



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND COURT

LAND CASE NO.79 OF 2014

GRACE ANN ANYANGO DAWA..... APPLICANT

VERSUS

EDWIN ODERA.....1ST RESPONDENT

MARY ACHIENG OPIYO.....2ND RESPONDENT

RULING

1. **Grace Ann Anyango Dawa**, the Applicant, vide Notice of Motion dated 24th March 2014 prays for temporary injunction against **Edwin Odera**, the 1st Respondent, restraining him from encroaching, entering into, developing, fencing, interfering or in any other manner dealing with land parcel **1437/126 Yala Township** pending hearing and determination of the suit. The Applicant has set out six grounds on the application including that she is the beneficial owner of the said land having taken possession in 2012 after purchasing it from **Mary Achieng Opiyo** the 2nd Respondent. Further that the 1st Respondent has illegally entered into the land and destroyed the door to the house on it and has threatened to forcefully occupy it. The application is also supported by the affidavit of **Grace Ann Anyango Dawa** sworn on 24th March 2014 in which she among others depones that she entered into a sale agreement with **Mary Achieng Opiyo** in August 2012 to buy the said land at Sh.280,000/=. That she paid the vendor Ksh.100,000/= vide Cheque dated 21st August 2012 and took possession of the suit land. That she is ready, able and willing to pay the balance of the purchase price but has been unable to contact the vendor. That the 1st Respondent went to the suit land in January 2014 and on 2nd March 2014 broke the door to the house on it and threw out the caretaker's belongings. That the Applicant reported the incident to the police who advised her to file a civil claim and hence this suit.

2. The application is opposed by the Respondents through their replying affidavits sworn on 10th October 2014 and filed in court on 13th October 2014. The 2nd Respondent among others confirms having entered into a sale agreement with the Applicant under which she was paid Kshs100,000/=. She further depones that the Applicant breached the agreement when she failed to pay the balance of the purchase price within the two weeks agreed. That she subsequently sold the same land to the 1st Respondent who paid for it fully and therefore, the application for injunction should not issue. The 1st Respondent depones that he entered into a land sale agreement with the 2nd Respondent and paid the total purchase price of Ksh.420,00/=. He was given the land documents by the 2nd Respondent who also surrendered the possession of the suit land to him and therefore, the application should not be allowed.

3. The counsel for the parties appeared before the court on 14th October 2014 and agreed to file written submission on the application. The applicant's counsel filed their submissions dated 30th March 2015 on 12th May 2015 while the Respondents' counsel filed theirs dated 7th April 2015 on the 9th April 2015.

4. The main issue for the court's determination is whether the Applicant has established a prima facie case for issuance of a temporary injunction at this interlocutory stage. Secondly who should pay costs.

5. The court has carefully considered the grounds on the Notice of Motion, the affidavit evidence filed by the Applicant and both Respondents, plus the rival written submissions by both counsel and come to the following determinations;

a) That from the documents annexed to the 1st Respondent replying affidavit, land reference number **1437/126 Yala Township (I.R.NO.3807)** was registered in the names of **Shem Jackson Opiyo**, as a lease for 99 years from 1st September 1981 on the 13th April 1982. That the said **Shem Jackson Opiyo's** estate is administered by **Mary Achieng Opyio**, the 2nd Respondent, as confirmed by the copy of the certificate for confirmation of grant dated 19th October 1998 issued in Nairobi H.C. Succession Cause No. 1465 of 1997. The schedule in the certificate of confirmation indicates that the said plot was to be inherited by **Mary Achieng Opiyo** and all her daughters in equal shares.

b) That for the Applicant to be successful in her application she has a duty to establish a prima facie case with a probability of success as required in the test set in **Giella -V- Cassman Brown & Co Ltd** (1973) E.A 358. The agreement for sale of agricultural land is always subject to the consent of the Land Control Board being obtained within the specified time. (See Section 4 of the Land Control Board Chapter 302 of Kenya). Where the consent is not obtained, Section 8 of the said Act provides that such agreements are void and the purchaser could seek refund of the money paid. The Applicant herein has not rebutted the 2nd Respondent's deposition that their sale agreement did not receive the consent of the Land Control Board. The court therefore takes it as a fact that the Applicant and 2nd Respondent sale agreement did not receive the Land Control Board consent. The 2nd Respondent has already given the 1st Respondent the relevant land documents following their sale agreement. The 1st Respondent has already paid the full purchase price unlike the Applicant. These facts leads the court to find that with the available facts, the Applicant has failed to establish a prima facie case with a probability of success.

c) That the Applicant is not in, possession or occupation of the suit land as he reportedly lost it to the 1st Respondent on 2nd March 2014.

6. That from the foregoing the court finds the application dated 24th March 2014 to be without merit and is dismissed with costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **24th day of February 2016.**

In presence of;

APPLICANT Absent

RESPONDENTS Absent

COUNSEL Mr Kowino for Defendant/Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

24/2/2016

S.M. Kibunja J.

Oyugi Court Assistant

Parties absent

Mr Kowino for Defendant

Court: Ruling delivered in open court in presence of Mr. Kowino for the Defendant/Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016