



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 53 OF 2015**

**DAVID KIPKURUI KANDIE..... 1ST PLAINTIFF**

**KIPROTICH KORIR ..... 2ND PLAINTIFF**

**-versus-**

**LEAH ACHIENG JOSIAH..... 1ST DEFENDANT**

**ALLAN ONYANGO JOSIAH..... 2ND DEFENDANT**

**THE KWALE DISTRICT LAND REGISTRAR..... 3RD DEFENDANT**

**ATHE ATTORNEY GENERAL..... 4TH DEFENDANT**

**RULING**

1. The Application under consideration is the Notice of Motion dated 26th March 2015 for the following orders:

- i. Spent
- ii. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, agents, servants, employees and/or representatives from trespassing, occupying, disposing, alienating, selling or dealing in any other way whatsoever in the land parcel No. KWALE/GALU KINONDO/410 pending the hearing and determination of this Application and the suit.
- iii. The costs of the Application be provided for.

2. The Application is supported by the Affidavit of KIPROTICH KORIR sworn on 26th March 2015. The gist of the Applicants' case is that they are the bonafide registered owners of the parcel of land known as KWALE/GALU KINONDO/410 (hereinafter "the suit property") which they have subdivided and sold to third parties. That there are currently over 21 new owners of the subdivisions that acquired the same for value and have new titles in their names.

3. The Applicants averred that an order was issued in **Mombasa JR Miscellaneous Application No. 51 of 2011** directing the Kwale Land Registrar to open new Green Card for the parcel in question without regard of the Applicants' title which had not been revoked or cancelled. The Applicants claimed that they did not participate in the said case and the opening of a new register over the said land shall extinguish the Applicants' indefeasible right to land. The Applicants contend that they will suffer irreparable loss and damage if the orders sought are not granted.

4. The Application is opposed by the 1st and 2nd Defendants through the Replying Affidavit sworn by

SARAH JUDITH ATIENO JOSIAH on 21st July 2015 and filed on 23rd July 2015. The deponent avers that the suit property was and still is the property of the late HAROLD MICHAEL ONYANGO JOSIAH according to a search certificate dated 24th July 2008. She further deposes that the Plaintiffs were not served with court papers for **Mombasa JR Miscellaneous Application No. 51 of 2011** because there was no indication in the said search that the Plaintiffs had any right, title or interest in the suit property.

5. The deponent further stated that the 1st and 2nd Respondents discovered some fraudulent dealing with the records of the suit property hence they moved to court vide **Mombasa JR Miscellaneous Application No. 51 of 2011** to protect the title. That an order was made in the judicial review proceedings to the effect that the late HAROLD MICHAEL ONYANGO JOSIAH is the true owner of the suit property which order remains unchallenged to date.

6. The Plaintiffs filed written submissions dated 15th July 2015 in which they have reproduced the grounds in the application and the Supporting Affidavit. I shall not reproduce the pleadings here as it will amount to repetition. The 1st and 2nd Respondents filed their written submissions dated 31st August 2015 on 7th September 2015. The 1st and 2nd Respondents submit that the application is misconceived, bad in law and brought in bad faith. They submitted that the Applicants have not satisfied the conditions necessary for the grant of interim injunction as enunciated in the case of **GIELLA V. CASSMAN BROWN & CO. LIMITED [1973] EA 358.**

7. On whether the Applicants have established a *prima facie* case, the 1st and 2nd Respondents submitted that the Applicants failed to adduce any evidence to show that the suit property belonged to Rachel Wairimu before the same could be transferred to other parties and finally to the Applicants.

8. On whether the Applicants will suffer irreparable harm, the 1st and 2nd Respondents submitted that the Applicants cannot suffer any loss since they are not owners of the suit property but trespassers. They urged the court to find the application as an abuse of the court process and a zealous effort to frustrate the estate of the deceased.

9. This court is tasked to determine whether this application meets the principles laid down for granting injunctions. The Applicants pleaded that they are the bonafide owners of the suit plot Kwale/ Galu Kinondo/410. The Applicants annexed a copy of the title deed to support this fact. They are aware of the orders obtained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in HC MISC JR NO. 51 “B” OF 2011. I have perused proceedings annexed by the applicant as “**KK2**” and note that case is somehow finalized as it is at the execution stage. The last order made by the trial judge was for a mention on 25<sup>th</sup> March 2015 to confirm if the order issued in that file has been complied with.

10. The Applicants applied unsuccessfully to be enjoined in the judicial review proceedings when their application to be joined was struck out. The Applicants did not file any appeal against that decision but instead filed the present suit. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are claiming title to the suit property and are accusing the Applicants of attempting to frustrate the estate of the deceased by this application. This court is therefore put in awkward position on how to deal with this matter in view of the orders issued in the judicial review proceedings vis-a-vi the Applicants right to be heard since they have also annexed a copy of a title deed issued in their name. I say so because this court cannot on the face of it declare the Applicants’ title as a forgery since the Applicants did not participate in the proceedings where the Respondents alleged the Land Registrar Kwale confirmed there was a “forgery”.

11. The court being alive to the orders in force cannot thus issue orders that would stay or conflict with the earlier orders. The orders sought in the application if granted will restrain the defendants from trespassing on, occupying, disposing et al. In the grounds stated to support the application, the Applicants pleaded that the opening of a new register over the said land shall extinguish their indefeasible right to land as envisaged in the Registered Land Act. Such orders if granted will also infringe on the rights of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents who also exhibited a title deed to the same property. In the circumstance of this application, the Applicants may have a *prima facie* case but that is not enough for the orders to be granted.

12. This court will therefore consider the heading of irreparable loss and balance of convenience. The Applicants pleaded that they are likely to suffer irreparable loss if the respondents move to interfere with the land. The extent and nature of loss was not explained other than stating that their right to the land would be extinguished. The Applicants did not state or submit that if such loss is occasioned, the same cannot be compensated by an award of damages. I am not satisfied this heading is proved. On the balance of convenience, I find it to tilt in favour of the respondents who have a decree/order in their favour. Further, the Applicants did not annex a recent certificate of official search to confirm whether the register has been amended or not. The application fails on this front too.

13. Consequently, I find the circumstances of this case does not warrant the grant of a temporary injunctions for the reasons contained in the body of this ruling. This application is ordered dismissed with each party bearing his/her costs of the application.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF FEBRUARY 2016**

**A. OMOLLO**

**JUDGE**