



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KISUMU

ELC. CASE NO.138 OF 2014

CORNEL OPIYO OSANO

PROF. FREDRICK O. OTIENO

DR. WENWA AKINYI ORANGA

ROY TOM MANGA

PROF. NOBERT OPIYO AKECH

CAROLINE ANYANGO OTIENO

GRACE OHAYO RAITOKO

MUGA JULIAN ZILPA

SALOME A. OSANO

JOSEPH JUMA OSANO

CAROLINE ADHIAMBO ONYANGO

SAMUEL OCHIENG OKECH

ROBERT KENNEDY OUKO.....PLAINTIFFS/APPLICANTS

VERSUS

SYNOHYDRO CORPORATION LIMITED.....DEFENDANTS/RESPONDENTS

AND

TOM ONYANGO

ROBERT OLOO KAIKO

MOURCIE OGOT ABIERO.....THIRD PARTY

(Being sued as officials of KIKAKO WELFARE ASSOCIATION)

RULING

1. (a) **Cornel Opiyo Osano, Prof. Fredrick O. Otieno, Dr. Wenwa Akinyi Oranga, Roy Tom Manga, Prof. Nobert Opiyo Akech, Caroline Anyango Otieno, Grace Ohayo Raitoko, Muga Julian Zilpa, Salome A. Osano, Joseph Juma Osano, Caroline Adhiambo Onyango, Samuel Ochieng Okech and Robert Kennedy Ouko**, hereinafter referred to as the 1st to 13th Applicants commenced suit through the plaint dated 26th May 2014 seeking for permanent injunction and restoration order against **Synohydro Corporation Limited**, the Respondent. Filed contemporaneously with the plaint is the notice of motion of even date seeking for temporary injunction orders.

b) The application dated 26th May 2014 came up for hearing interpartes on the 23rd June 2014. The Respondent and their counsel did not attend nor file any papers in opposition. The court heard P.J. Otieno Advocate for the Applicants and on satisfying itself that service had been effected allowed the application. That order has not been set aside or reviewed and the written submission by counsel for the Plaintiffs (Applicants) and Defendant (Respondent) dated 16th March 2015 and 28th April 2015 respectively ostensibly on the application dated 26th May 2014 are misplaced.

c) The Applicants then filed the notice of motion dated 13th August 2014 for the following orders:

i) Application be certified urgent.

ii) Order Commanding Kondele Police Station In Charge to ensure compliance of the court order of 23rd June 2014.

iii) Cite the Defendant for breach of the order of 23rd June 2014

iv) Attach property of the Defendant or commit its Managing Director to prison for disobeying court order of 23rd June 2014.

v) Costs.

The notice of motion was placed before the Environment and Land Court, Judge Busia on 13th August 2014 and certified urgent. The court directed that the application be served and heard on 25th August 2014 in Kisumu when prayer (b) was granted.

d) The notice of motion dated 13th August 2014 then came up for hearing on 22nd September 2014. On that date the Defendant/Respondent filed the notice of motion of even date seeking to enjoin **Tom O. Onyango, Robert Oloo Kaiko** and **Mourice Ogot Abiero**, being officials of **Kikako Welfare Association**, as Third Party. The Plaintiffs/Applicants counsel conceded to the application and the same was granted. The court then granted leave to file further affidavits on the application dated 13th August 2014 and rescheduled the hearing to 10th December 2014.

e) The Third Party filed the memorandum of appearance dated 14th October 2014 but have not filed any further pleadings since.

f) The record of 10th December 2015 shows that the counsel for the Applicant sought for a hearing date for the application dated 26th May 2014 and the court fixed it for 25th February 2015. The application dated 26th May 2014 had been granted on 23rd June 2014 and it could therefore not be fixed for hearing again without the orders of 23rd June 2014 being vacated either through review, setting aside or appeal. The mistake has been carried forward since that time.

2. Today's ruling should therefore be in respect of the notice of motion dated 13th August 2014. The court has noted that prayers (a) and (b) are already spent. The application is based on the six grounds on its face. The application is also supported by the affidavit of Cornel O. Opiyo sworn on 13th August 2014

and further affidavit sworn on 28th August 2014.

3. The application is opposed by the Respondent through the replying affidavit of Jianfei Wang sworn on 16th September 2014.

4. That even though counsel have not filed any submission on the application dated 13h August 2014, it is only fair the court consider the facts presented through the affidavits and prepare its ruling to avoid any further delay in this matter. The following is the summary of Applicants' and Respondent's case in respect of the application dated 13th August 2014.

a) **Applicants' case**

That the court issued orders of temporary injunction on 23rd June 2014 restraining the Respondent from trespassing or interfering with the Applicants parcels of land numbers **18133/3 to 18133/98**. That the order was extracted and served on the Respondent on 25th June 2014 but on 2nd August 2014 the 1st Applicant found the respondent excavating murrum from the said parcels and took photographs of the equipment and lorry.

b) **Respondent's case**

That the Respondent has leased land to excavate murrum from **Kikako Welfare Association (Third Party)**, and have been excavating since March 2014. That after the order of 23rd June 2014 was served on them, they realised the parcels of land they were restrained from excavating murrum from were different from the land they had been doing the excavation from and which had been shown to them by the Chairman of the Third Party. That they further engaged a surveyor who visited the excavation area and made a report showing that the murrum excavation is not on **L.R. NO.18133** or any part of that land.

5. The court has considered the grounds on the notice of motion and the affidavit evidence by Mr. Cornel Opiyo Osano and Jianfei Wang and come to the following findings;

a) That the court granted the Applicants notice of motion dated 26th May 2014 on the 3rd June 2014. That the extracted order restraining the Respondent from trespassing upon the land, or in any way interfering with the Plaintiffs parcels of land **L.R. No.18133/3 TO L.R.No.18133/98** was served on the Respondent on the 25th June 2014. The Respondent has not contested service.

b) That on the 2nd August 2014 and 27th August 2014, the 1st Applicant noted activity of excavation going on and captured the same in the photographs annexed to his supporting and further affidavits. The Respondent has not disputed that the excavation continued after the service of the court order issued on 23rd June 2014. The Respondent has however explained that the excavation activities continued on land lease from the Third Party which is not part of the land claimed by the Applicants. The Respondent has annexed a ground report by one **Patrick Opiyo, a licensed surveyor** to which is attached a sketch map showing that Land parcel L.R. No.18133 is about 140 metres from the excavation area marked "A". The court notes that the Respondent deposition on that matter has not been challenged.

c) That there is definitely a dispute as to whether the area the Respondent has continued to excavate murrum after the order of 23rd June 2014 was served on them is part of the land claimed by the Applicants or the land leased from the Third Party. That finding leads the court to conclude that it is therefore doubtful as to whether the Respondent has disobeyed the court order dated 23rd June 2014 and served upon them on 25th June 2014. The application dated 13th August 2014 is therefore without merit.

6. That in view of the foregoing the application dated 13th August 2014 is dismissed with costs in the cause.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 19TH DAY OF APRIL 2016

In presence of;

Applicants Absent

Respondent Absent

Third Party

Counsel Mr Emukule for Plaintiffs

Mr Adiso for wasuna for Defendant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

19/4/2016

19/4/2016

S.M. Kibunja J.

Oyugi court assistant

Mr Emukule for Plaintiffs

Mr Adiso for Wasuna for Defendant

Court: Ruling delivered in open court in presence of Mr Emukule for Plaintiffs and Mr Adiso for Wasuna for Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

19/4/2016