



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**PETITION NO. 13 OF 2012**

**GABRIEL OCHONG ORIWO**

**PHILISTER ACHAPA OBUOR..... PETITIONERS**

**VERSUS**

**AUGUSTINO OMWANDA.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND SURVEYOR, UGENYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> Respondent filed a Notice of Motion dated 8<sup>th</sup> July 2019 seeking orders that this Honourable Court do issue conservatory orders of prohibition prohibiting the Petitioners from selling or transferring the property known as Land Parcel Numbers NORTH UGENYA/SEGA /5181 and 1217. The Honourable Court do issue directions as appropriate. The costs be provided for.

The application is based on the grounds detailed on the face of the application and the supporting affidavit of one Paul Otieno Mutula Omalla, a beneficiary to the estate of the 1<sup>st</sup> Respondent, summarised as follows:

That in a judgment delivered on 12<sup>th</sup> November 2015, this court awarded costs of the suit to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent's Bill of Costs was taxed at Kshs 264,635/= and a Certificate of Costs issued on 16<sup>th</sup> January 2018. That the Petitioners have refused or neglected to pay the costs. That the Petitioners were served with the decree to pay costs as ordered by the court. That the 1<sup>st</sup> Respondent filed an application for attachment and sale of movable property and thereafter a Proclamation of Attachment was served upon the Petitioners but the estimated value of goods was insufficient to cover the taxed costs.

That NORTH UGENYA/SEGA /5181 is owned by the 1<sup>st</sup> Petitioner and NORTH UGENYA/SEGA /1217 is owned by the 2<sup>nd</sup> Petitioner. That the property subject matter of this case risks being alienated or sold before the costs of the 1<sup>st</sup> Respondent are covered if prohibitory orders are not issued by this court.

*There was no response from the Petitioners.*

*1. Whether the orders sought are merited*

Concerning the considerations to make in determining an application for conservatory orders in a matter involving constitutional rights, the

**“In such circumstances, the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to preserve the enjoyment of right pending hearing and determination of the petition for breach of fundamental human rights and freedoms. Needless to state, in terms of Article 24 of the Constitution, the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardised or affected by the enjoyment by the applicant of the rights in question.”**

The 1<sup>st</sup> Respondent has demonstrated that he was indeed awarded costs in the judgment of 12<sup>th</sup> November 2015 which was taxed at Kshs 264,635/= and that the Petitioners have failed or neglected to pay the costs. The Petitioners provided no response to this application and therefore failed to demonstrate why the 1<sup>st</sup> Respondent should not be granted conservatory orders as a means of enforcing his right to enjoy the fruits of his litigation.

As the orders will not adversely interfere with the property rights of the Petitioner regarding the suit parcels, the balance of convenience tilts in favour of the 1<sup>st</sup> Respondent.

The orders sought should be and are hereby granted in terms of prohibiting the sale or transfer of the suit parcels until the taxed costs are paid by the Petitioners.

**DATED AT KISUMU THIS 28<sup>th</sup> DAY OF MAY 2020**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**