



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. E004 OF 2020

IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP OF THE

WHOLE LAND PARCEL L.R BUKHAYO/MUNDIKA/5709

BETWEEN

BENJAMIN WASIKE OPOTY.....1ST APPLICANT

LAWRENCE WESONGA NYONGESA.....2ND APPLICANT

= VERSUS =

MARGARET NYONGESA OPOTI.....RESPONDENT

RULING

1. The Applicants brought the application dated 19th of September, 2020 under the provisions of sections 3 & 3A of the Civil Procedure Rules. They pray for orders THAT:

(a) The Applicants and the Respondent herein do open a joint Bank account into which the rent accruing from the premises on land parcel L.R Bukhayo/Mundika/5709 (the Suit Property), the subject matter herein shall be deposited;

(b) Pending the hearing and determination of this suit, a restriction be placed on land parcel L.R Bukhayo/Mundika/5709 to preserve its status; and

(c) Costs of the application be provided for.

2. The application was supported by the affidavit of BENJAMIN WASIKE OPOTY dated 18th September, 2020 and the on following grounds;

(a) That, the premises attracting rent are on the suit parcel herein;

(b) That, the Respondent holds the subject matter herein in trust for the family of the late Benson Nyongesa Opoti;

(c) That the Applicants have caused a caution to be placed on the suit parcel and they have now received notice for its removal from the Land Registrar;

(d) That the Respondent and the Applicants are co-administrators of the estate of Benson Nyongesa Opoti; and

(e) That the reliefs sought herein shall meet the ends of justice.

3. The Respondent filed her grounds on the 14th of October, 2020 in opposition to the application. She pleaded inter alia that an order for opening a joint account for remission of rent due from the premises on the Suit Property cannot issue without first ascertaining whether the land was a trust property or not and this ascertainment can only be done after full hearing of the main suit on its merit. The Respondent contends that the Suit Property does not form part of the estate of Benson Nyongesa Opoti (the deceased) as it solely belongs to her and she cannot be forced to share profits thereof with anyone else.

4. The Respondent also swore a replying affidavit which was filed on the 23rd of October, 2020. She deposed that the deceased, Benson Nyongesa Opoti, her husband died on 19th September, 2018. That prior to his demise, he had transferred the Suit Property to her on the 24th of March, 2006 as a gift. She avers that the deceased never created a trust over the Suit Property and never intended to create a trust on the Suit Land in favour of the entire family. She further deposed that she is the one who developed the Suit Property and not the deceased and that the Suit land does not form part of the deceased's estate.

5. The Applicants filed a further affidavit in response to the replying affidavit on the 24th November, 2020. The 1st applicant deposed that the deceased transferred the suit property to the Respondent to hold it in trust as the deceased was sickly and had developed poor eye sight. That the deceased paid all the taxes, dues, rates and rents and other legal obligations owing to the Suit Property and collected the rent from the premises on the Suit Property till his death. That the Respondent has never collected any rent from the said premises from the time the Property was registered in her name and only started collecting rent in August, 2020 after the death of Benson Nyongesa Opoti.

6. The Applicants filed their submissions on the 25th of November, 2020 relying on Order 40 Rule 1 (a) of the Civil Procedure Rules and section 74 of the Land Registration Act. The Applicants submit that this court may grant a temporary injunction for the purpose of staying or preventing the wasting, damaging, alienation, sale, removal or disposition of the Property as this Court thinks fit or until further orders. The Applicants further submit that the Land Registration Act allows the registration of a further caution only that the Registrar has the discretion to refuse or accept such further caution. That the Court has discretion to order the registration of a restriction whether or not there's an earlier one.

7. The Respondent filed her submissions on the 23rd of October, 2020 submitting that the property does not form part of the deceased's estate and a trust cannot be imputed over it and therefore a joint account cannot be formed in respect of the rent collected from the suit premises. The Respondent further submits that granting a restriction on the Suit Property will be tantamount to allowing two caveats on a single title by the same person at the same time because a caution already exists on the Suit Property, lodged by the Applicants.

8. From the filed affidavits, I have been able to deduce the following issues as what should be addressed in this ruling;

(a) Whether or not a restriction should be placed on the Suit Property pending hearing and determination of this suit;

(b) Whether or not the parties should open a joint bank account for the purposes of depositing rent accruing from the buildings on the Suit Parcel;

(c) Who pays the costs of this application?

9. The Applicants want rent deposited in a joint account because the suit premises comprised the estate of Benson Nyongesa Opoti-deceased. That the estate still has dependants still in school as shown in the letters from Sangalo Institute of Science and Technology and also Mount Kenya University. The suit property was registered in the name of the Respondent during the lifetime of the deceased so *prima facie* does not constitute part of the property of his estate.

10. Secondly the Applicants plead that the Respondent was registered in trust for the benefit of the Opoti family. It is an established principle of law that trust is a question of fact that can only be proved by adducing evidence. It is not possible to determine whether or not a trust exists through an interlocutory application. Whether or not the property was developed by the deceased does not improve the Applicant's claim for the interlocutory Orders herein because the provisions of section 24 of the Land Registration Act bestows on the registered owner all rights and interests unless the title is challenged as provided in section 26. The case is still pending so the court can only find the balance tilting in favour of the Respondent as at now.

11. Thirdly the rents accruing from the suit premises are determinable. In the event the Applicants succeed in their case, they can demand for refund of monies due and owing to them. I therefore find no basis to make an order for depositing rents in a joint account. I decline to grant **prayer (1)** of the application.

12. The second prayer is seeking to place a restriction on the suit title. Although this was opposed, I see no prejudice it will occasion to the Respondent. I say so because the doctrine of *lis pendens* also bars the Respondent from transacting on this property. I therefore grant the **prayer 2**.

13. The application partially succeeds. Each party to meet their respective costs.

Dated, signed & delivered at BUSIA this 4th day of March,2021.

A. OMOLLO

JUDGE