



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 90 of 2011

ARNODA AUMA AUMA ATITWA

LILIAN AWUOR ATITWA..... APPLICANTS

V E R S U S

CHISAKA OSANGA alias

CHISAKA PETER OSINGA.....DEFENDANT

RULING

In the application dated 25th April 2012 the applicants are seeking an order of injunction against the respondent in relation to a Plot measuring about 4.75 acres out of plot number **S/WANGA/BUCHIFI/226**. The applicants are also seeking a prohibitory order restraining the defendant from conducting any dealing on the suit land pending the finalization of this suit. The application is supported by the affidavit of the 1st applicant sworn on 25th April 2010.

Mr. Athung'a counsel for the applicants submitted that the applicants have been in occupation of 4.75 acres of the suit property and had been growing sugarcane thereon. In February 2012 the respondent set the sugarcane on fire and he was charged in Mumias Criminal Case No. 137 of 2012 which is still pending. The matter came for direction on 7th of March 2012 and the defendant went ahead and ploughed the land. The defendant admitted in his replying affidavit that he ploughed the land.

The defendant was aware of the suit and despite being served with interim orders went ahead and ploughed the land. Counsel urged the court not to allow the defendant to benefit from his illegality. The applicants further contend that they have a cane supply agreement with Mumias Sugar Company Ltd out of the cane grown on the suit land.

Mrs. Muleshe, counsel for the respondent relied on the defendants replying affidavit sworn on the 26th of August 2011. Counsel submitted that the land was fallow and the defendant who is the registered proprietor decided to plough it. He has planted crops and will suffer irreparable damage if the orders are granted. The cane contract with Mumias Sugar Company is for a plot different from the suit property. The defendant has no intention to dispose of the property.

The main issue for determination is whether the applicants have a prima facie case with a probability of success and have fulfilled the requirement for the granting of an injunction. With regard to the prayer for prohibition, since the defendant's position is that he does not intend to sell the property, granting the prayer will not prejudice the defendant. I do therefore proceed and grant prayer four (4) of the application dated 25th April 2012 as prayed.

In the affidavit in support of the application for injunction, the 1st applicant stated that the defendant ploughed a section of the suit plot on 7th March 2012 which was being utilized by the applicants. On the other hand, the defendant maintains that that portion was fallow and he decided to plough it. The application was filed on 28th April 2012 and this was after the defendant had already ploughed part of the land. I cannot therefore hold that the defendant indeed ignored the interim orders issued on 2nd May 2012.

The two applicants are the widows of the late **JOHN ATITWA OSINGO** who was a step brother to the defendant. The deceased had registered a caution against the suit property claiming beneficiary's interest. The applicants' case is that they are entitled to 4.75 acres from the suit property that measures approximately 9.5 acres.

In the replying affidavit, the defendant admits that the applicants are on the ground although he does not state when they went onto the land and started tilling it. From the pleadings herein, I do find that the applicants are in occupation of a portion of the suit property. Since the defendant has over five acres to utilize, I do find that his decision to plough the land while knowing that there was a dispute was made in haste. Although he had not been served with a court order, he should have exercised restraint on himself as the outcome of the case is unknown. The applicants' are not the ordinary encroachers who move onto unutilized land. They are step sisters in law of the defendant and whether or not their claim is allowed, the defendant should not conclude that the property is his and cannot be stopped from using it.

Since the defendant admits that the applicants are in occupation, I do order that the applicants do continue being in occupation of a portion of three and half acres pending the hearing and determination of this suit. Should it be established on the ground that the portion of 3 ½ acres is part of what the defendant ploughed, then that portion together with all the crops planted thereon shall be taken by the applicants as any damage suffered can be quantified. The respondent should utilize the remainder of the property measuring about six (6) acres.

In the end, the application dated 25th April 2012 is granted in terms of prayers three (3), four (4) and five (5). Prayer three (3) is granted but limited to three (3½) acres only as stated hereinabove.

Since the parties herein are related, I do order that each party do meet his own costs.

Delivered, dated and signed at Kakamega this 5th day of July 2012

**SAID J. CHITEMBWE
J U D G E**