



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.800 OF 2015

BONAVENTURE MICHAEL OKELLO AGINA.....PLAINTIFF

VERSUS

SINOHYDRO CORPORATION LTDDEFENDANT

RULING

1. **Bonaventure M. Okello Agina**, the Plaintiff, vide chamber summons under certificate of urgency dated 20th July 2016 against **Sinohydro Corporation Ltd**, the Defendant, prays for among others judgment to be entered against the Defendant at Ksh.2,474,000/=, costs and interests. The Plaintiff also prays for the Defendant to furnish security for that amount. The application is based on seven grounds on its face and is supported by the Plaintiff's affidavit that is undated but filed on 21st July 2016.
2. The application is opposed by the defendant through the replying affidavit of Petro Osangiri, sworn on the 15th august 2016.
3. The Plaintiff counsel filed written submissions dated 22nd September 2016 while counsel for the Defendant filed theirs dated 21st October 2016.
4. The following are the issues for court's determinations;
 - a) Whether the Defendant has admitted the Plaintiff's claim, and if so whether judgment should be entered and at how much.
 - b) Whether the Plaintiff has established grounds for issuance of an order for security, and if so for how much.
 - c) Who pays the costs.
5. The court has after considering the grounds on the application, the affidavit evidence, written submissions and pleadings filed come to the following determinations;
 - a. That the Plaintiff suit commenced through the plaint dated 25th April 2012 and amended on 4th April 2016 is for permanent injunction over land parcel L.R. NO.20496 vide Grant No.69850 (Land Survey Plan Number 193512), special damages of Ksh.2,474,000/=, mesne profits of Ksh.180,000/= and costs.
 - b) That the Defendant was served with the initial suit papers dated 25th April 2012 as they entered appearance through M/S Olel, Onyango, Inguthiah & Company advocates through the

memorandum of appearance dated 21st May 2012. There is however nothing to confirm service of the amended plaint dated 4th April 2016 in which the special damages was particularized at Ksh.2,474,000/=. The request for summary judgment cannot therefore be entered without evidence of service of the amended plaint.

c) That the Defendant then filed the chamber summons dated 3rd November 2012 seeking to have one Samson Odhiambo Nyawir enjoined as a co-defendant. The Defendant also filed a notice to a co-defendant dated 3rd November 2012 addressed to the same Samson Odhiambo Nyawir. The said application has not been heard todate.

d) That on the 12th May 2014, the counsel for the parties entered a consent that the County Land Surveyor/Valuer do visit the land described in the plaint and “**determine the extent of the encroachment and value of the damage done**”. That a report was to be filed in court in 60 days. The report dated 13th October 2014 by the regional surveyor and County Valuer was filed in court on the same date. The report stated that the Defendant had encroached on to the land by excavating murrum on an area of 0.0621 hectares. The report further indicated that it would be impossible to restore that portion of land to its original state. The two officers recommended that the owner of the affected land be compensated with Ksh.850,000/=, being the value of an alternative piece of land. That the report has not been adopted as an order of the court.

e) That the Plaintiff’s claim of Ksh.2,474,000/= appear to be based on a valuation report by one Gordon O. Nyabande of Vineyard Valuers Limited that is annexed to the chamber summons. That there is no indication as whether the said valuation was procured with the consent and participation of the Defendant.

f) That as correctly observed by the Defendant in their replying affidavit, the Plaintiff’s application is not clear on whether he seeks summary judgment or security. The court has noted that the application has made reference to **Order 36 Rule 1 of Civil Procedure Rules** which deals with applications for summary judgment where the Defendant has not filed a defence but has entered appearance, and **Order 39, Rules 1, 2, 5 and 6 of Civil Procedure Rules** on furnishing of Security. The court has therefore taken the position that the Plaintiff seeks for both the summary judgment to be entered and furnishing of security.

g) That the Defendant has not filed any defence to the Plaintiff’s claim. The Defendant has however entered appearance, filed an application as detailed in (c) above and participated in the entering of the consent of 12th May 2014 through which the Land Surveyor’s and Valuer’s report dated 13th October 2014 was filed. That had the parties indicated their satisfaction with the valuation contained in the report dated 13th October 2014, the court would have expected them to move the court to adopt its contents as an order of the court.

h) That the valuation of the damage claimed by the Plaintiff of Ksh.2,474,000/= is not contained in the report by the Land Surveyor and Valuer dated 13th October 2014. It is also not obtained pursuant to the consent of 12th May 2014. The parties may need to discuss and agree on whether the value in the report dated 13th October 2014 on damages is agreeable and if not the Plaintiff should proceed to fix the case for hearing during which time the Defendant will cross-examine the Plaintiff’s witnesses. Thereafter the court can determine the amount of special damages proved from the evidence availed before it.

i) That the Plaintiff has not disputed the Defendant’s deposition that they have several ongoing projects within the Country, Kenya, as particularized in the letter dated 7th August 2016 annexed to the replying affidavit. The Plaintiff’s claim that the Defendant is likely to leave the court’s jurisdiction without satisfying the decree that may be issued in this suit is therefore not based on facts.

6. That in view of the foregoing the chamber summons dated 20th July 2016 is without merit and is dismissed with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Lore for Osongo for Plaintiff

Mr. Mwesigwa for Olel for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017

22/2/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr Lore for Onsongo for Plaintiff/Applicant

Mr. Mwesigwa for Olel for Defendant/Respondent.

Court: Ruling Delivered in open court in presence of Mr. Lore for Onsongo for Plaintiff/Applicant and Mr Mwesigwa for Olel for Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017