



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**LAND & ENVIRONMENT NO.207 OF 2013**

**MICHAEL ODERA OTOM (Suing as the Admin of the Estate of  
THOMAS OTOM AGULLO.....PLAINTIFF**

**VERSUS**

**1. COMMISSIONER FOR LANDS**

**2. THE ATTORNEY GENERAL**

**3. RAILWAYS HOUSING CO-OP SOCIETY.....DEFENDANTS**

**RULING**

1. This ruling follows interpartes hearing of the application filed here on 7/8/2013. The hearing took place on 19/2/2014. The application is brought under Order 40 rules 1,2 and 3 of Civil Procedure Rules, 2010, and Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21). It concerns land parcel LR.15300 (hereafter suit land) and is brought by **MICHAEL ODERA OTOM** (Plaintiff) against Commissioner of Lands, The Attorney General and Railways Housing Co-operative Society (Defendants).

2. At this stage, what is sought is an order of injunction to restrain the defendants, their employees, servants, agents or representatives from encroaching , using, selling, subdividing, transferring or interfering with land parcel LR No.15300 until the suit is heard and determined. Provision for costs is also asked for.

3. The application is premised on the grounds that the defendants have trespassed upon the suit land and are converting it to their use; such encroachment is said to interfere with the plaintiff's ownership of the land parcel; and the plaintiff's occupation and peaceful use of the land parcel is being interfered with.

4. The plaintiff filed a supporting affidavit where he explained his position, gave some history, and tried to justify the need for a restraining order. The suit land belonged to his late father, he deponed, and the respondent is the administrator of his late father's estate.

5. The suit parcel is situated between Kibos Kisumu road and Kibos railway line in Central Kolwa location within Kisumu Municipality. The plaintiff's father inherited it from the plaintiff's grandfather – **JOSHUA AGULO** – who died way back in 1948. The land was said to be unregistered and freehold at the time.

6. The plaintiff says the land was fraudulently acquired as it was not gazetted. He only discovered in year

2013 that it was registered in the name of a person who was unknown to him. It was then subdivided and registered in favour of 3rd defendant. The plaintiff says the land should have been registered in the name of his late father.

7. The defendants are said to have been threatening the plaintiff and other family members and have on occasions destroyed crops and interfered with graves.

8. The 1st and 2nd defendant have not filed a replying affidavit. It was intimated on their behalf on 19/2/2014 that the reasons for not filing a response is that the application does not affect them.

9. The 3rd defendant filed a replying affidavit on 19/8/2013. It stated, inter alia, that it purchased the suit land from **SANYOCK ENTERPRISES LIMITED**.

10. It then followed all the necessary procedures and the suit land was registered in its name. The 3rd defendant availed the necessary documentation to authenticate this assertion.

11. The 3rd defendant opposed any claims of fraud and disputed the allegation by the plaintiff that the plaintiff's late father held the suit land as freehold.

12. Issue was also taken with the belated manner in which the claim is brought and it is termed curious that it was brought after 32 years since the demise of the plaintiff's father.

13. The 3rd defendant deponed that it holds a title that is not impeachable by the plaintiff. It committed no fraud in acquiring the suit land and was not party to initial creation of a lease over the suit land.

14. The 3rd defendant's response elicited a 26-paragraph further affidavit from the plaintiff in which the contents of the supporting affidavit sworn earlier were reiterated. It is repeated that the 3rd defendant fraudulently acquired the land.

15. In summary, the further affidavit reiterates the plaintiff's family original ownership of the land; its fraudulent acquisition by others; and the 3rd defendant's alleged falsehoods and misrepresentations in the replying affidavit.

16. The Court heard the application on 19/2/2014 and what the counsel who appeared for the plaintiff said on that day was a pure re-statement of what is stated in the plaintiff's application.

17. Counsel for the 3rd defendant did the same. What he said is clearly what the replying affidavit contains and the counsel for the plaintiff chipped in with a rebuttal reiterating what had already been stated earlier.

18. I have considered all the material laid before me by both sides. It is clear that the 3rd defendant is the current registered owner of the suit parcel. The plaintiff alleged fraud but the 3rd defendant explained well that it features nowhere in the initial conversion of the suit land into a lease. In fact, it would appear that the plaintiff is making generalized allegations of fraud against the 3rd defendant but would be hard put to prove any fraudulent role played by the 3rd defendant. It appears to me that the 3rd defendant is a late comer to the scene. What is availed so far does not show the 3rd defendant as a participant in past dealings concerning the suit land.

19. The plaintiff's explanation of the kind of ownership he or his family had over the land is confusing. He says (See para 6 of further affidavit) that the land was “**ancestral land cum Community land hence freehold**”. No distinction is made here between the value systems that attend to customary, community and freehold tenures. It is disingenuous to lump them together and to purport one to beget the other.

20. As pointed out by the 3rd defendant, an injunction does not easily issue against a registered owner of land. In this matter in particular, I am not persuaded that a prima facie case is made out against 3rd defendant. I am not persuaded that there is fraud perpetrated by the 3rd defendant as alleged. It is also

not shown that damages would not suffice as compensation. The value of the suit land can well be quantified and it is not demonstrated the particular irreparable loss that the plaintiff stands to suffer. And it appears to me that if I consider the balance of convenience, it would lie in favour of the 3rd defendant as the current registered owner.

21. It seems to me that the plaintiff may possibly present a formidable case against 1st and 2nd defendants. But he does not seek to restrain these parties. But I am not so sure about the plaintiff's case against the 3rd defendant who, from implications in the material availed so far, may easily turn out to be an innocent purchaser for value without notice of fraud or plaintiff's alleged ownership. That explains why I find it hard to grant a restraining order or accept the plaintiff's averments of fraud against 3rd defendant.

22. The upshot is that I find the application herein unmeritorious and I dismiss it forthwith with costs.

**A.K. KANIARU – JUDGE**

**29/5/2014**

**29/5/2014**

A.K. Kaniaru – Judge

Dianga -Court clerk

No party present

Interpretation: English/Kiswahili

M/s Onyango for Mwamu for applicant

M/s Aliongo for Respondent

**COURT:** Ruling on application filed here on 7/8/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days

**A.K. KANIARU – JUDGE**

**29/5/2014**