



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO. 222 OF 2015

VICTORIA DISTRIBUTORS..... APPLICANT

VERSUS

JOSEPH ABWAO NYAWIR..... RESPONDENT

RULING

1. INTRODUCTION

Victoria Distributors Limited, the Applicant, commenced this suit through their plaint dated 27th August 2015 against **Joseph Abwao Nyawir**, the Respondent. The plaint contains a prayer for injunction from burying the deceased, Samson Odhiambo Nyawir on land parcel I.R. 143070 (L.R. 29068), permanent injunction, eviction, damages and costs.

2. THE APPLICATION

(i) The Applicant filed the Notice of Motion under certificate of urgency dated 27th August 2015 contemporaneously with the plaint. The notice of motion has four prayers marked (a) to (d). The prayers marked (a) and (b) have already been spent and this ruling relates to prayers (c) and (d). Prayer (c) is for the temporary injunction restraining the Defendant by himself or agents from burying the remains of "Samson Odhiambo Nyawir, or entering, trespassing, passing through, removing any fences, wood, trees, or in any other way interfering with the plaintiff's quiet possession, enjoyment, ownership and use of parcel No. LR 143070, {L.R. 29068} while prayer (d) is for costs.

(ii) The application is based on the nine grounds on the Notice of Motion and the supporting affidavit sworn by Yogesh Dawda, the managing director of the Applicant, on 27th August 2015. The Applicant's case is that they are the registered proprietors of the leasehold interest on land parcel No.I.R. 143070 L.R. 29068) in Kisumu Municipality, herein after referred to as the suit land, which is registered under the Registration of titles Act. That at the time the Applicant bought the land in 2014 the Respondent had been squatters on that land for about three years and have continued living there as trespassers. That the Applicant has attempted to have the Respondent vacate from the land without success and that the Respondent intended to bury the remains of Samson Odhiambo Nyawir on the land. That the Respondent has no legal claim over the said land.

(iii) The Respondent opposed the application through the replying affidavit that he swore on 23rd September 2015. The Respondent among others depones that his brother, Samson Odhiambo Nyawir, died while aged 45 years and is yet to be buried because of this case. That the Respondent and his siblings

were born on the suit land on which their parents and other relatives are buried. That the land where they reside was ancestral land and the Government of Kenya has never acquired that land which measures about 5 (five) acres. That the land in the area where the Respondent resides has never been adjudicated but certain Ministry of Lands employees have issued titles to their friends and relatives illegally. That if the orders prayed for are issued, the Respondent would be rendered a destitute while this family has been in peaceful occupation of the land for the last 90 years.

(iv) That Applicant filed a further affidavit sworn by Yogesh Dawda on 7th October 2015 annexing a letter dated 30th September 2015 giving the history of the registration of the suit land from 1998 to 2014.

(v) The Respondent filed a further replying affidavit sworn on 28th October 2015 taking issue with the authenticity of the letter dated 30th September 2015 annexed to the Applicant's further affidavit.

3. The application came up for interpartes hearing on the 5th November 2015 when the court heard the rival submissions by Mr Karanja advocate for the Applicant and Mr Anyul and Nyamori advocates for the Respondent. The issue for the court's determination is whether the Applicant has established a prima facie case with a probability of success for the temporary injunction to issue at this interlocutory stage. Secondly whether the orders sought should issue and finally, who pays the costs.

4. CONCLUSIONS

The court has considered the grounds on the notice of motion, the affidavit evidence by both parties, the rival submissions by counsel of each of the parties and come to the following findings:

(a) That from the copy of the grant annexed to the supporting affidavit, the suit land described as I.R. 143070 (I.R. 29068) measuring 2.256 hectares was granted to Arvin Were Wasamba, Steve Oringo Wasambo, and Fredrick Rudolph Sandech Onyango as administrators of the estate of Joseph Rading Wasambo (deceased) for 99 years from 1st September 1998. Also annexed to the supporting affidavit is a copy of a land sale agreement between Arvin Were Wasambo as the vendor and the Applicant as the purchaser dated 4th August 2014 over the land parcel I.R. 143070 (L.R. 29068). The land described in the grant and the sale agreement is the same and that is the suit land. Though not canvassed by the parties, the documents of ownership of the suit land and the sale agreement do not disclose when the named vendor became the sole registered owner of the Leasehold as the grant that was availed indicated that he was so registered with two others. There is no disclosure on what role the two other co-owners played, if any, in the sale transaction of 4th August 2014. That is an issue that will possibly be pursued and clarified during the hearing of the main suit.

(b) That from the affidavit evidence provided by both parties, the Respondent has been residing on the suit land for years. The Applicant deposition is that the Respondent had been living on the land for three years before they bought the land in July 2014. The Respondent's deposition is that he has been living on that period over a longer period as he is 55 years old and was born on that land. He has annexed five photographs that contains images of houses, some of which appeared to have been there for many years. Evidentially therefore, the Defendant has been living on the suit land before the Applicant entered into the sale agreement dated 4th August 2014, and it cannot be true that he bought land that was vacant.

(c) That while the Respondent defence is that the suit land belongs to his family and that it is unsurveyed, the Applicant has availed a grant issued under the Registration of titles Act Chapter 281 of Laws of Kenya. (repealed under Section,109 of the Land Registration Act No.3 of 2012). The letter dated 30th September 2015 annexed to the further affidavit, though challenged by the Respondent in their further replying affidavit, indicates that the consent to transfer the land to the Applicant was granted on 30th September 2014. It is however not disclosed whether the Applicant has registered the transfer or whether they have been issued with a certificate of title in their names. The provision of section 23(1) of the Registration of titles Act (Supra) states as follows:

" (23) (1) The certificate of title issued by the Registrar to a purchaser of land, upon a transfer or

transmission by the proprietors thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions, and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the grounds of fraud or misrepresentation to which he is proved to be a party."

That provision has been retained in the Land Registration Act No.3 of 2012 under Section 26(1) which states:

" 26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easements restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The the Applicant, at paragraph 2 of the affidavit of Yagesh Dawda sworn on 27th August 2015, is said to be "the registered proprietor of the leasehold interest comprised in parcel No. I.R 403070 (L.R. 29068) as seen in the copy of lease certificate which I mark YD – 1", but the copy in the court file has different names. The persons named in the document are not parties in this suit and have not provided any deposition in the form of affidavits to support the Applicant's position. The court therefore find that the Applicant has not availed any documents from the

Registrar of Land to confirm that by the time they filed this application they were the registered proprietor of the leasehold interest of the suit land. What they have availed through the sale agreement dated 4th August 2014 and the letter dated 30th September 2015 is that they have entered into a sale transaction over the suit land with one Alvin Were Wasambo and that the consent to transfer has been obtained. The Applicant cannot therefore be taken as the absolute and indefeasible owner of the suit land until after the certificate of title in their names is issued and availed before the court, and cannot be taken to be prima facie proprietor in terms of Section 26(1) of the Land Registered Act.

(d) That in determining whether or not a temporary injunction should issue the Applicant must come within the principles clearly annunciated in the case of Giella – V – Casman Brown & Co Ltd (1973) E.A. 358. The Applicant needed to establish that they have a prima facie case against the Respondent with a probability of success.

The Counsel addressed the court on this aspect in their submission and at length referred to the decision in Dinah Caren Ondiek Akinyi – V – Leukadia Ajwang Ondoro & Another Kisii E.L.C.C NO.167 of 2013 where Justice Okongo allowed the burial of the remains of the deceased on the land in dispute to go on holding that the "mere act of interring the remains of a deceased person on a parcel of land does not confer title to that land on the estate of the deceased or on her beneficiaries". This court concurs with that finding of the Honorable Judge. The Respondent in that case, just like the Respondent in this case, had not filed their defence when the application to stop the burial were filed, and prosecuted. It would however have been better in this case had the Respondent filed their defence as the court would have ascertained what their answer to the Applicant's claim would be. That notwithstanding, the fact that the Applicant has not availed a certificate of title of the suit land in their names, and the admitted fact that the Respondent has been living on the said land for years, leads the court to find that the Applicant has not demonstrated a prima facie case against the Respondent with a possibility of success.

(e) That the evidence adduced by the Respondent, through the annexed photographs which are not controverted or challenged, showers that there are other graves of relatives of the Respondent on the suit land. As correctly observed by the Honorable Judge in the case of Dinah Caren Ondiek Akinyi – v –

Leukadia Ajwang Ondero & Another (supra), a burial on a disputed land (suit land) does not confer title or ownership to that land. There has been no evidence adduced to show what irreparable loss the Applicant would suffer if the burial took place on the suit land. In any case the plaint contains a prayer of damages, and any loss suffered can be ascertained in financial terms and orders issued.

(f) That the balance of convenience also weighs against granting of the injunction at this stage. The fact that the Respondent have been living on the suit land, have buried other relatives on it over the years and the absence of any evidence that the person selling the land to the Applicant had objected to the previous burials on the land makes the application lack merit.

4. For reasons set out above, the court finds that the Notice of Motion dated 27th August 2015 is without merit. The application is dismissed with costs and the interim orders vacated.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

Dated and delivered this **11th of November 2015.**

In presence of;

Applicant N/A

Respondent present

Counsel Mr Karanja for Plaintiff/Applicant

Mr Rakewo for Anyul for Defendant/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

11/11/2015

S.M. Kibunja J

Court clerk Oyugi

Plaintiff/Applicant present

Mr Karanja for Applicant

Mr Rakewa for Mr Anyul for Respondent

Court: Ruling delivered in open court in presence of Defendant/Respondent, Mr Karanja for Applicant/Plaintiff and Mr Rakewa for Anyul for Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015