



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND COURT

LAND CASE NO.196 OF 2014

PETER WELLINGTON WAMBURAPLAINITFF

VERSUS

MARY ATIENO OMARI.....1ST DEFENDANT

PHILIP OCHIENG OTIENO.....2ND DEFENDANT

GEORGE OWINO OKODE.....3RD DEFENDANT

VINCENT OTIENO OCHANDA.....4TH DEFENDANT

JOSPHINE OUMA.....5TH DEFENDANT

ANNE AKETCH OMBIMA.....6TH DEFENDANT

PATRICIA AWINO ADALA.....7THE DEFENDANT

YVONNE ADHIAMBO ADALA.....8TH DEFENDANT

SAMUEL OTIENO OJWANG.....9TH DEFENDANT

HESBORN OUMA OKWAYO.....10TH DEFENDANT

JEREMIAH OTIENO OKETCH.....11TH DEFENDANT

BENTA ANYANGO OGWENOH.....12TH DEFENDANT

REXFORD ODUNDO GUCHE.....13TH DEFENDANT

ROGGERS ONYANGO GUCHE.....14TH DEFENDANT

LYDIA AKOTH OTIENO.....15TH DEFENDANT

JOHN OCHIENG OCHOLA.....16TH DEFENDANT

LEONARD OTIENO ORUKO.....17TH DEFENDANT

VIOLET ADHIAMBO ODINDO.....18TH DEFENDANT

OWEN NYANGORO.....	19TH DEFENDANT
GEOFREY MWANDUKI NYAMBANE.....	20TH DEFENDANT
DOROTHY AKINYI OBUYA.....	21ST DEFENDANT
DR. IZAQ ODONGO.....	22ND DEFENDANT
DISTRICT LAND REGISTRAR, KISUMU.....	23RD DEFENDANT
CHAIRMAN NATIONAL LAND COMMISSION	24TH DEFENDANT
THE NATIONAL LAND COMMISSION.....	25TH DEFENDANT

RULING

1. **Peter Wellington Wambura**, the plaintiff, filed the notice of motion dated 24th July 2013 and later amended on 6th August 2013 under Order 40 Rules 1 to 4, Order 50 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the civil Procedure Act seeking for the following prayers:

1. (Spent).
2. (Spent)
3. Restraining orders against 4th and 5th Defendants from occupying constructing, transferring or otherwise interfering with land parcel L.R.22929 [**Kisumu/Kanyakwar''B''/1501**] pending the hearing and determination of this suit
4. (Spent)
5. Restraining orders against all Defendants from interfering or transferring any interest from land parcel L.R. NO.22929 [**Kisumu/Kanyakwar/'B'/1410** or the subdivisions thereof being **Kisumu/Kanyakwar 'B'/1497 to 1521**] pending hearing and determination of this suit.
6. The costs of the application.

The application is based on the eight grounds on the notice of motion and the supporting affidavit sworn by **Peter Wellington Wambura** on 24th July 2013.

2. The application is opposed as sworn herein below:

- a) The 18th Defendant, **Violet Adhiambo Odindo**, filed a replying affidavit sworn on 25th February 2014 in which she deponed that she acquired land parcel **Kisumu/Kanyakwar 'B'/1505** from **Mary Atieno Omari** (1st Defendant) regularly in 2009 and that there is nothing to connect that parcel with L.R. 22929.
- b) The 22nd Defendant, **Izaq Okoth Odengo**, filed a replying affidavit sworn on 23rd September 2013. He depones that he regularly and procedurally acquired his land **Kisumu/Kanyakwar 'B'/1498** from **Mary Atieno Omari** (1st Defendant) and that he did not collude with 1st or 23rd Defendant to deprive the plaintiff of his land. His counsel, M/S Bruce Odeny & Co Advocates, also filed grounds of opposition dated 27th September 2013 raising four grounds including that the firm of Wasuna & CO Advocates participated in drawing a number of sale agreements involving some Defendants and as potential witnesses should cease acting for the plaintiff. It is important to note that M/S Lumumba & Lumumba Advocates filed a notice of

change of advocates for the plaintiff dated 25th July 2014.

c) In her replying affidavit sworn on 30th October 2014, **Lydia Akoth Otieno**, the 15th Defendant, but erroneously described as 16th Defendant at the heading of the said affidavit, deponed that she bought land parcel **Kisumu/Kanyakwar 'B'/1511** from **Mary Atieno Omari** (1st Defendant), in 2009 regularly and that she did not collude with 1st or 23rd Defendant to deprive the plaintiff of his land.

d) The 16th Defendant, **John Ochieng Ochola**, filed a replying affidavit sworn on 30th October 2014 deponing that he acquired land parcel **Kisumu/Kanyakwar 'B'/1510** from **Mary Atieno Omari** in 2009 and followed the due process.

e) In her replying affidavit sworn on 21st July 2014, **Josephine Ouma**, the 5th Defendant, opposed the application. She deponed that she bought land parcel **Kisumu/Kanyakwar "B"/1501** from **George Owino Okode** (3rd Defendant) on 12th March 2013 and followed the due process. She denied colluding with 3rd and 23rd Defendants to deprive the plaintiff of his land.

f) **Vincent Otieno Ochanda**, the 4th Defendant, filed the replying affidavit sworn on 21st July 2014 whose contents is more or less similar to that of the 5th Defendant.

g) The last replying affidavit, is that of **Owen Nyangoro**, the 19th Defendant, sworn on 4th November 2015. He depones that he regularly acquired land parcels **Kisumu/Kanyakwara'b'/1499** and **1504** from **Mary Atieno Omari** (1st Defendant) on the 11th and 24th July 2009. That there is nothing to connect the two parcels with L.R.No.22929.

3. That on the 4th May 2015, the court issued directions that written submissions be filed in respect of the amended notice of motion dated 6th August 2013 and on 5th November 2015 the court placed the matter for ruling. By then the court had received written submissions from counsel for the plaintiff and the 18th, 22nd, 4th, 5th and 19th defendants.

4. SUMMARY OF THE SUBMISSIONS FILED BY:

a) **PLAINTIFF;**

That the plaintiff applied for a parcel of land at Kanyakwar area from the Commissioner of Land in the year 1990 and was issued with an allotment and after making the payments required was registered as proprietor of L.R.22929 [1.R 73666] measuring 1.802 hectares under the Registration of titles Act (Now repealed) for 99 years from 1st May 1991. That the plaintiff fenced off the land. That in 2013 the plaintiff noted that the fence had been brought down and some structures had been put up on sections of the land. That following further investigations, the plaintiff discovered that the Land Registrar and Surveyor had in 2008 created title the **Kisumu/Kanyakwar 'B'/1410** under the Registered Land Act Chapter 300 of Laws of Kenya and issued 2nd Defendant with the title to the said land. That later the 2nd Defendant had transferred the land to 1st Defendant who subsequently subdivided it into several portions and transferred some to the other Defendants. That the plaintiff lodged a complaint with the Ministry of Land, and the Chief Land Registrar wrote a letter dated 17th July 2013 asking the Kisumu County Land Registrar to expunge any title irregularly created under the

Registered Land Act (repealed) and encroaching on **L.R. NO.22929 [I.R. 73665]** that was registered under Registration of of Titles Act (repealed). The plaintiff then filed this suit and the notice of Motion amended on 6th August 2013. The counsel for the plaintiff submitted that they have established the grounds set out in **Giella -V- Casman Brwon 1973 E.A 358** that are precedent to issuance of temporary injunction. The counsel referred the court to the writings of **Richard Kuloba J, in Principles of Injunction, Anjanaben Anil Shah -V- Akiba Bank Limited [2005] eKLR** and **Mrao Ltd -V- First American Bank of Kenya Ltd & 2 others {2003} eKLR** in support of their submissions.

b) **18TH DEFENDANT;**

The counsel for the 18th Defendant submitted that the plaintiff has not demonstrated a *prima facie* case against the 18th Defendant who is a purchaser for value without notice of adverse interest claimed by the plaintiff. That the plaintiff has not shown any link between his land, L.R. No.22929, and that of the 18th Defendant **Kisumu/Kanyakwar 'B'/1505**.

c) **22ND DEFENDANT;**

That the 22nd Defendant had followed the due process in acquiring land parcel Kisumu/Kanyakwar 'B'/1498 from the 1st Defendant in 2009 and after registration as the proprietor became the absolute and indefeasible owner. That the 22nd Defendant was not aware or privy to the conversion of the suit plot from the Registration of Titles Act to Registered Land Act regimes of registrations. That the title issued to the 22nd Defendant was registered through the Torrens System which emphasizes on the indefeasibility of the title and therefore he did not need to go beyond the register to investigate the title. The counsel referred the court to the following three decided cases on the issue:

(i) **David Peterson Kiengo & 2 others -V- Kariuki Thuo** [2012] ECLR

(ii) **Charles Kirathe Kiarie & 2 others -V- Administrators of the Estate of John Wallace Mathare** – deceased [2013] ECLR.

(iii) **C.R. Patel -V- Commissioner of lands Registration** Uganda H.C.C.C. NO.87 of 2009.

d) **4TH AND 5TH DEFENDANTS;**

That the 4th and 5th Defendants are innocent purchasers for value without notice of land parcel, **Kisumu/Kanywkwar 'B'/1501** from the 3rd Defendant. The counsel referred the court to the locus classic case **Giella -V- Casman Brown & Co Limited** 1973 E.A on the three ingredients that the plaintiff needed to establish to get the temporary injunction and submitted that the plaintiff has failed to establish *prima facie* case or irreparable loss.

e) **19TH DEFENDANT;**

That the 19th Defendant is an innocent purchaser of **Kisumu/Kanyakwar/1499** and **1504**. That the plaintiff has not provided any link between **Kisumu/Kanyakwar/1410** and **L.R 22929**. That the 19th Defendant developed his land and injunction orders cannot issue.

5. The court has carefully considered the grounds on the amended notice of motion, the supporting and replying affidavits filed plus the written submissions by the five counsel and come to the following conclusions:

a) That from the copy of the green card/register for **Kisumu/Kanyakwar 'B'/1410** availed by the plaintiff, that parcel measuring 0.8 hectares is subdivision of plot **No.1322**. The first registered owner of **Kisumu/Kanyakwar 'B'/1410** is indicated as **Philip Ochieng Otieno** (the 2nd Defendant) who got registered on 31st October 2008. the copy of the register/green card for plot 1322 was not availed and the court is unable to establish what approximate acreage it was and the other parcels subdivided from it. The register/green card for parcel 1410 was closed on 7th May 2009 upon being subdivided into parcels 1497 to 1521. The plaintiff also provided copies of the green cards/registers for all but one of the parcels created after the subdivisions and are registered as follows:

Parcel 1497- Mary Atieno Omari

Parcel 1498- Dr. Izaq Okoth Odongo

Parcel 1499- Owen Nyang'oro

- Parcel 1500- George Owino Okode
- Parcel 1501- Vincent Otieno Ochanda and Josephine Ouma
- Parcel 1502- Dorothy Akinyi Obuya
- Parcel 1503- Geoffrey Manduku Nyambane
- Parcel 1504- Owen Nyangero
- Parcel 1505- Hesborn Otieno Odudo and Violet Adhiambo Ochieng
- Parcel 1506- Patricia Awino Adala and Yvonne Adhiambo Adala
- Parcel 1507 - Leonard Otieno Oruko
- Parcel 1508- Mary Atieno Omari
- Parcel 1509- Mary Atieno Omari
- Parcel 1510 - John Ochieng Ochola
- Parcel 1511- Lydia Akoth Otieno
- Parcel 1512- Mary Atieno Omari
- Parcel 1513- Roggers Onyango Guche
- Parcel 1515- Benter Anyango Ogwenoh
- Parcel 1516- Jeremiah Otieno Okech
- Parcel 1517- Mary Atieno Omari
- Parcel 1518- Hesborn Ouma Okwayo
- Parcel 1519- Patricia Awino Adala and Yvonne Adhiambo Adala
- Parcel 1520- Anne Akech Ombima
- Parcel 1521- Mary Atieno Omari

That no copy of the register/green card for parcel 1514 was availed to the court. The registers for parcel 1521 shows that it was closed on 12th April 2010 upon being subdivided into parcels 1550 to 1641. The copies of the register for the parcels subdivided from parcels 1521 where not availed to the court.

b) That parcels 1498 and 1507 are shown to be 0.12 hectares each, parcel 1521 as 0.02 hectares while all the other parcels set out in (a) above are 0.1 hectares each. The court has calculated the acreage for parcels 1497 to 1513, 1515 to 1521 and it totals to **2.26 hectares**. The court is left wondering how **Kisumu/Kanyakwar "B"/1410** whose acreage was indicated in the register as **0.08 hectares** was be subdivided to 25 parcels and that the acreage of the 24 out of 25 parcels had grown to **2.26 hectares**. The real situation or position may only get clearer after the hearing of the evidence. Even though the registry map sheet No.2 on which all the parcels are indicated to appear was not availed to the court and further remembering that the court is not expected to make definitive findings of fact or law at this interlocutory stage,[See **Anjanaben Anil Shah -V- Akiba**

Bank Limited [2005] eKLR,] the unexplained growth of the acreage of parcels subdivided from parcel 1410 leads the court to find that the plaintiff claim that the parcels or some of them have encroached onto his land L.R. 22929, may be probable.

c) That a person registered as proprietor of a parcel of land is taken as the absolute and indefeasible owner **under Section 26 of the Land Registration Act No.3 of 2012**. Such a title can only be challenged on the ground of fraud or misrepresentation, to which the registered owner is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff has challenged the Defendants title to the various parcels registered in their names by filing this case. The prayers in the application are aimed at preserving the suit properties pending the hearing and determination of the suit.

d) That though the plaintiff availed a map attached to his title documents for L.R. 22929 showing the ground layout of the property, there is no map availed on the ground positions of parcel 1410 or the subdivisions thereof. It is therefore impossible for this court to know whether indeed parcel 1410 or the subdivisions thereof have indeed encroached onto parcel L.R.No.22929. This is especially so when the response, if any, to the Chief land Registrar's letter dated 17th July 2013 has not been availed.

6. That having come to the conclusions set out above, the court finds that there is indeed need to safeguard the suit properties pending the hearing and determination of the suit filed by the plaintiff. The amended notice of motion dated 6th August 2013 is therefore allowed in the following terms:

a) That a temporary injunction is hereby issued restraining all Defendants, their servants or agents from any further constructions, or transferring any interests on land parcels **Kisumu/Kanyakwar'B'/1410** and the subdivisions thereof that forms part of L.R..22929 [I.R. 73665] Kisumu, pending the hearing and determination of this suit. To this end an inhibition Order on the parcels of land **Kisumu/Kanyakwar 'B'1410** and the subdivision thereof is hereby issued in terms of Section 68 of the land Registration Act.

b) The costs of the application will be in the cause.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and Di livered at Kisumu this 24the day of February 2016

In presence of:

Plaintiff Absent

Defendants Absent

Counsels: Mr Kavuko for Plaintiff/Applicant, Mr Odeny for 2nd Defendant/Respondent,

Mr Kowino for Onyango for 18th Defendant/Respondent and Mr Olel for 4th Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

24.2.2016

S.M. Kibunja J.

Oyugi Court Assistant

Parties absent

Mr Kavuko for Plaintiff/Applicant

Mr Odeny for 22nd Defendant/Respondent

Mr Kowino for Onyango for 18th Defendant/Respondent

Mr Olel for 4th Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

Court: Ruling delivered in open court in presence of Mr Kavuko for plaintiff/Applicant, Mr Odeny for 22nd Defendant/Respondent, Mr Kowino for Onyango for 18th Defendant/Respondent and Mr Olel for 4th Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016