



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 801 OF 2015

[FORMERLY HCC NO.333 OF 2001]

HILDA ASIKO .....PLAINTIFF

VERSUS

MASELINA ODAWA.....1<sup>ST</sup> DEFENDANT

THE COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT

THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT

RULING

1. **Hilda Asiko**, the Plaintiff, moved the court through the notice of motion dated 19<sup>th</sup> January 2017, brought under **Order 42 Rule 6 (1), (2), (4) and (6)** of the Civil Procedure Rules, **Section 3 and 3A** of the Civil Procedure Act and **“ARTICLE 159 OF THE CPA”** seeking for the following orders;

- That the application be certified urgent.
- Stay of proceedings and execution of the judgment delivered on 8<sup>th</sup> September 2016 pending the hearing and determination of this application.
- Stay of proceedings and execution of the judgment delivered on the 8<sup>th</sup> September 2016 pending the hearing and determination of the intended appeal.
- Temporary injunction restraining the Defendant by themselves or their agents from interfering with transferring, subdividing, working on, ploughing, dealing or in any way interfering with the Plaintiff's possession of the parcel **Kisumu/Muhoroni1630** also known as **Kisumu Muhoroni/1040** until this application is heard and determined.
- Temporary injunction restraining the Defendants by themselves or their agent from interfering with, transferring, subdividing, working on, ploughing, dealing or in any way interfering with the Plaintiff's possession of the parcel **Kisumu/Muhoroni/1630** also known as **Kisumu Mohoroni/1040** until the intended appeal is heard and determined.

The application is based on the six grounds marked (a) to (f) on the notice of motion and is supported by the affidavit of the plaintiff sworn on the 17<sup>th</sup> January 2017.

2. The application is opposed by the **Mercelina Odawa**, the 1<sup>st</sup> Defendant, through the grounds of opposition filed through her advocate dated 24<sup>th</sup> March 2017.

3. The application came up for hearing on the 28<sup>th</sup> March 2017 when Mr. Mwamu and Mr. Ojuro, the learned counsel for the Plaintiff and 1<sup>st</sup> Defendant respectively, made their oral submission summarized as follows;

**A. PLAINTIFF'S COUNSEL'S SUBMISSIONS;**

- That the first Defendant has began the process of evicting the Plaintiff from the suit land through the letter dated 24<sup>th</sup> November 2016 giving the Plaintiff 30 days' notice.
- That the Plaintiff was dissatisfied with the court's judgment of 8<sup>th</sup> September 2016 and had filed a notice of appeal on the 16<sup>th</sup> September 2016.
- That the Plaintiff has been on the land for 43 years and stand to suffer irreparable loss.
- That the application has been filed without undue delay.
- That the stay orders will not prejudice the 1<sup>st</sup> Defendant as the case started in 2001 and the Plaintiff has all along been in possession.
- That the Plaintiff will comply with whatever directions the court may give.

**B. 1<sup>ST</sup> DEFENDANT'S COUNSEL'S SUBMISSION;**

- That though the judgment was delivered on the 8<sup>th</sup> September 2016, it was not until the 25<sup>th</sup> January 2017 when the notice of motion dated 19<sup>th</sup> January 2017 was filed.
- That there has been undue delay in filing the application as it was filed over four months from the date of the judgment sought to be stayed.
- That the 1<sup>st</sup> Defendant's letter dated 24<sup>th</sup> November 2016 and delivered to the Plaintiff through her counsel on 28<sup>th</sup> November 2016 required the Plaintiff to comply with the court order to give vacant possession of the suit land to the 1<sup>st</sup> Defendant.
- That the judgment of 8<sup>th</sup> September 2016 is final and the Plaintiff has not shown what irreparable loss she is likely to suffer if she complied with it by giving vacant possession.
- That giving vacant possession of the suit land to the 1<sup>st</sup> Defendant will not render the appeal nugatory as the land will be there even after the appeal.
- That the 1<sup>st</sup> Defendant has not offered any undertaking as a condition to the application being granted and should therefore be dismissed with costs.

4. The following are the issues for determination by the court;

a) Whether the Plaintiff has established that she is likely to suffer substantial loss if the application for stay is not granted.

b) Whether the application has been filed without unreasonable delay.

c) Whether temporary injunction order can issue at the stage, and if so, whether the Plaintiff has established a case for the issuance of the order.

d) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, oral rival submissions by both counsel and come to the following determinations;

a) That after the court's judgment dismissing the Plaintiff's case and in favour of the 1<sup>st</sup> Defendant was delivered on the 8<sup>th</sup> September 2016, the Plaintiff indicated her dissatisfaction by timeously filing the notice of appeal dated 13<sup>th</sup> September

2016. That the 1<sup>st</sup> Defendant then filed the party to party bill of costs on 21<sup>st</sup> September 2016 and a notice of taxation dated 26<sup>th</sup> September 2016 was issued indicating that the taxation

would take place on the 27<sup>th</sup> October 2016. That it was not until the 25<sup>th</sup> January 2017 that the Notice of motion dated 19<sup>th</sup> January 2017 was filed.

b) That the submission by counsel for the 1<sup>st</sup> Defendant is that the Plaintiff delayed in filing the application while counsel for the Plaintiff position is that there was no delay. The court has noted that the counsel for the 1<sup>st</sup> Defendant wrote a letter dated 24<sup>th</sup> November 2016, and served upon counsel for the Plaintiff on 28<sup>th</sup> November 2016, that required the Plaintiff to give vacant possession in 30 days. The letter further gave notice that should the Plaintiff fail to give vacant possession the 1<sup>st</sup> Defendant would “institute **further legal actions**

..... **including citing for contempt**”. That it is the 1<sup>st</sup> Defendant’s counsel’s submissions that the letter they dispatched to the Plaintiff is the one that moved her to file the

current application. That as there is no alternative explanation offered by the Plaintiff, the court finds the submission by the 1<sup>st</sup> Defendant counsel to be reasonable. Plaintiff delayed inordinately long in filing the application for stay. The application was filed about four months after the judgment was delivered. There is no explanation given why it was not filed at the time the notice of appeal was filed or shortly thereafter.

c) That the judgment of 8<sup>th</sup> September 2016 was a final determination of the Plaintiff’s claim against the Defendants, and the 1<sup>st</sup> Defendant’s counterclaim against the Plaintiff. That it follows therefore that the temporary injunction order sought in prayers 4 and 5 of the notice of motion are not available to the Plaintiff as such an order is only available at the interlocutory stage awaiting the final determination of the case that is pending in the court. That there is no pending suit in this matter.

d) That as submitted by the counsel for the 1<sup>st</sup> Defendant, the Plaintiff has not shown what loss she is likely to suffer if the stay order is not issued. That the Plaintiff was found in the judgment of 8<sup>th</sup> September 2016 to have trespassed onto the suit land. That the fact that she remained on the suit land during the time this suit was pending hearing and determination does not on its own mean she should continue to be in occupation even after the court has ordered her to give vacant possession.

6. That flowing from the foregoing, the court finds no merit in the notice of motion dated 19<sup>th</sup> January 2017 and filed on the 25<sup>th</sup> January 2017 and the same is dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY 2017

In presence of;

Plaintiff            Absent

Defendants        1<sup>st</sup> Defendant present

Counsel M/S adwar for Mwamu for Plaintiff

Mr. Ojuro for the 1<sup>st</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**31/5/2017**

31/5/2017

S.M. Kibjuna Judge

Oyugi Court Assistant

1<sup>st</sup> Defendant present

M/S Adwar for Mwamu for Plaintiff

Mr. Ojuro for 1<sup>st</sup> Defendant/Respondent

Court: Ruling dated and delivered in open court in presence of M/S Adwar for Mwamu for the Plaintiff and Mr. Ojuro for the 1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**31/5/2017**



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