



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT

LAND CASE NO.60 OF 2013

ALOICE OWILLA HONGO.....APPLICANT

VERSUS

HELLEN OTENDO OTANDO..... RESPONDENT

RULING

1. **Aloice Willa Hongo**, the Applicant, through the Notice of Motion dated 20th March 2013 filed contemporaneously with the plaint of the same date prays for four prayers. Prayers 1 and 3 which are about certifying the application as urgent and barring **Hellen Otengo Otando**, the Respondent, from burring the remains of her daughter, **Diana Otengo**, on Land parcel **Kisumu/Oyola/681**, the suit land, were granted the exparte on 22nd March 2013. This ruing relates to prayers 2 and 4 which are for injUNCTION and costs. The Applicant states that she is the registered proprietor of the suit land and annexed a copy of her title deed issued on 5th February 2013 in her names to her supporting affidavit sworn on 20th March 2013. She further deponed that the Respondent forcefully trespassed onto the suit land on 17th March 2013 and started constructing a semi permanent structure.
2. The application is opposed by the Respondent through her affidavit sworn on 24th October 2013. The Respondent deponed that her late husband **John Pius Otengo**, bought the suit land in 1973 and they have lived on it without any interruption since.

That her late husband and mother in law were buried on the suit land. That the Applicant's title to the suit land was obtained by fraud and misrepresentation.

3. The counsel for the parties agreed to file written submissions on the application. The Applicant's counsel filed their submissions dated 6th May 2015 while the Respondent's counsel filed their dated 6th October 2015.
4. The court has considered the grounds on the Notice of Motion, the affidavit evidence by both parties and the written rival submissions by both counsel and come to the following conclusions:

(a) That the Applicant become the registered proprietor of the suit land on 5th February 2013 as confirmed by the copy of the title deed and certificate of official search annexed to her supporting affidavit. The Applicant therefore is entitled to the rights and privileges of a registered proprietor of a suit land under Section 24 and 25 of the Land Registration Act No.3 of 2012.

(b) That the court is obligated to take the Applicant as the *prima facie* owner of the suit land upon production of the documents of title in her name under Section 26 of the Land Registration Act No.3 of 2012 which also provides the grounds on which titles of a registered proprietor can

be challenged.

(c) The Respondent has in answer to the Applicant's claim under the plaint dated 20th March 2013 for permanent injunction, eviction and costs filed a statement

of defence and counterclaim. She prays that the plaintiff's title be cancelled and she be registered as the proprietor for being in possession for over 12 years. In her replying affidavit she has deponed that the Applicant's registration with the suit land was obtained through fraud and misrepresentation. She further deponed that her late husband had bought the land and annexed copies of receipts for payment of purchase price. She further deponed that her late husband and mother in law were buried there. These facts have not been challenged or contraversed by the Applicant through an affidavit and they go to show that the Respondent may have been in possession of the suit land before the Applicant become the registered proprietor of the suit land. This may be the reason the Applicant's second prayer was for eviction. The effect of the Respondent's counterclaim is to lodge an onslaught on the Applicant's title to the suit land. If the Applicant succeeds in her claim the Respondent will be evicted and permanent injunction order issued. On the other hand, if the Respondent were to succeed, the Applicant's title to the suit land would be cancelled and the Respondent registered as the proprietor. This situation makes the court find that the best scenario is allow the party who has been in possession to continue exercising possession without electing any permanent and additional developments pending the hearing and determination of the Applicant's suit and

Respondent's counterclaim.

5. That flowing from the foregoing the application dated 20th March 2013 is hereby dismissed with costs in the cause. The court on its own volition orders that the party in possession of the suit land at the time of filing of this suit continue being in possession on condition that no additional structures are developed and no degrading activities are carried out on the suit land pending hearing and determination of the Applicant's suit and Respondent's counterclaim.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **25th day of January 2016**

In presence of;

Applicant N/A

Respondent N/A

Counsel Mr. Abisa foir Mr Yogo for Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/1/2016

25/1/2016

S.M. Kibunja J.

Oyugi court clerk

Parties absent

Mr Abisa for Yogo for Defendant

Court: Ruling delivered in open court in the presence of Mr Abisa for Mr Yogo for Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/1/2016