



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 14 OF 2020**

**BENTA ADOYO OJODE.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELIZABETH OKELO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOHN OTUOMA ACHENJE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Benta Adoyo Ojode has come to court against Elizabeth Okelo and John Otuoma Achenja by way of Notice of Motion dated 9/12/2020 to restrain the defendants by way of a permanent injunction from constructing a structure on parcel number K/N/ "A"/1121 and from collecting the proceeds from the rental houses built by the late Nashon Ojode Gwando in the parcel of land. The applicant states that she is the registered owner of the land.

In the supporting affidavit, she states that the suit property land No. Kisumu/Nyalenda "A"/1121 belonged to her late husband Nashon Ojode Gwambo. That she carried out succession and thereafter processed title deed.

That on or about 2006 after the death of her husband, the 1<sup>st</sup> defendant/Respondent started encroaching on the suit property putting up illegal structure and the same the 2<sup>nd</sup> Defendant/Respondent collecting the proceeds from Rental houses of her late husband.

That Despite numerous attempts to advise the Defendants/Respondents to vacate, the same have been futile prompting her to take legal action and report the same. That the federation of women lawyers- Kenya Kisumu further advised her to seek redress in a court of law.

That both the Defendants/Respondents have never consulted her or sought her consent in anyway whatsoever with regard to dealings with the suit property.

That the defendants/Respondents have now started showing potentials buyers to the suit property with the intention of selling the same.

That the 1<sup>st</sup> Defendant/Respondent has started putting a structure thereon with the intention of permanently displacing her from the suit property to her detrimental.

That she verily believes to be true that one cannot benefit from an illegality and such any dealings with regard to the suit property are null and void.

Elizabeth Okelo in reply states that their great grandfather in his wisdom and desire to protect the family had the said land parcel registered in the name of one of his sons Nashon Ojode Gwambo who was the brother to Joseph Ochinga Gwambo, Joan Akumu Gwambo and Semo Gwambo.

That her husband Martin Okelo Ochinga was the son of Joseph Ochinga Gwambo who is the brother in law to the plaintiff herein and the fact that the suit land parcel belonged to the family of Esau Gwambo her husband put up rental units on the land parcel way back in the year 1987.

That the rental houses that were built by her husband in 1987 were done when the plaintiff's husband was still alive and they were constructed on a portion of land that was given to her husband by the father Joseph Ochinga Gwambo.

That she knows of her own knowledge that the 2<sup>nd</sup> defendant John Otuma Achenja is the husband to one Sarah Adhiambo Ochinga who is the daughter to Joseph Ochinga Gwambo and that the 2<sup>nd</sup> defendant constructed the house in 1984 on that portion that the wife had been given by the father Joseph Ochinga Gwambo.

In the essence, the respondents state that they are in possession of the suit property and that they have developed the same.

I have considered the application and rival submissions and do find that the defendants are in possession of the land and have been collecting rent from the rental houses. Though the plaintiff is the registered proprietor, there is doubt that she is the absolute owner as the defendants are in possession due to claim that the land was their ancestral land.

I do find that the plaintiff and defendants both have claims that are likely to succeed in court. Therefore, there is doubt as to which will succeed.

I do find that this is a case to be determined on the balance of convenience.

On a balance of convenience, I do find that the status quo should be maintained as a grant of the orders sought will deprive the defendants of their livelihood and will amount to an eviction. Application s dismissed with costs in the cause.

**DATED AT KISUMU THIS 19<sup>th</sup> DAY OF MARCH, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**