



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**Civil Case 2 of 2012**

**EMELDA MUSUNDI OJWANG .....1<sup>ST</sup> PLAINTIFF**

**ALFRED OJWANG .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SARAFINA APONDI ODIPO .....1<sup>ST</sup> DEFENDANT**

**ROBERT ODIPO .....2<sup>ND</sup> DEFENDANT**

**BONFACE ODIPO .....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

Before me is a notice of motion filed by the plaintiffs purportedly under the now repealed **Section 128(1)** of the **Registered Land Act, Order 40** and **Order 51** of the **Civil Procedure Rules, Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** seeking several orders from this court. In total, the plaintiffs have sought twelve (12) prayers. The twelve (12) prayers can be summarized into two (2) broad categories i.e. the plaintiffs seek orders from this court to inhibit the registration of any dealings in respect of the parcel of land known as Marachi/Elukhari/986(hereinafter referred to as the suit property) pending the hearing and determination of the suit. The plaintiffs further seek orders from this court in the nature of mandatory injunction to restore them to the suit property where they claim they were illegally evicted from by the defendants after the present suit was filed. The application is supported by the annexed affidavit of the 2<sup>nd</sup> plaintiff and the grounds stated on the face of the application. The application is opposed. The 2<sup>nd</sup> defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard rival oral submission made by Mr. Mogi for the plaintiffs and by Mr. Miano for the defendants. After carefully evaluating the issues in dispute in this application, it was clear to this court that the facts as stated by the plaintiffs and as put forward by the defendants are completely at variance. Whereas the plaintiffs contend that they were in actual possession of the suit property up to the time they served the defendants with the pleadings in this case, the defendant's case is that the plaintiffs have never at any time been in actual possession of the suit property. What is however not in dispute is that as at the time the application was argued before this court, the plaintiffs were no longer in occupation of the suit property. The plaintiffs conceded to this fact but gave an explanation to the effect that they were unlawfully evicted from the suit property when they served the pleadings in this case to the defendants. The plaintiffs' suit is predicated on their assertion that they have been in continuous occupation of the suit parcel of land for a period of more than forty (40) years, and therefore, by virtue of their occupation, they had acquired title to the suit parcel of land by adverse possession. In order to establish their case, it is obvious that the plaintiffs will have to prove that they are in actual occupation of the suit property.

Having carefully analyzed the admitted facts of this case, i.e. that the plaintiffs are not in actual occupation of the suit parcel of land, it was clear to this court that the present application, prima facie, cannot succeed. This is because the plaintiffs have not placed any material before this court to enable it reach a finding that they were legally in occupation of the suit parcel of land to entitle this court to issue an order restoring them to the same. Further, the defendants established, prima facie, that the suit parcel of land is still registered in the name of Calisto Odipo who died on 26<sup>th</sup> March 1982. It was not clear from the pleadings whether the family of the said Calisto Odipo (deceased) have petitioned this court to be issued with a grant of letters of administration intestate. It was incumbent upon the plaintiffs to establish the status of the ownership of the suit parcel of land before filing suit. It has not been stated that the defendants are the administrators of the estate of the deceased or that they have been authorized by this court to appear on behalf of the estate of the deceased by being issued with a limited grant of letters of administration ad litem. In the absence of any evidence establishing that the defendants are the administrators of the estate of the deceased, the plaintiffs' suit against them is unsustainable. That being the case, their application for interim reliefs cannot succeed.

The upshot of the above reasons is that the plaintiffs' application dated the 24<sup>th</sup> February 2012 lacks merit and is hereby dismissed with costs.

**DATED AT BUSIA THIS 25<sup>TH</sup> DAY OF JULY, 2012**

**L. KIMARU**  
**J U D G E**