



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND CASE NO. 296 OF 2013

MARY ACHIENG ODIRA.....PLAINITFF

VERSUS

MASLIANA OJWANG MBAJA.....1ST DEFENDANT

JOSINTER AUMA O. OUKO.....2ND DEFENDANT

MATHEWS NGONGAH.....3RD DEFENDANT

KISUMU DISTRICT LAND REGISTRAR.....4TH DEFENDANT

R U L I N G

1. The plaintiff filed this suit here on 24/10/2013. she claimed that she bought a portion of Land parcel No. **KISUMU/NYALUNYA 2307** on 2/10/09 at a price of 130,000/=. Her contract was with 1st defendant – **MASLIANA OJWANG MBAJA**.
2. But the 2nd defendant, who is the wife of 1st defendant's grandson, secretly and illegally subdivided Land parcel No. **KISUMU/NYALUNYGA/2307** (Suit Land hereafter) into parcel Nos **3957, 3958, and 3959**. It appears that the 3rd defendant

– **MATHEWS NGONGA** – was sold a portion but its not clear whether that was done by 2nd defendant – **JOSINTER AUMA O. OUKO** – or 1st defendant –

MASLIANA OJWANG – or both.

3. The plaintiff wants the court to order cancellation of titles now in the names of 2nd and 3rd defendants, a refund of Kshs130,000/= at current market rates plus costs of the suit.
4. But before all this, the plaintiff wants restraining orders. To get them, she filed a Notice of Motion here on 23/12/2013. She tried to get a restraining order **EXPARTE** on 23/1/2014 but the court declined to grant it. For now, the relevant prayers for consideration are as follows:

Prayer 3: That pending the hearing and determination of this suit the court issues

an order of temporary injunction restraining the respondents/defendants whether by themselves, their agents, servants, employees, or anybody on their behalf from cultivating, selling, disposing off, subdividing, transferring, taking possession or interfering in any manner with the suit land.

Prayer 4: Costs of this application be provided for.

5. The application is premised on the grounds that the defendants colluded to re-sell the suit land and that the 3rd defendant is trying to use force to develop the Land.
6. The affidavit sworn by the plaintiff in support of the application reiterates the fact of buying the land and avers that the 2nd defendant resold the plaintiff's land to 3rd defendant.
7. There is a joint replying affidavit, filed on 14/2/2014 responding to the application. According to defendants, the plaintiff's own version of sale agreement shows that a different parcel of land was being sold to her. And 1st defendant, they stated, couldn't sell the suit land as she had no capacity to do so.
8. The plaintiff's suit is said to be vague. It is not clear from whom she is claiming a refund, and it is not clear exactly which portion of land she is claiming. The plaintiff is also accused of not stating what her loss would be if she is not granted the orders.
9. Further, the plaintiff was said to have no arguable case. The land she allegedly brought was different and has not been interfered with. And she can claim any refund from 1st defendant.
10. The application was argued before me inter partes on 26/2/2014. What the plaintiff said is what is contained in the application and the plaint. It would be a superfluous exercise to repeat it, having highlighted both the suit and the application earlier.
11. The 3rd defendant argued for himself and the others. It is clear he bought the land from 2nd defendant. He bought parcels Nos **3957 and 3958** after subdivision of the suit land. He exercised due diligence and it appears clear that he is now the registered owner of the two parcels of land.
12. I have considered the material laid before me by both sides. It is clear that the 3rd defendant is the registered owner of the parcels of Land sold to him. And I agree with the defendants that the description of the parcel of land sold to plaintiff – **KISUMU/AKADO/2307** – is different from the one stated in the suit, which is **KISUMU.NYALUNYA/2307**. The plaintiff made no attempt whether in the application or during hearing to explain this anomaly.
13. The plaintiff was also duty bound to comply with the principles applicable in granting injunctive relief. The principles were well articulated in the decided case of **GIELLA VS CASSMAN BROWN & CO LTD {1973} E A 358**. Simply put, the plaintiff needed to show a prima facie case with a probability of success. She also needed to show she would suffer irreparable loss and finally, she should have demonstrated that the balance of convenience favoured her.
14. The plaintiff showed none of these. In fact, looking at her case, one notices she is claiming a refund while at the same time seeking cancellation of titles. It is not clear that these are sought as alternatives. The way they are sought, it seems the plaintiff wants both of them.
15. The 3rd defendant in particular is a registered owner. It is not easy to grant a restraining order against such owner.
16. When all is considered, this is not a good case to grant temporary restraining orders. I consider that damages would be an adequate remedy to the plaintiff. I consider too that she had failed to demonstrate well that she is deserving of those orders.
17. The plaintiff's application is therefore found unmeritorious and the same is hereby dismissed with costs.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

20/8/2015