



**REPUBLIC OF KENYA**

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

**ELC CASE NO. E9 OF 2020**

**BERNARD WANJARE ODERO (Suing as the Legal representative the estate  
of HENRY ACHOK (DECEASED)).....PLAINTIFF/APPLICANT**

**VERSUS**

**JACOB OJOO OMAMO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, BONDO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

**(Plaintiff's/Applicant's Case)**

In the application dated 4/11/2020, Bernard Wanjare Odero (hereinafter) referred to as the Plaintiff, and suing as the legal representative of the estate of Henry Achok (Deceased) prays for temporary injunction to be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent whether by themselves, their agents and or servants from trespassing, wasting, transferring, mortgaging or making entries in the Land register or otherwise interfering or dealing with Land Parcels Number NORTH SAKWA/MARANDA/3536, 3537 and 3538, formerly NORTH SAKWA/MARANDA/822, pending the hearing and determination of this application.

The plaintiff further seeks prohibitory orders against the 2<sup>nd</sup> Respondent, barring the 2<sup>nd</sup> Respondent from making any entries or further registration on Land Parcel Number NORTH SAKWA/MARANDA/3536, 3537 and 3538 pending the final determination of this suit. That costs of this application be provided for.

The application is based on grounds that the Plaintiff/Applicant is the Legal Representative of the estate of HENRY ACHOK (Deceased) and has full authority of the family and the estate of the deceased to commence proceedings against the Defendants/Respondents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have already interfered with the deceased estate being Land Parcel Number NORTH SAKWA/MARANDA/822 formerly and now have divided into 3 portions namely NORTH SAKWA/MARANDA/3536, 3537 and 3538. The 2<sup>nd</sup> Respondent refused to register caution on Land Parcels Number NORTH SAKWA/MARANDA/3536, 3537 and 3538 as desired by the Plaintiff/Applicant.

Unless restrained the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will continue to interfere, transfer, mortgage and or make entries to the Land Register unlawfully on the aforesaid estate thereby causing the plaintiff/Applicant irreparable damage with the likelihood of a breach of peace.

It is in the interest of justice that the orders prayed for herein be granted and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be restrained from interfering with Land Parcels NORTH SAKWA/MARANDA/3536, 3537 and 3538, formerly NORTH SAKWA/MARANDA/822.

In the supporting affidavit, the plaintiff states that he is the legal representative of the Estate of the late Henry Achok who was the registered proprietor of Land Parcel Number North Sakwa/Maranda/822 measuring 8.4 hectares and that by an oral agreement the Late Henry Achok surrendered his Title Deed for the aforesaid land to the late Odongo Omamo who was his cousin for some valuable consideration to use the Title Deed as security to obtain a loan of Kshs. 40,000/= from Standard Chartered Bank Ltd. That it was an implied term of the aforesaid agreement that upon liquidation of the loan the security would be discharged and the title returned to the late Henry Achok.

That on or about 3<sup>rd</sup> July, 1992, the security was discharged by the bank and the entire Parcels of Land irregularly and fraudulently transferred to the First Defendant/Respondent who was still a minor without the deceased's knowledge and consent. That the Plaintiff filed a suit to protect the deceased estate and the family's interest.

On 25/8/2020 the second Respondent frustrated his efforts to lodge a caution against Land Parcels Number NORTH SAKWA/MARANDA/3536, 3537 and 3538 that was formerly North Sakwa/Maranda/822. That the 2<sup>nd</sup> Respondent's action is unlawful and contravenes provisions of section 71 of the Land Registration Act, No. 3 of 2012 of the Laws of Kenya. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are likely to unlawfully interfere, transfer, mortgage and or make entries in the Land Register with regard to Land Parcels number NORTH SAKWA/MARANDA/3536, 3537 and 3538 before the suit is heard and final determination is reached. That it is in the interest of justice that the orders sought herein be granted. The plaintiff is certain that unless the Honourable Court intervenes there is likely to be a breach of the Principles of Natural Justice as this suit is yet to be heard and finally determined.

The plaintiff fears are that if the Respondents are not restrained by this Honourable Court the deceased's estate and the family is bound to suffer irreparable damage should they be left to continue interfering and dealing otherwise on Land Parcels Number NORTH SAKWA/MARANDA/3536, 3537 and 3538.

### **(Respondents Case)**

The Respondent filed a replying affidavit whose import is that he was registered as proprietor of the suit parcel of land on 3/7/1992. He has had the land subdivided into 3 parcels NORTH SAKWA/MARANDA/3536, 3537 and 3538. He has sold part of the land. Some purchasers have taken possession and constructed. He states that his father (deceased) bought the land from the Plaintiff's uncle (deceased) for a consideration of Kshs. 45,000 and caused the land to be registered in the Defendant's name as a minor. The Plaintiff attempted to refund the consideration but the defendant's father rejected it. The suit land was transferred to the defendant in 1992 when the plaintiff's uncle was alive and the said uncle died in 1999 and before death he never complained. The Plaintiff has complained to arbitrator who have rejected his claim. The plaintiff does not reside on the land but the defendant does occupy the land. He is the registered owner of the land hence an injunction should not issue.

In the supplementary affidavit of Bernard Wanjare Odero filed on 27/11/2020 and sworn on 26/11/2020, he states that the issue of limitation can't be raised where fraud is alleged. He states that the title deed was used by the deceased to secure a loan of Kshs. 40,000 from the Standard Bank but when he was unable to repay, he secured a loan of Kshs. 45,000/= from William Odongo to pay the Bank Loan.

It was agreed that he would surrender the title deed to William O. Omamo once the security is discharged. The Plaintiff was surprised to find out that the parcel of land was registered in the name of the defendant who is the son to Willima Odongo Omamo. He alleges fraud on the part of William Odongo Omamo. The Plaintiff claims to have learned that on the 3/7/1992 the parcel of land was transferred to the defendant. He claims that there was no sale agreement. The Plaintiff heavily relies on allegations of fraud on the part of the defendant's father.

The circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules whose import is that where it is proved by affidavit :-

**(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;**

**(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."**

In the case of *GIELLA VERSUS CASSMAN BROWN* (1973) EA 358 and as was reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014)eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, all any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

In the case of **MRAO LTD VERSUS FIRST AMERICAN BANK OF KENYA LTD (2003) EKLR** in which the Court of Appeal gave a determination on a prima facie case. The court stated that :

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I have considered the application and all affidavits on record and do find that the land in dispute is registered in the names of Jacob Oloo Omamo. The registration was done on 3/7/1992 when he was a minor. Prior to that the property was in the plaintiff's uncle name.

The History of the parcel of land starts within Edition 1 of the property Section. The register was opened on 1/8/1978 in the North Sakwa/Maranda registration section and parcel number 822 measuring 8.4 Ha was created in Registry Map sheet no. 24. Henry Achok Ochilo was registered as the owner and land certificate was issued on 10/6/1983. On 13/9/1983 the land was charged by the proprietor to

Standard Chartered Bank to secure a loan of Kshs. 40,000/=. On the 3/7/1992, the discharge of charge was registered.

On the same date the defendant was registered as the proprietor of the suit parcel of land as a minor and title deed was surrendered. The transaction is stated as a transfer and consideration was Kshs. 45,000/=.

It appears that Mr. Henry Achok Ochando surrendered the title deed to the lands office. The transaction of 13/8/2013 indicates that the title deed was surrendered and re-issued. On 3/2/2020, the title deed was closed on subdivision to create new number 3536, 3537, 3538.

There is no evidence of a sale agreement between the Plaintiff's uncle and the defendant's father. It is not clear the nature of transaction between the plaintiff's uncle and the defendant's father. The court is not able to determine fraud at this moment, however, the fact that the defendant have not annexed the transfer document or any instrument to that effect raises eye brows as to the nature of the transaction between the deceased plaintiff's uncle and the defendant's father. Moreover, I have not been able to discern the minutes and consent of the Land Control Board.

On limitation, I do find that the deceased Henry Achok Olando died before the limitation period had expired and that the plaintiff obtained limited grant of letters of administration ad litem on 23/7/2020 and therefore at this moment one can't conclude that the suit is filed out of time as.

I do find that the plaintiff has established a prima facie case with a likelihood of success and that if a temporary injunction is not issued, the plaintiff might suffer irreparable loss because the property can be transferred to a third party and placed out of reach by the plaintiff and the court.

The balance of convenience tilts towards granting an injunction in terms that the land registrar be and is hereby restrained from entering in any transaction in respect of parcel number NORTH SAKWA/MARANDA/3536, 3537 and 3538 till the suit is heard and determined. The status quo on the ground to be maintained.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 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**