



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 6 OF 2007 (O.S)

MICHAEL OGWENO MBOGO 1ST PLAINTIFF/APPLICANT
JACKTON KOLO MUGA 2ND PLAINTIFF/APPLICANT
ALPHONSE ONYANGO MBOGO 3RD PLAINTIFF/APPLICANT
PETER OTIENO MBOGO 4TH PLAINTIFF/APPLICANT
VERSUS
PETER ALBERT ODIWUOR DEFENDANT/RESPONDENT
AND
SILAS ONYANGO ODHIAMBO INTERESTED PARTY/RESPONDENT
RULING

There are two applications that came up for hearing on 19th July, 2010. First one is dated 26th November, 2009 and was filed by the interested party. It seeks an order to lift, discharge and/or set aside prohibition orders made on 28th June, 2007. The second application is dated 4th June, 2010 and was made by the plaintiffs seeking orders that:

- (a) **Pending hearing and determination of the application, an interim order of stay of proceedings and/or further proceedings in respect of the application dated 26th November, 2006 be granted.**
- (b) **An order to rescind, annul or revoke the transfer and registration of L.R. No. Kabondo/Kakangutu East/853 in the name of the interested party.**
- (c) **An order to restore and/or rectify the register in respect of L.R. Kabondo/Kakangutu East/853 in the name of the defendant as it were before the transfer and registration of the same in the name of the interested party.**
- (d) **Consequent to prayer (c) above being granted, the Honourable court be pleased to restore the inhibition that was granted vide an order made on 28th June, 2007.**
- (e) **An order to direct the District Criminal Investigations Officer, Rachuonyo, to investigate the circumstances relating to the removal of the inhibition issued and registered on the 27th day of July 2007 pursuant to orders made by this court on 28th June, 2007.**
- (f) **Consequent to prayer (e) above being granted, the Honourable court be at liberty to punish and recommend appropriate criminal proceedings to be taken against the interested party and such other parties that may have participated in the fraudulent actions relating to the removal of the inhibition and transfer of the suit land in favour of the interested party.**

The application by the interested party was supported by an affidavit sworn by himself wherein he stated that he purchased the suit property known as **Kabondo/Kakangutu East/853** and thereafter a consent order was made between himself and the defendant. Annexed to the affidavit is a consent order marked as "SOO/-01" which reads as follows:

"CONSENT ORDER
DEPUTY REGISTRAR

KISII HIGH COURT

Kindly record the following order.

“By consent of both parties herein:

- 1. There be an order of inhibition issued by the court directing the land Registrar Rachuonyo District, to register an inhibition against Land Parcel No. Kakangutu East/853 pending the determination of Kisii HCCC No. 6 of 2007 or until further court order.**

Dated at Kisii this 28th day of June, 2007.

For Auma O.J. Omondi & Co.

Advocate for the Plaintiff

For W. Nyakongo & Co.

Advocates for the Defendant.”

He further stated that after obtaining the consent, the defendant signed the transfer forms and the deponent proceeded to pay stamp duty in respect thereof so that the land could be registered in his name. When he was making these transactions there was no case relating to the said parcel of land that was pending in court, neither was there any order restraining him from obtaining a title deed to the parcel of land. The delay in obtaining a title deed was caused by the defendant when he failed to return the original title deed to the District Land Registrar for cancellation. When the interested party made a follow up at the land registry he was informed that the court had issued an order of an inhibition against any transaction on the suit land until further orders.

In his view, the court had not been properly informed of the circumstances surrounding the suit land at the time of issuing the order of inhibition as aforesaid. He further contended that the order was obtained by fraud and misrepresentation of facts and unless it is lifted he stood to suffer substantial loss and damage, the interested party added. He reiterated that he was not party to the consent order stated hereinabove.

The aforesaid application was opposed by the plaintiffs who filed a statement of grounds of opposition and stated as hereunder:

“1. The instant notice of motion is mischievous, misconceived and otherwise bad in law.

2. The instant application has been filed and/or mounted by a stranger in utter and flagrant contravention of the provisions of order III rule 7 and 8 of the Civil procedure Rules consequently the court process herein ought to be expunged *Ex-Debito Justitiae*.

- 3. The interested party/applicant not having been party to the consent order, same lacks the requisite *locus standi* to challenge and/or impeach the consent order recorded on the 28th June, 2007.**
- 4. The orders sought to be lifted and/or discharged were entered into by consent of the parties. Consequently the said order cannot be lifted, discharged and/or set aside in the absence of an appropriate application for review.**
- 5. The interested party/applicant was not the registered owner of the suit land at the time of entry and/or endorsement of the consent order. Consequently the interested party was/is devoid of any interests in the suit land.**
- 6. The suit land was irregularly and/or illegally transferred and registered in the name of the interested party on the 21st day of April 2010, on the face of an order of inhibition. Consequently the instant application is misconceived and legally untenable.**
- 7. The order sought vide the instant application are (sic) calculated to defeat and/or circumvent the plaintiffs'/respondents' interests in the suit land and in terms section 30(g) of the Registered Land Act, Chapter 300, Laws of Kenya.**
- 8. The instant application constitutes and/or amounts to abuse of the due process of the court.**

9. That the instant application is otherwise devoid of merits whatsoever.”

The plaintiffs’ application was supported by an affidavit sworn by **Michael Ogweno Ombogo**, the 1st plaintiff. He stated that on 30th January, 2007 the plaintiffs lodged an originating summons seeking a declaration of adverse possession in respect of the suit land. They also sought an order of inhibition in respect of the suit land. The application for inhibition was disposed of vide a consent of the plaintiffs and the defendant dated 28th June, 2007. The consent was duly lodged at the lands registry, Rachuonyo, and the same was endorsed on the register on 27th July, 2007. The order of inhibition was to last until the hearing and determination of the suit. But to their surprise on 21st April, 2010 the interested party went to the respective plaintiffs’ homestead and threatened to evict them from the suit land unless they volunteered to vacate the same. Pursuant to the threats they conducted a search at the lands registry and realized that the suit land had been transferred and registered in the name of the interested party on 21st April, 2010. They further discovered that the inhibition that had been registered in the register had been removed without notice to them.

The plaintiffs then instructed an advocate to take up the matter, peruse the court file and establish how the inhibition was removed. The advocate realized that there was no order vacating and/or lifting the inhibition. In the circumstances the transfer and registration of the suit land in the name of the interested party was therefore fraudulent, the deponents stated. The plaintiffs reasonably fear that the interested party is likely to sell or charge the suit land unless the court restrains him from so doing. They therefore urged the court to grant them the orders as sought.

The interested party responded to the plaintiffs’ application and stated in his replying affidavit that the registration of the suit land in his name was done at the instance of a court order. He annexed to his affidavit a copy of a court order issued by the Chief Magistrate’s Court at Kisumu, **Miscellaneous civil Case No. 4 of 2007(O.S)**. The applicant in the said case was **Peter Odiwuor Kayo**, (the defendant herein), as administrator of the estate of **Ibrahim Kayo Otieno**. The order read as follows:

**“Upon reading the applicant’s application dated 31st
August, 2007 and upon hearing the submissions by
the applicant’s counsel this 26th November 2009,
IT IS HEREBY ORDERED AS FOLLOWS:**

- 1. That the caution lodged on L.R. No. Kabondo/Kangutu East/853 be and is hereby removed.**
- 2. That the transfer in favour of Silas Onyango Odhiambo in respect of L.R. No. Kabondo/Kangutu East/853 be registered.**

Issued at Kisumu under my hand and the Seal of this Court this 3rd day of December, 2009.

**(signed)
A.C. Onginjo
Senior Principal Magistrate.”**

He further stated that the plaintiffs had earlier on filed an application seeking restraining orders but the application was dismissed. He further stated that the plaintiffs were aware that they had no valid claim over the land and that they had proceeded to record a consent with the defendant without his knowledge. The consent was therefore entered into fraudulently.

The defendant, who is represented by M/s W. Nyakongo & Company Advocates, did not file any replying affidavit to the aforesaid applications but he filed submissions. He supported the plaintiffs’ application dated 4th June, 2010. The plaintiffs and interested party also filed their respective submissions.

The defendant opposed the application by the interested party dated 25th June 2007 on grounds that:

- (a) The interested party was guilty of laches for
having failed to have his application dated**

25th June 2007 determined expeditiously.

- (b) **The plaintiffs had explained the delay in having the suit determined speedily, the reason being that their former advocate left his practice and joined the Attorney General's chambers.**
- (c) **The consent dated 28th June 2007 was actually made between the plaintiffs and the defendant.**
- (d) **The consent raises doubt over the defendant's administrator on a claim over the suit land by the interested party.**

In his submissions, the interested party stated that this suit was instituted without his knowledge. The plaintiffs also filed an application seeking an order of inhibition to prohibit the defendant from transferring the suit land. The application was heard and the orders sought were not granted. After the said application was dismissed counsel for the parties entered into the consent of 28th June, 2007 purportedly to inhibit any further transactions on the suit land. That was also done without the knowledge of the interested party. On 2nd March 2009 the interested party filed an application seeking leave to be joined in the suit. The application was allowed and thereafter on 26th November, 2009 he filed an application seeking orders to set aside the consent of 28th June 2007.

Counsel further submitted that at the time of entering into the said consent, the interested party was a purchaser for value of the suit land and had obtained a letter of consent for transfer of the suit land from the local Land Control Board. That information was well within the knowledge of the defendant who had accompanied the interested party to the Land Control Board. The defendant had therefore colluded with the plaintiffs in filing this suit with a view to defrauding the interested party of his property. It was further submitted that the consent was made through fraud, misrepresentation or concealment of material facts.

Regarding removal of the inhibition and the registration of the transfer, it was submitted that the same was done vide an order issued by the Chief Magistrate's Court at Kisumu, **Miscellaneous Civil Case No. 4 of 2007 (O.S.)**.

On their part, the plaintiffs submitted that after filing of the Originating Summons dated 30th January 2007 claiming the suit land by way of adverse possession, they entered into a consent with the defendant on 27th July, 2007. At the time of entering into the said consent the suit land was registered in the name of the defendant and the interested party had not acquired any interest over the same. They further submitted that the registration and transfer of the suit land in the name of the interested party while the order of inhibition had been registered against the title was a violation of the law. The interested party was aware of existence of the inhibition order because he had presented an application dated 26th November, 2009 seeking to have the inhibition lifted.

I have carefully considered the applications on record, the affidavits sworn by various parties and the submissions.

From the information on record, the interested party and the defendant entered into a sale agreement in respect of the suit land whereby the defendant sold the land to the interested party at a consideration of **Kshs.270,000/=**. That was sometimes in the year 2006. On 19th December, 2006 the two appeared before the Kabondo Land Control Board and applied for consent to transfer the suit land to the interested party. The said Land Control Board gave the consent as requested. On 12th February, 2007 the interested party proceeded to pay stamp duty for the transfer. The transfer was presented for registration on 18th January, 2007 when the appropriate registration fees was paid. However, for some undisclosed reasons the registration was not effected.

In the meantime, on 30th January 2007 the plaintiffs instituted this suit by way of originating summons asking the court to declare them the joint owners of the suit land under the doctrine of adverse possession. Together with the originating summons they also filed an application seeking an order of inhibition to stop any dealing with the suit land pending determination of the suit. The application came

up before Gacheche, J. on 3rd May 2007. The application was dismissed. But after dismissal of the said application on 28th June 2007, M/s Auma O.J. Omondi & Company, Advocates for the plaintiffs and W. Nyakongo & Company, Advocates for the defendant, entered into a consent which was on the following terms:

“CONSENT ORDER

**Deputy Registrar
Kisii High Court.**

Kindly record the following consent order.

By consent of both parties herein:

1. There be an order of inhibition issued by the court directing the Land Registrar, Rachuonyo District, to register an inhibition against Land Parcel No. Kakangutu East/853 pending the determination of Kisii High Court civil suit No. 6 of 2007 or until further court order.”

That order was registered against the title on 27th July 2007. But there was an earlier order of restriction that had been registered against the title on 10th January 2007 restricting any dealings with the suit land without the knowledge of the Chief of Wang Chieng Location following a letter which the Chief had written to the Land Registrar.

As regards the consent that was entered into between the plaintiffs’ advocate and the defendant’s advocate on 28th June 2007, they did not make any reference to the orders issued by the court on 3rd May 2007 dismissing the application that sought orders of inhibition in respect of the suit land. A consent could not be filed by counsel to allow an application that had been dismissed without leave of the judge who had dismissed the application. The defendant was also aware that the interested party had already purchased the suit land and had been granted the appropriate consent by the local Land Control Board. That was before even the plaintiffs filed this suit. In the circumstances, I would agree with the interested party that the said consent was entered into fraudulently and without disclosure of material facts which were within the knowledge of the defendant.

On 3rd March 2009, the third party was joined in this suit. As at that time the defendant had filed before the Chief Magistrate’s court at Kisumu **Miscellaneous Civil Case No. 4 of 2007**, seeking removal of the caution that had been registered against the title of the suit land. Although the defendant referred to it as a caution, what was in existence was a restriction. The application was filed on 31st August, 2007. It is not clear whether the plaintiffs had been served with the said application. It would also appear that the defendant did not disclose that the plaintiffs had filed this suit against him. The defendant was certainly aware of the plaintiffs’ suit because he had entered appearance thereto on 20th June 2007.

When the Chief Magistrate’s Court allowed the defendant’s application on 3rd December 2009, it seems as though the interested party used the same to register the transfer of the suit land in his name and thereafter obtained a title deed.

The District Land Registrar, Rachuonyo, was aware that on 27th July 2007 an order of inhibition had been registered against the title prohibiting all dealings until this suit was heard and determined. The restriction specifically referred to **“O.S No. 6/07 Kisii High Court.”** By relying on the court order that had been issued by the subordinate court, **Chief Magistrate’s court at Kisumu, Miscellaneous Civil case No. 4 of 2007**, the said Land Registrar acted in contravention of the law and in particular **section 136** of the **Registered Land Act**. The defendant and the interested party were also not innocent players because they were aware of existence of the orders issued by this court on 28th June 2007, whether the orders were properly issued or not.

It appears to me that the defendant is a fraudulent double dealer. In some instances he was acting in cahoots with the plaintiffs to defeat the interest of the interested party and in other instances he seemed to be in league with the interested party against the plaintiffs.

In the circumstances as stated hereinabove, what is the legality of the order of inhibition that was issued on 28th June, 2007? My view is that taking into consideration that it was entered into long after the

defendant had sold the suit land to the interested party and transfer of the same having been consented to by the local Land Control Board and taking into account that the consent was entered into after the court had dismissed an application seeking the same orders, the consent order was fraudulent. The defendant was also guilty of non-disclosure of material facts. The same is hereby set aside.

Turning to the orders sought by the plaintiffs, I do not think that it will be appropriate to revoke the transfer and registration of the suit land in the name of the interested party at this stage. It is appropriate that the District Land Registrar, Rachuonyo, be ordered to explain the circumstances under which he removed the inhibition that was registered on 27th July 2007. In that regard I direct that he be served with the plaintiffs' application dated 4th June, 2010 and a copy of this ruling. Upon consideration of the explanation the court will make further orders regarding the plaintiffs' application. This matter will be mentioned on 19th October, 2010 by which time the District Land Registrar, Rachuonyo, should have filed his affidavit.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF SEPTEMBER, 2010.

**D. MUSINGA
JUDGE.**

21/9/2010

Before D. Musinga, J.

Mobisa – cc

N/A for the Plaintiffs

N/A for the Defendant

N/A for the Interested Party

Court: Ruling delivered in open court on 21st September, 2010.

**D. MUSINGA
JUDGE.**