



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO.115 OF 2014

LUCASE ONGINJO GOGO.....PLAINTIFF

VS

NAFTALI OMONDI AMBALA.....1ST DEFENDANT

EUNICE AKOTH WANGOMA.....2ND DEFENDANT

COSMAS ODHIAMBO.....3D DEFENDANT

EDWIN OLUOCH NYAGAYA.....4TH DEFENDANT

RULING

1. The plaintiff herein – **LUCAS ONGINJO GOGO**- filed this suit here against the four defendants – **NAFTALI OMONDI AMBALA** (1st defendant), **EUNICE AKOTH WANGOMA** (2nd defendant), **COSMAS ODHIAMBO** (3rd defendant) and **EDWIN OLUOCH NYAGAYA** (4th defendant) – on 24/4/2014 vide a plaint dated 23/4/2014.
2. Contemporaneously with the plaint was an application of even date seeking, inter alia, temporary restraining orders against the four defendants.
3. The whole matter concerns land parcels Nos. **EAST ALEGO/MUR-NGIYA/1693** and **EAST ALEGO/MUR-NGIYA/1694** both of which are said to be resultant subdivisions from the original **EAST ALEGO/MUR-NGIYA/317**.
4. The defendants are said to have trespassed into Land parcels **EAST ALEGO/MUR-NGIYA/1693** and **EAST ALEGO/MUR-NGIYA/1694** (suit Lands hereafter) and settled there. The suit lands are registered in plaintiff's name. The plaintiff felt aggrieved by the defendants' alleged actions, hence the suit and the application.
5. The application seeks four prayers but at this stage, prayer 1 and 2 are moot, having been dealt with earlier on. That leaves prayers 3 and 4, which are as follows:

Prayer 3: That a temporary injunction do issue directed at the defendants, their employees, workers, agents and /all whomsoever, jointly and severally restraining them from fencing, taking physical possession, trespassing, encroaching, forcefully entering, advertising for sale, selling, disposing, transferring alienating, charging, stepping on, dealing or interfering whatsoever with the plaintiff's original Land parcel **EAST ALEGO/MUR-NGIYA/317** now - subdivided into **EAST ALEGO/MUR-NGIYA 1693** and **EAST ALEGO/MUR-NGIYA 1694** pending the hearing and determination of the suit.

Prayer 4: That costs of the application be provided for.

6. Both the grounds advanced in support of the application and the supporting affidavit that come

- with the application emphasise that the plaintiff is the registered owner of the suit lands; that the defendants have trespassed or encroached; that the plaintiff stands to suffer irreparable loss; and that attempts to stop the defendant actions have been met with a violent reaction.
7. The defendants responded vide a replying affidavit filed on 8/7/2014. Some history was given, part of which is that the original land parcel was **EAST ALEGO/MUR-NGIYA/317** then jointly owned by **GOGO MARI** and **NYAGAYA OPIYO** in equal share. The two original owners are now deceased. **Gogo Mari** was plaintiff's father while **NYAGAYA OPIYO** was the 4th defendant's father and uncle to 1st defendant.
 8. The plaintiff however later caused subdivision of the original land parcel into Land parcels Nos **EAST ALEGO/MUR-NGIYA/1693, 1694, 1695, 1696, 1697 and 1698**. It seems clear he registered the parcels in his own names. The defendants are contesting this, terming it illegal and void ab-initio.
 9. The defendants also accuses the plaintiff of telling lies. It is said he is the one who cut the 1st defendant with a panga in broad day light and he even has a pending criminal case against him concerning the attack. There has also been litigation over the suit parcels between the same parties in the subordinate at Siaya. Judgment in that case was availed, it was **Civil case No.1/2013** in the Principal Magistrates court at Siaya.
 10. Hearing didn't take place in this matter. Submissions were filed instead. I have read and considered the submissions.
 11. A crucial issue is raised by the defendants namely: That the defendant has told lies. This is a serious issue and I need to deal with it first. What the plaintiff is seeking is an equitable remedy and he who comes to equity must come with clean hands. You can not go to a court of equity and tell untruths hoping that you will get the orders you want.
 12. Order 4 rule 1(f) of Civil Procedure Rules, 2010 enjoins the plaintiff to make a disclosure as to whether there is a pending or previous suit between himself and the defendants. This is what the plaintiff pleaded at paragraph 11 of his plaint. **“There is no suit pending between the parties in connection with the subject matter herein”**. The plaintiff obviously failed to disclose that at least there were previous proceedings at Siaya. He therefore comes across as a liar. He ought to have disclosed that there was a previous suit. The defendants even went further: The plaintiff is the one who attacked the 1st defendant. The charge facing the plaintiff at Siaya was also availed. The plaintiff himself alleged that he was beaten. He shows nothing to confirm this.
 13. The need for honesty when seeking injunctive relief has been emphasised in several cases. In **MOSES NGENYE KAHINDO VS AGRICULTURAL FINANCE CORPORATION HCC No.1044/01, NAIROBI, Ringera J** (as he then was) observed as follows: **“And of course it requires no stressing that as an injunction is an equitable remedy, if the applicants conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however, meritorious the case may otherwise have been”**.
 14. In **Tharthy VS MIDDLE EAST BANK (k) ltd & Another (2002) 1 KLR 595**, Ringera J (as he then was) was spot on again when he said:

“An injunction is an equitable remedy and the court may decline to grant the same if it is shown that the applicants conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity”

15. Going to the merits of the plaintiff application is pointless when he has been clearly shown to be less than honest. Without much ado therefore, I dismiss the plaintiff's application with costs.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

7/5/2015

A.K. Kaniaru J.

John Ogendo court clerk

Odeny for plaintiff

Ayaryo for Onyango for defendant

Interpretation English/Kiswahili

Ruling on application dated 23/4/2014 read and delivered in open court.

Right of appeal 30days .

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015