



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**ENVIRONMENT AND LAND COURT**

**ELC CASE 67 OF 2017**

**RICHARD AMAYO OGOSI** (Suing as he administrator of the estate of

**WASHINGTON OGOSI ADONGO.....PLAINTIFF**

**VERSUS**

**JOHN ANDIEGE AWINO.....1<sup>ST</sup> DEFENDANT**

**ZADOCK ANDIEGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff/ applicant who is represented by Odongo Awino and Co advocates filed a Notice of Motion dated 16<sup>th</sup> February 2017 under certificate of urgency (hereinafter referred to as the application). He brought it pursuant to order 40 Rule 1, 2 & 4 of the Civil Procedure Rules and sections 1A, 3A & 63(e) of the Civil Procedure Act and all other enabling provisions of the law. He is seeking the following orders:

**1) Spent**

**2) Spent**

**3) THAT pending hearing and determination of this application interparties, a temporary order do issue restraining the Defendants/Respondents, their servants, agents and all such persons claiming title from the constructing, developing or putting up any structures therein including a Posho Mill on land parcel LR NO. KABONDO/KAKANGUTU EAST/486 ( the suit property)**

**4) THAT this application be heard interparties on such dates and at such time as this Honourable court may direct.**

**5) THAT the costs of this application be awarded to the plaintiff/applicant**

2. The basis of the (application) is a 19-paragraphed supporting affidavit sworn on 16<sup>th</sup> Feb 2017 by the plaintiff/applicant who stated that he is a co-administrator of the estate of the late Washington Agosi Adongo. He further stated that the defendants/Respondents have entered the **suit property** and are interfering with the estate of the deceased by intending to put up a posho mill on the suit property, among other things. The application is also supported by the plaintiff/applicants supporting affidavit based on eight (8) grounds on the face of the application. The grounds are:-

1) **THAT** the Applicant/Plaintiff is one of the administrators of the estate of one WASHINGTON AGOSI ADONGO and also a son on the deceased.

2) **THAT** as the administrators of the deceased's estate, they have the legal duty to protect the deceased's property pending distribution and confirmation of Grant and to ensure no interference with it by any party.

3) **THAT** the defendants are intent on putting up a Posho Mill on the deceased's land without the administrators' consent and/or approval.

3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/ respondents are represented by Olel, Onyango, Ingutia & co. advocates. By an authority dated 27<sup>th</sup> Feb 2017

2<sup>nd</sup> second defendants/respondent authorized the 1<sup>st</sup> defendant/respondent to swear and sign affidavit on his behalf.

4. In a replying affidavit sworn on 27<sup>th</sup> Feb 2017, the 1<sup>st</sup> defendant/respondent opposed the orders sought in the application. He stated that he has had physical possession of a portion of the suit property since 1978 when he bought it from the plaintiff's father the late Washington Ogesi Adongo at Ksh. 7,500/=being consideration in full for the purchase of the suit property as shown by an agreement dated 15<sup>th</sup> January 1978. He further stated that part of the purchase price was used to pay school fees for the plaintiff/ applicant at Sibuo secondary school as per copies of receipts. He averred inter alia, that the plaintiff's late father surrendered title deed to the suit property to him and he holds it to date.

5. The plaintiff/applicant filed a further affidavit sworn 27/3/17 in support of his application. He stated, among others that he is a total stranger to the purported sale that allegedly took place in 1978 between his father and the 1<sup>st</sup> respondent, the purported sale is invalid and inadmissible in law as it offends the Law of Contract Act and the Stamp Duty Act. He termed the occupation of the respondent on the suit land illegal.

6. On 16/11/2017, I gave time lines within which the parties were to exchange written submissions on the application pursuant to **Order 51 rule 16 Civil Procedure Rules, 2010.**

7. The plaintiff/applicant's counsel filed their submissions dated 15/11/2017 by which they urged the court to grant the orders sought and that the plaintiff/applicant has made out a case for the grant of the same. The counsel submitted that there is no dispute on the facts here under:-

**(a) THAT the suit land (KABUNDO/KAKANGUTU/486 is registered in the names of one William Ogesi Adongo is now deceased.**

**(b) THAT the plaintiff/applicant is one of the legal administrators to the estate of the deceased.**

**(c) THA the plaintiff/applicant is one of the legal administrators to the estate of the deceased.**

8. It was further submitted by the counsel that the plaintiff/applicant has sufficient locus standi to instituted and prosecute the suit. The counsel submitted that the defendants/respondents unlawfully entered the suit land and proceeded to put up a semi-permanent structure thereon. He argued that the defendants/respondents have no title to the land and did not exhibit any document showing that they lay legal claim to the suit land. The counsel made reference to the land control board sanction under section 6 of the Land Control Act and the Limitation of Actions Act.

9. The defendant/respondent counsel filed submissions dated 18<sup>th</sup> January, 2018. The counsel submitted on a prima facie case, irreparable loss and balance of convenience being the principles for the grant of injunction. He further submitted that the court ought to protect the purchaser's interests and that some structures on the suit land have been there since 2000 and the plaintiff/applicant is still aware of their existence.

10. To buttress his arguments, counsel for the defendant/respondent relied on the case of **Showind Industries –vs–Guardian Bank Ltd & Anor (2002) 1 EA 284** to the effect that there exists a higher threshold that must be satisfied before grant of an injunction. The counsel urged the court to find no merit in this application and dismiss it with costs to the respondents.

11. I have studied the application, the replying affidavit, the further affidavit and submissions including case law cited by counsel. The plaintiff/applicant is seeking a temporary order of injunction. **Order 40 of the Civil Procedure Rules, 2010** governs temporary injunctions and interlocutory orders. The conditions applicable for interlocutory injunctive remedy were well settled in the case of **Giella –vs– Cassman Brown & Co. Ltd (1973) EA 358 at 360.** The conditions are :

**(a) The probability of success**

**(b) Irreparable harm which would not be adequately compensated for by damages; and**

**(c) If in doubt, then a balance of convenience.**

12. The plaintiff/applicant claims that the defendants/respondents have put up semi-permanent structure on the suit property and that they intend to grab the suit land. In support of his claim, he displayed the following documents;

**a) a grant of letters of administration intestate issued on 2<sup>nd</sup> November, 2015 in Homa Bay High Court Succession cause No. 283 of 2015,**

**b) a certificate of official search dated 8<sup>th</sup> February, 2017 and**

**c) Photographs marked RAO 1 to 3 respectively in support of his claim.**

13. The 1<sup>st</sup> defendant/respondent stated that he has been in physical possession of the suit land since 1978 when he bought it from the late Washington Ogesi Adongo who was the father to the plaintiff/applicant. He stated that he possesses the title deed to the suit property to date.

14. It is common baseline that the Defendants are already in occupation of the suit land or part of it and they have put up structures thereon.

At paragraph 14 of the supporting affidavit, the plaintiff/applicant stated;

***THAT I now seek this court's intervention to stop the defendants from further putting up structures onto my father's land and .....***

15. The defendants/respondent have been thereon, not just from yesterday as revealed in, among others, ground 5 of the application, paragraphs 6,7, 8 and 16 of the Plaintiff's supporting affidavit, paragraphs 6, 7 8, 12 and 14 of the 1<sup>st</sup> defendant/respondent replying affidavit and paragraphs 9, 14, 15, 17, 18 ,21 and 22 of further affidavit by the plaintiff/applicant. The 1<sup>st</sup> Defendant/respondent in his replying affidavit at paragraph 8 stated as follows;

***"THAT in response to paragraph 6.....I have been on my portion of this parcel of land for a period of over 35 years."***

16. I am aware of Article 40 Constitution, 2010 on protection of right to property. An individual /or in association with others has the right to acquire and own property of any description in any part of Kenya.

17. Grant of an injunction as sought in the application at this interlocutory stage of the suit would amount to an eviction order against the defendants. Paragraph 14 of the plaintiff's/applicant's further affidavit reads;

***"THAT in reply to paragraph 8 of the .....occupation...illegal....trespassers ought to be evicted.."***

18. Therefore has the plaintiff/applicant met the prerequisites for the grant of orders sought? Owing to the already noted revelation in the affidavits and the submissions by counsel for the defendant/respondent, the succinct answer to it, is not in the affirmative. He has not shown that he has a prima facie case and that he is likely to suffer harm not adequately compensatable in damages. Even if the plaintiff/applicant had satisfied me at technical level that he has made out a case for the injunction sought, I would have declined the same in the exercise of my equitable discretion as judicially recognized in the **Showind Industries case** (supra)

19. In **Musa Angira Angira-vs-ICDC (2015) eKL R Mutungi, J** observed that the order that was merited was one conserving and or preserving the property until the hearing and determination of the suit. He ordered the parties to maintain the obtaining status quo.

20. Moreover, this court is mandated by Section 13(7) of the Environment and Land court Act 2012 (2011) to make preservation orders in respect of a suit property. I find that the order merited herein in the circumstances is maintenance of the prevailing status quo in lieu of the orders sought in the application.

21. I accordingly order that pending the hearing and determination of the suit, the plaintiff/applicant and the defendants/respondents shall maintain the obtaining status quo particularly that ;-

**(a) The defendants/respondents to still occupy and use 0.6 Ha of the suit land**

**(b) The plaintiff/applicant not to interfere with the houses built by the defendants/respondents on the 0.6 Ha.**

**(c) The defendants/respondents shall not put up a posh mill and any permanent structure on the disputed portion of the suit property.**

22. Costs of the application shall be in the cause.

**Dated, signed and delivered in open court at Migori this 31<sup>st</sup> day of JANUARY 2018**

**G MA ONGONDO**

**JUDGE**

**In the presence of:-**

Mireri counsel holding brief for Odongo Awino for the plaintiff/Applicant.

Lori – Court Assistant