



REPUBLIC OF KENYA

High Court at Kisumu

Environmental & Land Case 37 of 2012

MOSES OCHOLLA ODUBE1st PLAINTIFF / APPLICANT

ALBERT OKOK(Suing as administrators of the estate of

CALEB ODUMBE GUYA PLAINTIFF / APPLICANT

VERSUS

DAVID GUYA ODUMBE1st DEFENDANT / RESPONDENT

NICKSON SHIKUKU ODIRA2ND DEFENDANT/RESPONDENT

ANGELA JULIANA ATIENO3RD DEFENDANT/RESPONDENT

RULING

The plaintiffs/applicants Notice of Motion dated 27th August 2012 prays for interim orders of injunction to restrain the defendant's/respondents and in particular the 2nd and 3rd Respondents from developing land Parcel Number **Kisumu / Kanyakwar "A"/65** pending the hearing and determination of this suit. The same is supported by the supporting affidavit of **Moses Ocholla Odumbe** sworn on 27th August 2012.

The gist of the said application is that the applicants are the administrators of the Estate of the late Caleb Odumbe Guya who died on 5th September 1999. Prior to his death he was the registered proprietor of the suit property. They further aver that they learned in August 2012 that some people were planning to carry out development on the suit land.

The applicant state that upon carrying out a search they discovered that the 1st defendant who is their brother had fraudulently registered himself as the proprietor of the parcel of land and later transferred it to the 2nd and 3rd defendants.

That position has not been opposed by the 1st defendant / respondent. In his replying affidavit dated 17th September 2012 and sworn on the same date he argued that the property was a gift from his father and that the same was not included when applying for the succession proceedings of his father's estate.

A closer look at the annexed copy of the confirmed grant issued on 8th December 2000 indeed does not include the suit property. However, he depones that he did everything above board including the transfer from himself to the 2nd and 3rd defendants. He attended the land Control Board contrary to the

applicants contention.

The 2nd defendant/respondent has equally sworn a replying affidavit dated 17th September 2012. Where he claims that he purchased the suit property from the 1st defendant on 3rd January 2012 for a total purchase consideration of Kshs. 4.5 Million. He further exhibited all the relevant conveyancing documents which shows how he had himself registered as the proprietor of the suit land.

The 2nd defendant further obtained a loan facility from M/s Housing Finance which according to him amounts to Kshs. 21 Million.

What I find not in-dispute are that the plaintiffs as well as the 1st defendant are brothers or they are related; the suit property was registered originally in the name of the late Caleb Odumbe Guya; the administrators of the estate of the late Guya are Moses Ochola Odumbe and Albert C. Okok; the suit property is not reflected in the certificate of confirmation of a grant dated 8th December 2000; the 1st defendant had himself registered as the proprietor of the suit property, on 6th January 2012 and that he has since transferred the suit property to the 2nd and 3rd defendant.

The question that needs to be answered at this interlocutory stage is whether the transfer from the late Mr. Guya to the 1st defendant was effected lawfully on the face of the documents presented to this court by the parties.

The law governing the deceased estate in the event of death is the Succession Act Chapter 160 Laws of Kenya once the deceased died testated or intestate. The parties by filing succession cause number 18 of 2000 complied with this.

The 1st Respondent readily admitted in his affidavit that the suit property was left behind during the aforesaid succession proceedings. But how did he had himself registered as the proprietor of the suit property?

According to the green card, exhibited by the applicant the 1st defendant on 16th January 2012 vide R. L. 19 and R. L. 7 forms the 1st defendant basis of transfer. The forms were not however exhibited. What was exhibited were the transfer forms in favour of the 2nd and 3rd defendants including the relevant consents from the land Control Board.

Of interesting further is that the plaintiffs who are the administrators of the estate have already denied that they effected any transfer. They argued further that any transfer by them would have been reflected within the grant dated 8th December 2000.

Having carefully perused the pleadings as well as the parties submissions I am convicted that the plaintiffs have established a prima facie case against the defendants jointly and severally.

Section 79 of the Law of Succession Act Chapter 160 provides:-

“The executor or the administrator to whom representation has been granted shall be the personal representatives of the deceased for all purposes of the grant and subject to any limitations imposed by the grant, all the property of the deceased shall vest in him as personal representative”.

Section 45 thereof further prohibits any unauthorized party from inter-meddling with the deceased property.

From what is on record therefore I am unable to know how the 1st defendant had himself registered as the true owner of the property. This requires adduction of evidence.

What is the fate of the 2nd and 3rd defendants who claim to be innocent purchasers for value without

notice?. My position is that they will have to await the outcome of the main suit. If for argument sake they proceed to develop the property, which forms part of the estate of the late Guya and which ownership has not been determined, they stand to suffer more loss and damage. The 1st defendant as observed earlier own cannot conclusively be determined to be the true owner. Whether he was given inter vivos or otherwise by the deceased is a matter which ought to be heard by way of oral evidence.

The respondents/defendant did file a Notice of Motion dated 17th September 2012 which they are seeking that I do discharge the interims order granted on 28th August 2012 vide the application dated 27th August 2012. The basic argument of that application is that the 2nd and 3rd respondent have since borrowed a loan facility from a certain financial institution and they have already moved to the site.

When the 2nd application came up for hearing the parties conceded that I should make my determination and give a Ruling.

Pursuant to my earlier own observation and remarks I shall allow the plaintiff application dated 27th August 2012 by granting a temporary injunction pending the hearing and determination of the main suit. I shall further dismiss the application dated 17th September 2012. The plaintiff shall have costs of both applications.

An interesting issue was further raised by the plaintiffs submissions dated 15th October 2012 to the effect that the firm of Lilian Nchogu & Co Advocates are not on record on behalf of the defendant and that the proper firm should be that of M/s Kowinoh & Co Advocates.

I have perused the court records and I have found that on 3rd September 2012 M/s Kowinoh & Co Advocates entered an appearance for the 2nd and 3rd defendants. I have not seen any appearance on behalf of the 1st defendant. The pleadings so far filed have been done so by the firm of Lilian Nchogu & Co Advocate on behalf of the defendants.

Consequently since there was no change of advocates nor an appearance by the firm of Lilian Nchogu & Co Advocates on behalf of either of the parties, it follows that they are not properly on records. They are in effect strangers. All their pleadings have been filed unlawfully and unprocedurally. I shall therefore order that the pleading filed by the firm of Lilian Nchongu & Co Advocates be expunged from the courts record.

The plaintiffs/applicants application is otherwise allowed with costs.

Dated, signed and delivered at Kisumu this 31st day of October 2012

**H.K. CHEMITEI
JUDGE**

In the presence of:

Otieno for Omondi for the applicant

Nyauke for the respondent

HKC/aao