



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 28 OF 2014

LYDIA ACHIENG ABURA.....PLAINTIFF

VERSUS

USONIK FARM PURCHASE

COOPERATIVE SOCIETY LIMITED.....DEFENDANT

RULING

1. The Plaintiff, Lydia Achieng' Abura, suing as the sole administrator of the estate of Isabella Akumu Abura, deceased, seeks for the following prayers through the notice of motion dated the 13th February 2014;

1. Spent

2. Spent

3. Injunction order restraining Usonik Farm Purchase Cooperative Society Ltd, the Defendant, by itself or agents from trespassing on, wasting, constructing on, continuing occupation, cultivating or otherwise interfering or dealing with L. R. No. 6015/3 Nandi District, the suit land, pending the hearing and determination of the main suit.

4. Eviction order against the Defendant and its agents with their structures from the suit land pending the hearing and determination of the suit.

5. Demolition order of the structures erected by the Defendant on the suit land.

6. Order for Police Officer Commanding Nandi Police Station to enforce the orders above.

7. Any further such orders that fits the circumstances.

8. That costs be in the cause.

The application is based on the fourteen (14) grounds on its face and supported by the Plaintiff's affidavit sworn on the 13th February 2014 summarized as follows;

a) That the estate of deceased was indebted to Agricultural Finance Corporation (AFC) and after receipt of the statutory notice, the beneficiaries and the plaintiff, as the sole Administrator of the estate resolved to sell 500 acres of the estate to offset the debt.

b) That they identified a suitable buyer who made part payment and AFC released the original title to the Plaintiff after settling the debt.

c) That the sale transaction is yet to be completed due to the Defendant's act of trespassing and leasing part of the suit land without the Plaintiff's approval.

d) That the Plaintiff has reported the Defendant's activities to local Provincial Administration and the police and their request to the Defendant to stop their activities on the suit land has not been heeded.

2. The application is opposed by Defendant through the replying affidavit sworn by Phillip Kiptoo Tanui, the secretary, on the 28th February 2014 summarized as follows;

a) That one Jack Franklin Ojwang Abura, a brother to the Plaintiff and administrator of his late mother's, Isabella Abura's estate, made an offer to sell 350 acres at Kshs. 70,000/= per acre to Kichaba Farmers Co-operative Society vide his letter dated 1st June 2007. That following further discussions the offer was raised to 500 acres and the members of Kichaba Farmers Cooperative Society incorporated the Defendant on 17th July 2007 to handle the sale transaction.

b) That following discussions with among others, Jack Franklin Ojwang Abura and A.F.C leadership on the 20th September 2007, the financial institution agreed to a redemption figure of Kshs. 9,000,000/=. That the Defendant notified its membership to raise the amount to enable payment being made on 4th October, 2007.

c) That Jack Franklin Ojwang Abura passed on the 1st October 2007, and by then the Defendant's predecessor had paid him Kshs. 500,000/=.

d) That after the burial of Jack Franklin Ojwang Abura, his widow and sisters assured the Defendant that they would continue with the sale and that they were free to continue occupying the identified portions of the land where they had been growing sugarcane.,

e) That in September 2013, the Defendant learnt that the Plaintiff had allegedly sold the suit land to Caroli Omondi. That the Defendant instructed their advocate to do a demand notice to the Plaintiff and her siblings on the 7th November 2013.

f) That upon learning that Caroli Omondi intended to start constructing on the said land, the Defendant membership resolved to also erect their structures on their portions of the suit land.

g) That the Defendant attended the meetings called by the Provincial Administration and recorded statements with the police as required. That the Defendant's position is that they are ready and willing to complete the transaction.

h) That the land being situated in Nandi County, the court with jurisdiction is Eldoret Environment and Land Court, and not this court.

3. The Plaintiff also filed the notice of motion dated 4th July 2014 seeking for judgment against the Defendant to be entered as prayed in the plaint dated the 13th February 2014 for the Defendant had not filed a defence. The application is based on the five (5) grounds on its face and supported by the affidavit sworn by the Plaintiff on the 7th July 2014 summarized as follows;

a) That the suit was filed on the 17th February 2014 and Defendant entered appearance on the 4th March 2014 but to date has not filed their statement of defence.

b) That the Defendant's inaction is a calculated attempt to delay the suit to the detriment of the Plaintiff.

4. The application dated 4th July 2014 is opposed by the Defendant through their three (3) grounds of opposition dated the 22nd July 2014 and summarized as follows;

a) That the application is brought under the wrong provisions of the law.

b) The application was served on the 17th July 2014 contrary to the provisions of Order 36 Rule 3 of Civil Procedure Rules.

c) That no formal application for judgment has been filed by the Defendant, and hence the application is premature and an abuse of the court process.

5. The record shows that the Defendant had filed a notice of preliminary objection on the issue of Court's Jurisdiction which was heard on merit and rejected on the 8th May 2014. The court then gave direction on the 22nd July 2014 for Counsel to file and exchange written submissions on the motion dated 13th February 2014. The record shows that the learned Counsel for the Plaintiff and Defendant filed the written submission dated the 11th September 2014 and 17th November 2014 respectively. That however no date for ruling was fixed the 6th February 2019.

6. That Joan Abura and Lynette Dawa filed the notice of motion dated the 19th June 2017 seeking to come on record in place of Lydia Achieng Abura, the Plaintiff, who had passed away on the 20th October 2016. The application was allowed on the 30th August 2017.

7. The court has also noted the Defendant's motion dated 5th November 2018 seeking for enlargement of time to file defence, and for the statement of defence dated the 16th July 2014 and filed on the 22nd July 2014 to be deemed as filed and properly on record. The application is opposed by the Plaintiff through their three (3) grounds of opposition dated the 30th November 2018.

8. The two applications dated the 13th February 2014 and 4th July 2014 came up for hearing on the 25th September 2018 when Mr. Otieno for the Plaintiff made his oral submissions, after which the hearing was adjourned on application of Counsel for the Defendant. That the hearing

proceeded on the 6th February 2019 when Mr. Magut, Learned Counsel for the Defendant made his submissions. The following are the summaries of the learned Counsel's submissions;

A. PLAINTIFF'S COUNSEL'S SUBMISSIONS

- That unlike the Defendant who has no legal or beneficial interest over the suit land, that of the Plaintiff as the administrator of the estate is well grounded in law.
- That the Plaintiff's interest over the suit land need to be protected as Section 45 of the Succession Act prohibits intermeddling with the estate of a deceased person.
- The Defendants have not availed a sale agreement as required by Section 3 of the law of Contract Act and that the offer in the letter they rely on was to another entity and not them.
- That the Counsel for the Plaintiff relied on the decisions in the cases of Pauline Arepel Cheptalam vs Zipporah Chepoche paw Kanyongo & Another [2017] eKLR and Lomolo (1962) Limited vs Shadrack K. Kimose & 147 Others [2016] eKLR in asking the court to find that the Defendant's defence was filed outside the time and hence irregular. The Counsel also referred to the case of Kangaita Tea Factory Company Ltd vs Muhammed Njiru Njagi & 7 Others [2014] eKLR.

B. DEFENDANT'S COUNSEL SUBMISSION:

- That prayers for eviction and demolition cannot issue at the interlocutory stage but should await the final determination of the suit.
- That the Defendant's members had been allowed to enter onto the suit land in 2015 by one of the vendors who passed on the 1st October 2017 before a formal sale agreement could be made on the 4th October 2017. That the Defendant had paid Kshs. 500,000/= as deposit and have erected houses and are farming thereon and hence are no trespassers.
- That the application for entry of judgment has been brought under the wrong provisions of the law as no formal application for judgment had been made.
- That their application for enlargement of time to file defence dated the 5th November 2018 is pending hearing.
- The learned Counsel referred to the cases of Jayesh Hasmukh Shah vs Navin Haria & Another [2016] eKLR, William Ntomanta Mlethanga sued as M'Manta Nkari vs Baikiamba Kirimania [2017] eKLR, Mixko Blacterman, Suing through his Power of Attorney, Shabir Halim Ali, & Another vs David Mwangi & 2 Others [2015] eKLR, Daniel Lago Okomo vs Safari Park Hotel Ltd & Another [2017] eKLR and Beatrice Wanjiru Kamuri vs John Kiriba Muiruri [2016] eKLR in making a case that the Plaintiff's applications should be rejected.
- The learned Counsel submitted that the authorities cited by the Counsel for the Plaintiff were not binding and are distinguishable in that one dealt with a situation where the defence had been struck out, while the other had no reasonable defence and asked the two applications to be dismissed and the suit allowed to go to hearing.

9. The following are the issues for the court's determinations;

- a) Whether the Plaintiff has established a prima facie case for any of the orders sought in the application dated the 13th February 2014 to be granted at this interlocutory stage.
- b) Whether the Plaintiff has made a case for interlocutory judgment to be entered as prayed in the motion dated 4th July 2014.
- c) Who pays the costs of the application.

10. The Court has carefully considered the grounds on the two applications and grounds of opposition, the affidavit evidence, written and oral submissions filed and come to the following findings;

- a) That this suit was commenced through the plaint filed on the 17th February 2014. That also filed on the same date is the motion dated the 13th February 2014 that is one of the applications subject matter of this ruling. That the other application subject matter of this ruling is dated 4th July 2014 and filed on the 7th July 2014. The latter application is for summary judgment while the former one is generally for injunction and eviction orders. That should the court find favour in the latter application, the suit would be determined and there would be no need to consider the former one which is for interlocutory orders.

b) That the Defendant entered appearance vide memorandum dated the 28th February 2014 and filed on the 4th March 2014, through M/s Terer Magut & Company Advocates. That they also filed the notice of preliminary objection of the same date which has already been rejected vide the ruling of 8th May 2014. The Defendant was obligated under **Order 7 Rule 1 of the Civil Procedure Rules** to file their defence in 14 (fourteen) days from 4th March 2014, when they entered appearance and serve the Plaintiff in 14 (fourteen) days from the date of filing. That the 14 days from the date of entering appearance lapsed on or about 29th March 2014, and no statement of defence had been filed to the Plaintiff's claim by that date.

c) That the Plaintiff's motion dated 4th July 2014 and filed on the 7th July 2014 is shown in its heading to be brought pursuant to **Section 3A of the Civil Procedure Act and Order 36 Rules 1 (b), 2 and 3 of the Civil Procedure Rules**. The application seeks for judgment to be entered for the plaintiff against the defendant as prayed in the plaint. The prayers at paragraph 21 of the said plaint are as follows;

- a) **"Permanent injunction stopping the invasion and erection of structures on the property;**
- b) **Demolition orders to demolish the illegal structures erected on the property;**
- c) **An order compelling the trespassers to vacate the property;**
- d) **General damages for the delay occasioned in completing the sale transaction.**
- e) **Costs of this suit and interest at court rates."**

That **Section 3A of the Civil Procedure Act** provides for the inherent powers of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. That **Order 36 of the Civil Procedure Rules** provides for summary procedure of courts processes. That **Rule 1 (1) (b)** of the said Order is the one dealing with suits for **"the recovery of land..."** and not **Rule 1 (b)** cited in the motion. That **Rule 2** of the Order allows the Defendant to defend the application brought under **Rule 1** either through **"affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit"**, while **Rule 3** deals with applications by Government. That in view of the provision of **Order 50 rule 10 of Civil Procedure Rules** and **Article 159 (2) (d) of the Constitution 2010**, the court finds the failure to cite correctly the Rules under which the application is based is not fatal to the application as its body and affidavit leaves no doubt on the prayers sought.

d) That under the provision of **Order 36 Rule 1 (1) (b) of Civil Procedure Rules**, all the Plaintiff's prayers except (d) which is for general damages may be considered as by the time the application dated 4th July 2014 was filed on the 7th July 2014, the Defendant had not filed any defence. The court is aware that summary judgment should be entered in the clearest of cases as the decisions referred to by both Counsel clearly show. That in determining whether this is a proper case where summary judgment should be entered, the court has considered the Defendant's statement of Defence dated the 16th July 2014 and filed on the 22nd July 2014, about 4 (four) months out of time and without leave. That further, the Court has considered the defendant's motion dated 5th November 2018 and filed on the 7th November 2018 for enlargement of time to file defence among others, and the grounds of opposition in reply dated 30th November 2018. That even though the Defendant's application was not heard contemporaneously with the other two subject matter of this ruling, it is important for the court to consider the same and make a determination on it at the same time. That the duty of the court, and in line with the overriding objective is to facilitate the just, expeditious proportionate and affordable resolution of the dispute as decreed under **Sections 1B and 1A of the Civil Procedure Act**. That the Defendant has through their application presented reasonable grounds in support of their application of time to file defence to be enlarged. That the fact that prayer (d) for general damages cannot be determined summarily without oral hearing, the court is of the view that allowing the filing of the defence out of time will fast track the hearing and determination of this suit on merit.

e) That from the pleadings filed and affidavit evidence presented for and against the motion dated the 13th February 2014, the Plaintiff as the administratrix of the estate of the suit land registered proprietor is the one with the beneficial and legal right to determine who occupies or takes possession of the said land. That even without making a final determination on whether or not the Defendant or its members have any rights to occupy or possesses the land, it is obvious they had not received the blessings of the Plaintiffs when they erected structures on the suit land. That it is only fair that the Defendant be restrained from using the suit land pending the hearing and determination of the suit. That the Defendants should therefore remove the structures erected on the suit land within ninety (90) days from today, and in default of the Plaintiffs arrange to be at liberty to have them demolished under the supervision of Officer Commanding Nandi Police Station.

11. That in view of the foregoing, the court orders as follows in respect of the motions dated 13th February 2014, 4th July 2014 and 5th November 2018;

A: MOTION DATED 13TH FEBRUARY 2014:

- i) **Restraining order in terms of prayer 3 pending the hearing and determination of this suit is hereby granted.**
- ii) **The Defendant do vacate the suit land and remove all the structures erected thereon in ninety (90) days and in default be evicted, and structures demolished as prayed in prayers 4 and 5.**
- iii) **That the Officer Commanding Nandi Police Station do provide security during the execution of the default orders in (ii) above.**

iv) The costs be in the cause.

B: MOTION DATED 4TH JULY 2014;

The application be and is hereby dismissed with costs in the cause.

C: MOTION DATED 5TH NOVEMBER 2018;

i) That prayer 2 for enlargement of time granted as prayed.

ii) The Defendant do serve the statement of defence, if not already served, in 14 days

iii) The Defendant do pay the Plaintiff's thrown away costs assessed at Kshs. 20,000/= (Twenty thousands) only in 14 (fourteen) days, and in default orders C (i) and C (ii) above do stand vacated; interlocutory judgment entered; and the Plaintiff at liberty to set the suit down for hearing through formal proof.

D: FURTHER ORDERS:

i) That further to the order of 30th August 2017 allowing the motion dated the 19th June 2017 and so as to fast track the hearing and determination of this suit, the Plaintiffs are hereby directed to file and serve an amended plaint incorporating the two plaintiffs in place of the original one who has since passed on. That needless to state, the Defendant will file and serve an amended defence in 14 days after service.

ii) That both parties granted 30 (Thirty) days to file and serve statements and list of documents in 30 days.

iii) The matter be mentioned before the Deputy Registrar to confirm compliance with Order 11 of Civil Procedure Rules and trial conference on a date to be agreed today.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE