



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 46 OF 2020

JANE OMOLLO JECTONE alias

JENIPHER ODOYO OLANGO.....1ST PLAINTIFF

MOURICE ODOYO.....2ND PLAINTIFF

WYCLLIFF ODOYO.....3RD PLAINTIFF

HASSAN ODOYO.....4TH PLAINTIFF

VERSUS

NIXON OTIENO BOGO sued on behalf of

TOM ONYANGO BUGO (Deceased).....1ST DEFENDANT

COUNTY LAND REGISTRAR HOMA-BAY.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. A Notice of motion dated 4th August 2020 filed in court on the even date was commenced under Order 4 Rules 1,2 and 2a Civil Procedure Rules, Section 1a,1b,3a and 63(e) Civil Procedure Act, Article 50 and 159 of the Constitution of Kenya,2010 (the application herein). The four (4) plaintiffs, JANE OMOLLO JECTONE alias JENIPHER ODOYO OLANGO, MOURICE ODOYO, WYCLLIFF ODOYO and HASSAN ODOYO (Hereinafter referred to as the 1st, 2nd, 3rd and 4th applicants respectively), through M/s. Agure Odero and company Advocates, are seeking the following orders:-

a) Spent

b) That pending the hearing and determination of this application/suit this Honourable court be pleased to grant stay proceedings Ndhiwa Elc No. 22/2020, (Ndhiwa PM's court land case herein). Nixon Otieno Bugo Vs- Maurice Odoyo Wycliff Odoyo and Hassan Odoyo who are plaintiffs in this O.S. case.

c) THAT pending the hearing and determination of this application, this Honourable court be pleased to grant an order of interim injunction restraining the 1st defendant/respondent either by himself, agents, servants or any other person acting under his instruction from alienating, trespassing and or evicting the plaintiff, blocking their accessibility, fencing the whole of parcel LR NO. Dhiwa/Kamdar/1114 measuring 1.93 hectares (the suit land herein), which the 1st defendant has begun cultivating, building structures, fencing, denying the plaintiffs access as they are currently landlocked.

d) THAT pending the hearing and determination of this suit, this Honourable court be pleased to grant an order of temporary injunction restraining the 1st defendant/respondent either by himself, agents, servant or any other person acting under his instruction from alienating, trespassing and or evicting the plaintiff, blocking their accessibility, fencing the whole of the suit land, which the 1st defendant has begun cultivating, building structures, fencing, denying the plaintiffs access as they are currently landlocked.

e) Costs of this application be borne by the defendants/respondents.

f) Such orders as court shall deem fit to grant.

2. The application is anchored on the 1st applicant's supporting affidavit of 21 paragraphs sworn on even date for and on behalf of the 2nd, 3rd and 4th applicants. Annexed to the said affidavit, are copies of documents marked as "JOJ 1" to JOJ 5" which include a letter dated 30th December 2016 by the Land Adjudication and Settlement Officer, Homa-Bay County, a notice to withdrawal of a suit namely Migori Chief Magistrate's court Environment and Land Case number 48 of 2018 and a plaint in Ndihiwa PM's court land case. The application is also based on grounds (a) to (m) set out on its face which include that the applicants have acquired the rights of adverse possession over the whole of the suit land, initially, Kamdar Adjudication section registered in the name of the 1st applicant until the year 2018 when the 1st respondent colluded with the 2nd respondent proceeded and registered the suit land in the name of Tom Onyango Bugo (deceased) and that the applicants have a prima facie case against the 1st respondent.

3. In a 41 paragraphed replying affidavit sworn on 18th August 2020 and filed in court on 19th August 2020, the 1st respondent through H.O. Mimba and Company Advocates, opposed the application. He deposed, inter alia, that he is the son of the deceased who was monogamous and that the application contains falsehood and imagination intended to mislead the court. That the instant case is a civil case while Ndihiwa PM's court land case is a land case thus, this court is devoid of jurisdiction over this matter. That the best the court can do in the interest of justice, is to order consolidation of the two suits in order to speedily determine the dispute.

4. It is important to note that the present suit was mounted by way of originating summons (OS) drawing inspiration of Sir Eric Law, JA (as he then was) in **Kibutiri vs= Kibutiri (1983) eKLR and Bwana vs= Said (1991) KLR 454**, among other long line of authorities. The same was simultaneously filed with the application for determination of issues (a) to (e) on its face and based on the 1st applicant's supporting affidavit of even date with annexed copies of documents marked as "JOJ 1" to JOJ 5" inter alia, a plaint dated 27th July, 2020 in Ndihiwa PM's court land case and a temporary order of injunction granted on 27th July, 2020 thereof. By the Originating summons, the applicants (plaintiffs therein) claim to have acquired the suit land by adverse possession.

5. By a 19-paragraphed replying affidavit sworn on 31st August 2020 and filed in court on 17th September 2020, the 1st applicant (the 1st defendant herein), termed the suit devoid of merit, misplaced an abuse of the court process and sought its dismissal with costs. He deposed in part that the plaintiff is a trespasser on the suit land and should vacate it forthwith. That at no time has the suit land been registered in the name of the plaintiffs except by forgery. His further affidavit of 45 paragraphs filed on 15th October 2020 tends to reinforce his assertion in this matter.

6. The 1st applicant swore a 22-paragraphed supplementary affidavit on 15th September 2020 and filed the same on even date and annexed thereto copies of documents marked as "JOJ 1" to "JOJ 5" which include an abjection, demarcation log book and proceedings in regard to the suit land during the demarcation process. That the 1st respondent has fenced her whole home on the suit land which is contrary to **Articles 28, 40 and 43 of the Constitution (supra)**.

7. On 17th September 2020, this court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction Number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.

8. Accordingly, the respondents' counsel filed a 3-paragraphed submissions dated 12th October 2020 making reference to the application, the replying affidavit and that an order of injunction has already been issued in Ndihiwa PM's court land case hence, the same temporary order cannot be issued by this court in the instant matter. Counsel submitted inter alia, that the application lacks merit, is frivolous and an abuse of the court process. That the same has failed to meet the threshold for the grant of injunction sought in line with the celebrated case of **Giella vs= Cassman Brown and Co. Ltd (1973) EA 358**.

9. Counsel argued that it is not in dispute that the suit land is registered in the name of the respondents. That the applicants are trespassers thereon.

10. Counsel further argued that the order of stay sought cannot be granted as the Ndihiwa PM's court land case and the instant one are seeking different reliefs. That the court can only intervene by transferring this suit to Ndihiwa PM's court with a view to consolidating the two (2) cases or they be heard at Ndihiwa PM's court on priority basis. Counsel submitted that the order of status quo in force be maintained pending hearing and determination of the two (2) suits.

11. On the other hand, by the applicant's submissions dated 28th October 2018, reference is made to this court's orders of 21st September 2020 as well as the Orders sought in the application and the grounds thereon. That the orders are meant to preserve the suit land as well as LR NO. Ndihiwa/Kamadara/115.

12. The applicant's counsel invoked **Article 159 of the Constitution (supra)** for the grant of the orders sought in the application. That no prejudice will be caused to the respondents thereby.

13. I have anxiously considered the application, the replying affidavit as well as the parties' respective pleadings and rival submissions in their entirety. So, have the applicants made out their case for the grant of stay of proceedings in Ndihiwa PM's court land case, temporary injunction and costs of the application?

14. At the outset, I take into account the Constitution and statutory provisions under which the application is originated herein. The term "**Stay of proceedings**" in the Black's Law Dictionary 10th Edition at page 1639 means:-

(a) “the postponement or halting of a proceeding, Judgment or the like,

(b) An order to suspend all or part of a judicial proceeding or a Judgment resulting from that processing”

15. By dint of **section 19 (2) of the Environment and Land Court Act, 2015(2011) (The ELC Act)**, this court is bound by the procedure laid down by the Civil Procedure Act Chapter 21 Laws of Kenya (the CPA herein). It is therefore, noted that under section 5 of the Civil Procedure Act, courts shall try all civil suits unless barred by the law.

16. On the that score, where can a suit such as the instant one, be filed? Section 11 of the CPA stipulates that all suits shall be filed in a court of the lowest grade an competent to try the same.

17. Notably, **section 9 of the Magistrate’s courts Act,2015 (The MCA)** donates jurisdiction to magistrates’ court to hear and determine cases relating to environment and land. The mandate thereof, too, flows from section 26 (3) and (4) of the ELC Act while this court is mandated to exercise appellate jurisdiction over the same under **section 13(1) of the ELC Act**.

18. In **Samuel Kamau Macharia and another =vs= Kenya Commercial Bank Ltd and others (2012) eKLR**, the Supreme Court of Kenya pronounced itself pertaining to jurisdiction, as follows:-

“A court’s jurisdiction flows from either Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law....”

19. It is common baseline from ground (e) of the originating summons (OS), paragraph 14 of the 1st applicant’s supporting affidavit and paragraph 17 of the replying affidavit in opposition to the application that Migori CM’s court land case was withdrawn on 30th July, 2020. In that regard, the said suit is quite loosely linked to the orders sought in the application.

20. **Section 6 of the Civil Procedure Act**, governs stay of suit. It is pretty clear from the material availed in this matter that the plaintiff in Ndhiwa PM’s court land case is the 1st defendant in the instant suit. The 1st, 2nd and 3rd defendants therein, are the 2nd, 3rd, and 4th plaintiffs herein. The property in dispute in both cases is the suit land.

21. To that extent, that two (2) matters concerning the same property are pending hearing and determination in two (2) different courts. In the case of **Judicial Commission of Inquiry into the Goldenberg Affair and 3 others =vs= Kilach (2003) KLR 249 at 265 and 266**, it was noted:-

“.....the respondent filed this notice of motion in the High court and the same is set for hearing on 9th April, 2003. It wouldn’t be right for the two matters to be heard simultaneously by the High court and the Commission.” (Emphasis added)

22. The 1st respondent asserted that an order of temporary injunction was granted on 27th July 2020 in Ndhiwa PM’s court land case. In paragraph 29 of this replying affidavit to the application, he deposed:-

“That I was the first to file a suit in Ndhiwa being ELC case no. 22 of 2020 whereby the Honourable court issued an order of Temporary injunction which is still in force.”

23. In light of the foregone averment alongside section 26 (3) and (4) of the ELC Act, section 9 MCA and section 11 of the CPA (supra), I find that the Ndhiwa PM’s court has the requisite jurisdiction to deal with the suit pending before it as well as the present suit. The reasoning of my brother Omondi Ohungo J in the case of **Patrick Ndegwa Munyua =vs= Benjamin Kiiru Mwangi and another (2002) eKLR**, is very relevant hereto and the same is endorsed accordingly; see also **Re Giles (2) (1890) 43 CHD 391 and Kibutiri case (supra)** that the procedure of filing such matters is intended to enable noncomplex matters to be resolved by the court.

24. The 1st respondent further deposed at paragraph 32 of the replying affidavit to the application that the applicants are seeking another temporary injunction against the respondent in the present suit. Indeed, he is puzzled thereby.

25. This court has jurisdiction to grant preservation orders including temporary injunction under **section 13 (7) (a) of the ELC Act**. However, as already observed, there is a temporary injunction in force in Ndhiwa PM’s court land case involving the same parties and same subject matter. Clearly, the aforesaid court has the requisite jurisdiction to deal with the present suit, too.

26. To that end, it is the finding of this court that the application is devoid of merits. The same falls in the obtaining circumstances.

27. Wherefore, in view of **Article 3 (6), 48 and 159 (2) (b) of the Constitution (supra)** and sections 11 and 18 of the CPA, it is hereby ordered that :-

a)The application by way of notice of motion dated 4th August 2020 mounted by the plaintiffs/applicants, be and is hereby disallowed with costs in the cause.

b) The instant suit originated by way of an originating summons dated 4th August 2020 and duly filed in this court on even date, be and is hereby transferred to Ndhiwa Principal Magistrate’s court for hearing and determination.

c) Mention before the Principal Magistrate at Ndhiwa Law courts for directions on 17th February 2021.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of November 2020.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Agure Odera learned counsel for the plaintiffs/applicants

Mr. P. Ochwangi learned counsel holding brief for Mimba learned counsel for the defendants/respondents

Mr. Tom Maurice – Court Assistant