



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL SUIT NO. 161 OF 2008**

**JACKSON ESITIKA**  
**(Suing As The Administrator Of The**

**Estate Of**

**DORA OKISA MUNYAMA**

.....**PLAINTIFF**

**VERSUS**

**NEREAH ANDENYI.....1<sup>ST</sup> DEFENDANT**  
**PERUS AMIMO .....2<sup>ND</sup> DEFENDANT**  
**LEONARD INDIATSI .....3<sup>RD</sup> DEFENDANT**  
**HENRY OTIENO ABWAO.....4<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff’s Chamber Summons dated 24<sup>th</sup> November 2010 prays inter alia for orders of injunction to restrain the defendants, their servants or agents and or representatives from disposing or in any way dealing with Land Parcel No. **BUNYORE / EBUSIKHALE/2083** pending the hearing and determination of this suit. The plaintiff has further prayed for costs. The parties herein chose to rely on rival affidavits and the Skeleton submission.

From the pleadings before me it’s apparently clear that there is a blood relationship between the plaintiff and the 1, 2, and 3<sup>rd</sup> defendants. The 4<sup>th</sup> defendant for all intent and purposes is a purchaser. The suit properly seemed to have had a history of litigation or quasi-litigation. The same was a subject matter of Succession vide **Kakamega Succession Case No. 146 of 1988**. According to the grant attached as annexures N A 1 in the sworn replying affidavit of **NEREA ANDENYI** dated 14<sup>th</sup> January 2011 the following were recorded as the beneficiaries to the said parcel of land namely:-

- (1) Mary Kusa Eduswe**
- (2) Nereah Andanyi Harbart**
- (3) Peris Awino Nyonje**
- (4) Dora Okwisa Munyama**
- (5) Adah Aono Mariko**
- (6) Susana Ayako**

Subsequently, one Mary Kusa the beneficiary sold the said Land to one Bartholomew Amolo Esilaba but was later transferred back to the rightful beneficiaries. I have further had the occasion of perusing the green card attached to the further affidavit of Jackson Esitika sworn on 4<sup>th</sup> February 2011. The same is

full of entries, restrictions and cautions. This obviously explains the value and the sensitivity of this suit property.

The question that begs to be answered therefore is how did the 4<sup>th</sup> defendant obtain the title and ownership of the suit property?.

According to the 1<sup>st</sup> defendant's replying affidavit dated 14<sup>th</sup> January 2011 the sale and transfer was done lawfully through the relevant Land Control Board. This is buttressed by the 4<sup>th</sup> defendant vide his affidavit dated 9<sup>th</sup> December 2010 and sworn on 8<sup>th</sup> December 2010. The said affidavit attaches the transfer of land form (R.L.1) and the consent of Luanda Land Control Board. The transfer aforesaid annexture HOA (a) is undated though it seems that the same was executed in June 2009. According to the entries in the green card by June 2009 entry number 9 Hannington Amukoa was the registered owner of the suit property. This nevertheless need further clarification from the lands office. If however this be the case the 1<sup>st</sup> defendant could not have possibly transferred the suit land to the 4<sup>th</sup> defendant. Further the entries shows that the 1<sup>st</sup> defendant was to subdivide the land among her six (6) siblings.

It's further contended by the 1<sup>st</sup> defendant that there was an understanding that the proceeds from the sale would be shared equally and that the plaintiff herein was given Kshs. 10,000/= pursuant to the sale of the suit land to the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant on the other hand has deponed that the 1<sup>st</sup> defendant was acting on behalf of the rest of her siblings. This has never been proved in any way. Neither has the 1<sup>st</sup> defendant exhibited any agreement to the effect that the suit land was to be sold and its proceeds shared among the six (6) of them.

I have read both the plaintiff's and the defendants skeleton submission together with the rival authorities.

I am inclined to grant the plaintiff the prayers sought for the following reasons, namely

- (i) The plaintiff has the right to protect the interest of her late mother who was among the 6<sup>th</sup> siblings entitled to the share of the suit land.**
- (ii) The suit land has had a history of controversy and for it to be protected a conservatory order of this court shall be necessary**
- (iii) There seemed not to have been a very clear dealings between the 1<sup>st</sup> and 4<sup>th</sup> defendants in respect to the sale and transfer of the suit property and despite the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants pleaded ignorance they may have benefited from the transaction.**
- (iv) There seems to have been fraud which needs further in depth investigation and this can only be done during the hearing where the services of the Land Registrar shall be required.**
- (v) There are no minutes of the Luanda Land Control Board and what the 4<sup>th</sup> defendant in conjunction with the 1<sup>st</sup> defendant have exhibited transfer and consent. The minutes are obviously relevant.**

The celebrated case of **Giella vs= Cassaman Brown & Co Ltd 1973 (E.A.) 3586** principles buttresses my conclusions; the plaintiff has demonstrated a prima facie case, irreparable harm and loss may be suffered by the Applicant in the event that an injunction is not granted and finally the balance of convenience as it is now tilts in

favour of the plaintiff.

However, the plaintiff shall issue undertaking as to damages within the next fourteen (14) days from the date of this Ruling. I therefore allow the plaintiff's application dated 24<sup>th</sup> March 2010 in terms of prayer three (3) thereof and further he shall have the costs of

this application.

It is so ordered.

**Dated, signed and delivered at Kisumu this 19<sup>th</sup> day of October 2011.**

**H. K. CHEMITEI  
JUDGE**

HKC/aao