it was further deponed, supposed to develop it within 12 months.
 7. It was also stated that the requisite procedure was followed in repossessing the suit land and that the defendant can only challenge the decision to repossess by way of Judicial Review, not a suit like this one.
 8. Written Submissions were filed in lieu of oral arguments. The Plaintiff reiterated what the application contains. The defendant acts were termed illegal as the Procedure stipulated in the relevant law was not followed. The defendants submissions were not any different. The contents of the Replying Affidavit were reiterated. The defendant was said to be a government entity. Being such, an injunctive relief can not issue against it; the proper reliefs being those associated with Judicial Review. To reinforce these arguments the decided cases of ***National Housing Vs Nairobi City Council & Another HCC NO. 404/1998 and ALI and 3 others =Vs= City Council of Nairobi; HCC No. 20 of 2003***, were availed.
 9. I have considered the application, the response made, and the rival submissions. The main reason given to justify the defendant move to repossess the suit property is that the Plaintiff stayed for unduly long time without developing it. The Plaintiff has not responded to this. And it is clear from the grant that the defendant's continued ownership of the property was conditional upon compliance with this and other conditions.
 10. But the more powerful argument against the granting of injunction against the defendant is that it is a public body, and it therefore behoved the Plaintiff to come to court by way of Judicial review; several decided cases were availed to reinforce this view. The defendant didn't respond to them.
 11. The Defendant argued that he would suffer irreparable loss and damage. This was only alleged but not demonstrated. Evidently, the suit land is undeveloped. Its value is known or knowable. The Defendant is a government entity, reasonably well-heeled, and can pay damages.
 12. I have had occasion to handle matters of generally similar nature, seeking the same orders as here, and concerning Plot or parcels of land in the same general area. In particular, I considered such Application in **RICHARD OYARO WOFA =Vs= PHILIP ANAYO & 2 OTHERS: HCC NO. 145/2012, KISUMU, RISPER AUMA OKOTH =VS= ANGELINE AUMA ODERA: HCC NO. 140/2012, KISUMU, and EUNICE OMWANZA =VS= MUNICIPAL COUNCIL OF KISUMU; E & L NO. 33/2013, KISUMU**. In all these cases, I held that damages would be an adequate remedy.
 13. All these matters were just like this one. Nothing warrants a departure from the position espoused in these mentioned past cases .
 14. I am also persuaded that the defendant, being a public body, is not one to be enjoined easily. A more appropriate move would have been by way of Judicial Review.
 15. The upshot is that the Application herein is unmeritorious. It can not be allowed and the same is dismissed with costs.

HON. A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

7/5/2015

A.K. Kaniaru -J

John Ogendo – Cc

No party present

Interpreter: English/Kiswahili

Omondi T. for Rodi for defendant

Court: Ruling on Application filed here on 17/4/2013 read and delivered in open Court.

Right of Appeal 30 days.

HON. A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015