



Ogwe v Directorate of Criminal Investigations & 3 others (Environment & Land Case E001 of 2021) [2022] KEELC 3882 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E001 OF 2021
GMA ONGONDO, J
JULY 26, 2022**

BETWEEN

ISAIAH OGWE PLAINTIFF

AND

DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST DEFENDANT

ASSET RECOVERY AGENCY 2ND DEFENDANT

LAND REGISTRAR, HOMA BAY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. On October 25, 2021, the plaintiff, Isaiah Ogwe through Ogwe & Associates Advocates, filed the present suit by way of an originating summons dated October 22, 2021, pursuant to section 81, 89 (5) and (6) of the *Proceeds of Crime and Anti-Money Laundering Act* 2009 (POCAMLA) as read together with order 51 of the *Civil Procedure Rules, 2010* and section 3A of the *Civil Procedure Act*, chapter 21 Laws of Kenya.
2. The applicant contends that the restrictions against his land parcel Nos Kanyada/Kanyango/Kalanya/5125, East Kanyada/Kanyadier/203, Kanyada/Kotieno Katuma 'A'/2312 & 2313, Homa Bay/ Kothidha/ 556 and Kanyada/Kotieno Katuma A/2406 and/or any other property of the applicant be set aside, lifted and/or quashed for failing to meet the test required for their granting under section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* 2009 (POCAMLA herein) and for causing unnecessary hardship to the applicant, and/or be vacated in line with section 89 (1), (5) and (6) of the same Act. Further, that costs of the application be provided for.



3. The originating summons is anchored on a thirty-nine (39) paragraphed supporting affidavit of the applicant sworn on October 22, 2021 and filed on October 25, 2021. The questions for determination are set out at paragraph (a) to (bb) on the face of the originating summons. The same include;
 - a. Under the provisions of article 47 of the Constitution as read with section 4 (1) and (3) of the Fair Administrative Action Act, 2015, the applicant was entitled to be given a fair and reasonable opportunity to explain himself before the agency before the decision to register a restriction against the said properties. Was he afforded such an opportunity?
 - b. Besides, were the restrictions registered with or without any express court order; and if any was obtained, was the same served on the applicant as required by law and should they be lifted forthwith.
4. The applicant deposed, inter alia, that he is the registered owner of land parcel numbers Kanyada/Kanyango/Kalanya/5125, East Kanyada/Kanyadier/203, Kanyada/Kotieno Katuma 'A'/2312 & 2313, Homa Bay/Kothidha/556 and Kanyada/Kotieno Katuma A/2406, having acquired the same between the years 1993 and 2017. That on or about October 14, 2020 while intending to amalgamate Kanyada/Kotieno Katuma 'A'/2312 & 2313, the land registrar, Homa Bay notified him that such amalgamation was not possible due to an existing restriction registered against the two parcels by the 2nd respondent on August 16, 2019. That upon conducting a search on his other properties, the applicant realized that the same restriction had also been registered by the 2nd respondent against titles to land parcel numbers Kanyada/Kanyango/Kalanya/5125, East Kanyada/ Kanyadier/203, Homa Bay/Kothidha/556 and Kanyada/Kotieno Katuma A/2406
5. The applicant avers that he is a bona fide purchaser for value, having acquired the said parcels on diverse dates. That the restrictions were registered against the suit properties without any basis and the same seem to remain as such indefinitely. Further, that he was not given any notice before the registration of the restrictions and that the said restrictions contravene articles 40, 47 and 50 of the Constitution of Kenya, 2010 as well as the provisions under the Fair Administrative Action Act, 2015. He further stated that land parcel numbers Kanyada/Kanyango/Kalanya/5125, East Kanyada/Kanyadier/203 and Kanyada/Kotieno Katuma 'A'/2312 & 2313 were acquired before POCAMLA came into force in 2009 thus, the Act cannot apply retrospectively.
6. The respondents did not defend the suit despite service being effected upon them by Isaiah Miruka, a court process server, as per his affidavit of service sworn and filed on November 30, 2021.
7. On January 26, 2022, this court ordered and directed that the present suit be canvassed by way of written submissions pursuant to a request made by the plaintiff's counsel.
8. Consequently, the applicant filed submissions dated March 3, 2022 on even date. He reiterated the contents of the supporting affidavit on record and urged the court to lift the restrictions on the suit properties. Counsel relied on the case of Assets Recovery Agency v Mike Sonko Mbuvi Gideon Kioko (2020) eKLR, to fortify his submissions.
9. The respondents did not file any submissions in respect to the suit.
10. I have thoroughly considered the entire suit and the plaintiff's submissions herein. In that regard, has the applicant demonstrated that he deserves the orders sought in this suit?
11. The applicant lamented that the restrictions were registered against the suit properties without any basis and the same seem to remain as such indefinitely. Further, that he was not given any notice before



- the registration of the restrictions. That the said restrictions contravene articles 40, 47 and 50 of the Constitution of Kenya, 2010 as well as the provisions under the Fair Administrative Action Act, 2015.
12. The plaintiff further stated that land parcel numbers Kanyada/Kanyango/ Kalanya/5125, East Kanyada/Kanyadier/203 and Kanyada/Kotieno Katuma 'A'/2312 & 2313 were acquired before POCAMLA came into force in 2009. That, the Act cannot apply retrospectively.
 13. Clearly, the respondents did not oppose the suit as indicated in paragraph 6 hereinabove.
 14. This court is pretty aware of section 82, articles 40, 47, and 50, as well as the *Assets Recovery Case (all supra)*. I take them all into account herein.
 15. The uncurtailed right to a fair trial is guaranteed by article 25(c) of the Constitution. Moreover, the right to be heard is a fundamental principle of justice; see Halsbury's Laws of England, 5th Edition (2010) volume 61 paragraph 639.
 16. Indeed, the parties were given a chance to have their case fairly heard as held in the case of Ogada v Mollin (2009) KLR 620 and Onyango Oloo v Attorney General (1986- 1989) EA 456. The defendants failed to defend this suit at all.
 17. I therefore, find the suit to be uncontested, steadfast and congenit. It has merit. In that regard, the applicant is entitled to the orders sought in this suit.
 18. *A fortiori*, I find the instant suit lodged by way of an originating summons dated October 22, 2021 and lodged in court on October 25, 2021 proved by the plaintiff against the defendants on a balance of probabilities; see also Kirugi & another v Kabiya & 3 others (1987)KLR 347.
 19. I proceed to allow the originating summons in the following terms:
 - a) A declaration that the restrictions lodged on August 16, 2019 against the plaintiff's land parcel numbers Kanyada/Kanyango/Kalanya/5125, East Kanyada/Kanyadier/ 203, Kanyada/Kotieno Katuma 'A'/2312 & 2313, Homa Bay/ Kothidha/ 556 and Kanyada/Kotieno Katuma A/2406 and/or any other property of the applicant be set aside, lifted and/or quashed for failing to meet the test required for their granting under section 82 of the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA herein) and for causing unnecessary hardship to the applicant, and/or be vacated in line with section 89 (1), (5) and (6) of the same Act.
 - b) Costs of this suit to be borne by the plaintiff in view of the character of the suit bearing in mind the proviso to section 27(1) of the Civil Procedure Act, chapter 21 Laws of Kenya.
 20. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 26TH DAY OF JULY, 2022.

Present

Mr. Ogwe, learned counsel for the plaintiff

Angela and Fiona, Court Assistants

