



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.39 OF 2015

ELLY ROBERT ONYURO.....1ST APPLICANT

**REBECCA ONYURO [Suing as personal representatives of
the estate of ALICE AKOTH OKONGO.....2ND APPLICANT**

VERSUS

ROSEMARY ADHIAMBO ODINGA.....1ST RESPONDENT

SKYLARK CONSTRUCTION LTD2ND RESPONDENT

GIRO COMMERCIAL BANK LTD.....3RD RESPONDENT

THE COUNTY LAND REGISTRAR [KISUNU COUNTY]4TH RESPONDENT

RULING

1. **Elly Robert Onyuro** and **Rebecca Onyuro**, the Applicants, filed the Notice of Motion dated 12th February 2015 against **Rosemary Adhiambo Odinga, Skylark Construction Limited, Giro Commercial Bank Limited**, and **The County Land Registrar, KISUMU**, hereinafter referred to as 1st to 4th Respondents, for restraining orders against 1st, 2nd and 3rd Respondents in relation to land parcel **Kisumu Municipality Block 7/148** pending the hearing and determination of the suit. Alternatively the Applicants prays for an order of status quo prevailing at the time of filing the suit to be maintained pending the determination of this suit. The application is based on the nine grounds marked 1 to 9 on the notice of motion and the supporting affidavit sworn by **Elly Robert Onyuro** on the 12th February 2015.
2. The application is opposed by the 1st Respondent who filed the grounds of opposition dated 4th May 2015 through her advocates contending that the application is predicated on a suit that is statute barred, that the suit property was not part of the estate of **Alice Akoth Okongo** and therefore the Applicants are unlikely to succeed.
3. The 2nd Respondent also opposed the application through the replying affidavit sworn by **Jitendra Banji Patel** on 30th May 2015.
4. The 3rd Respondent filed the replying affidavit sworn by **Tilas Nthua Muringi** on the 7th September 2015 opposing the application.
5. The counsel for the 2nd and 3rd Respondents filed the Notice of Preliminary objection dated 21st April 2015 to the Notice of Motion dated 12th February 2015 seeking to have the suit struck out

with costs. The notice sets out three grounds; that the suit being based on the tort of fraud is statute barred, that the Applicants lacks capacity as the letters of administration ad litem lapsed on 18th March 2015 and that the suit is subjudice as there exists another suit against **Hezron Onyuro**.

6. The counsel for the parties appeared in court on 8th October 2015 and agreed to have the application dated 12th February 2015 and the 2nd Respondent's preliminary objection dated 21st April 2015 dealt with together through written submissions. The counsel for the Applicants filed their submissions dated 19th October 2015 on the 22nd October 2015. The counsel for 1st Respondent filed their submissions dated 28th October 2015 on the same date while counsel for the 2nd Respondent filed their first written submissions dated 27th October 2015. The counsel also filed their second written submissions dated 28th October 2015 on 30th October 2015.

7. The issues for determination in the Notice of Motion dated 12th February 2015 and the of Preliminary Objection dated 21st April 2015 are as follows:

- a) Whether the suit is statute barred.
- b) Whether the suit is subjudice.
- c) Whether the Applicants have capacity to file this suit for reason of the letter of administration ad litem lapsing on 18th March 2015.
- d) Whether the Applicant has established a case for issuance of restraining orders at the interlocutory stage.
- e) Who pays the costs.

8. The submissions by counsel for the Applicants, 1st and 2nd Respondents are as summarized hereinbelow:

a) **Applicants written submissions**

That the Applicant has established a prima facie case that requires further investigations and a temporary order of injunction should issue. That the Applicant has shown that **Alice Akoth Okongo**, the registered proprietor of the suit land, did not sign the sale agreement and transfer documents in favour of the 1st Respondent and therefore the 1st Respondent did not receive a good title capable of being transferred to the 2nd Respondent. That the 1st Respondent did not pay for the suit property and transferred it to her names after the registered proprietor's death without the grant of letters of administration. That the transfer of the suit property from the 1st Respondent to the 2nd Respondent was merely meant to defeat the Applicants' claim. The damages would not be an appropriate remedy and as the 2nd Respondent are continuing with the construction on the suit property, the restraining orders should be issued.

b) **1st Respondent's submissions**

That the Applicants claim is founded on the torts of fraud and conspiracy allegedly committed by the 1st Respondent in 2009. That under **Section 4(2) of the Limitation of Actions Act** Chapter 22 of Laws of Kenya, the time for filing such a claim lapsed on or about 21st September 2012. That the question as to whether the suit property was part of the estate of the late **Alice Akoth Okongo** would only reasonably be determined after the full trial but not at this interlocutory stage. That therefore the Applicants have failed the first test of the **Giella – V- Cassman Brown & Co Limited** [1973] E.A 358 case of a prima facie case and the notice of motion dated 12th February 2015 should be dismissed with costs.

c) **The 2nd Respondent submission**

That the Applicants have not established a prima facie case as defined in the Court of Appeal decision in Mrao Limited – V- First American bank of Kenya Limited & 2 others (2003) eKLR as the 2nd Respondent is a bona fide purchaser for value without notice as defined by the court of Appeal in Arthi Highways Development -V- West End Butchery Limited & 6 others [2015] eKLR. That the particulars of fraud attributed to the 2nd Respondent are yet to be proved. That the Applicants has not established that the loss, if any, that they may suffer if injunction is not granted will not be compensable by way of damages. The counsel referred to the decision in Peter Kinuthia Wathaka – V- Tom Ochieng T/A M'Oketch Auctioneers & 3 others [2005] EKLR. That the test of balance of convenience tilts against the issuance of injunction as the 2nd Respondent is in possession, has paid the purchase price and charged the property to raise funds for a project on the suit land. That from the pleadings, the discovery of the alleged fraud was made in 2009 and therefore the twelve years within which to file suit ended in 2012 or early 2013 in terms of Section 4 (2) and 26 of the Limitation of Actions Act. That the Applicants filed this suit after six years without leave and the suit is therefore statute barred and the application founded on it should fail for being an abuse of the courts process. That the suit offends Section 6 of the Civil Procedure Act in view of the existence of Kisumu CMCC No.384 of 2004 Kavin Ismael Surani – V- Alice Akoth Okongo & 2 others Kisumu CMCC NO.386 of 2008 (which was stayed) and Kisumu HCCC No.209 of 2009 which had allegations of fraud pleaded. That for reasons that the suit is statute barred and subjudice the application must fail and should be dismissed with costs.

9. The court has carefully considered the grounds on the Notice of Motion dated 12th February, 2015 the Notice of Preliminary objection dated 21st April 2015, the affidavit evidence and the submissions by counsel and come to the following determinations:

a) That the Applicants are children of the late **Alice Akoth Okongo**, who became the registered proprietor of **Kisumu Municipality/Block 7/148** on 4th June 2008 and had a certificate of lease issued in her names on 5th June 2008 [See copy of certificate of lease attached to the 1st Applicant supporting affidavit sworn on 12th February 2015].

b) That the said **Alice Akoth Okongo** died on the 2nd September 2009 and the Applicants obtained Limited Grant of letters of administration ad litem dated the 18th November 2014 in Kisumu P & A Cause No.1029 of 2014 in respect of her estate for the purpose of filing suit. [See copy of the Grant annexed to the 1st Applicant's affidavit]. The Applicants filed the plaint and Notice of Motion dated 12th February 2015 on the same date which was within the period of 90 days given in the grant. The lapse of the 90 days occurred when the suit and the application were pending in court and the lapsing does not affect the pending suit contrary to the 2nd Respondent's counsel's submissions.

c) That there appear to have been discussion between the 1st Respondent, as the purchaser, and **Hezbon Onyuro** as the vendor over the sale of the suit land in 2009. The said Hezbon Onyuro was the husband of the late **Alice Akoth Okongo** and is also now deceased. The Applicants have annexed to the supporting affidavit a copy of a transfer document of the suit land allegedly executed by the late Alice Akoth Okongo in favour of the 1st Respondent, dated 20th July 2009, but there is nothing to confirm whether said transfer document was registered with the Land Registrar. Also annexed are the copies of the register that appear to have been subsequently cancelled that show that the 1st Respondent got registered as proprietor of the suit land on 17th November 2009 and another indicating the date of her registration was 14th May 2010. The two dates of 1st Respondent's registration with the suit land are after 2nd September 2009 which is the date of demise of **Alice Akoth Okongo**. The 1st Respondent's counsel's submissions seems to take the position that the suit land was not part of the estate of the late **Alice Akoth Okongo** but then goes on to submit that the issue can only be determined after full hearing of the suit and not at the interlocutory stage. The question that this line of submission leave unanswered then is whether the 1st Respondent's title to the suit land was pursuant to the alleged sale discussions with **Hezbon Onyuro** culminating in the transfer documents of 20th July 2009 between the 1st Respondent and the late **Alice Akoth Okongo** or not. This may also be another issue that can only be determined after the hearing of the main suit.

d) That after the demise of **Alice Akoth Okongo** on 2nd September 2009, her spouse, **Hezbon Onyuro**, had a life interest on her intestate estate under Section 35 of the Laws of Succession Act

Chapter 16 of the Laws of Kenya. The said **Hezbon Onyuro** had the powers of a spouse as set out in Section 37 of the Law of Succession Act and could sell the intestate's immovable property with consent of the court. Though the 1st Applicant referred in his supporting affidavit to a succession cause having been filed by **Hezbon Onyuro** over the estate of **Alice Akoth Onyuro**, and even gave its reference as Kisumu HC Succession Cause No.464 of 2010, there are no documentary evidence available to show whether a grant had been issued. This will possibly become clearer after the hearing of the main suit and the court cannot pronounce itself with finality at this stage due to insufficiency of details.

e) That the said Hezbon Onyuro is said to have passed on in September 2011 when the 1st Applicant was in custody. [See paragraph 61 of the 1st Applicant's affidavit]. The 1st Applicant's deposition in paragraphs 63 to 69 of the supporting affidavit that he got to know that the suit property had allegedly been sold when he accessed his father's documents after the burial has not been challenged. The specific date that the 1st Applicant accessed his father's documents has not been disclosed but must

have been before he made the statutory declaration he swore on 12th April 2012, which he referred to at paragraph 75 of the supporting affidavit. The applicants have taken the step of obtaining the Grant ad litem to enable them file this suit over the suit property. If the Applicants are successful, they pray that the property revert back to the names of "**Alice Akoth Okongo (deceased) or her personal representative**". The Applicants are challenging the title to the suit land held by the 2nd Respondent currently and the previous holder, the 1st respondent on the ground of both fraud, illegality, and unprocedurally acquiring the title to the property of a deceased person without following the process set out in the Law of Succession Act. The court is of the view that the facts so far available by the parties are insufficient to conclusively determine whether or not the suit is statute barred or subjudice. Had evidence showing the suit was statute barred been available, then the suit would be liable for dismissal and the notice of Motion would fail. Equally had evidence been available to show that the suit was subjudice the court would have given a direction on which suit to stay.

f) That though the 2nd Respondent has the title to the suit land which they have charged to the 3rd Respondent, that the title is being challenged by the Applicants on grounds of fraud, illegality and being unprocedurally obtained in terms of Section 26 of the Land Registration Act No.3 of 2012. The 2nd Respondent is obviously entitled to the right and privileges of a registered proprietor under Section 24 and 25 of the Land Registration Act but should bear in mind the Applicants' challenge and its results in the event of being successful. Whether or not the 2nd Respondent is a bona fide purchaser of the suit land for value without notice will only become apparent after the main suit's hearing. Though the court is of the view that the facts available makes this case unsuitable for issuance of temporary injunction at this stage the court nevertheless finds there is need to ensure the legal status of the suit land existing as at 12th February 2015 is maintained pending hearing and determination of this suit.

10. That from the foregoing the court orders as follows;

(a) That the 2nd Respondent preliminary objection vide notice dated 21st April 2015 is rejected at this stage but the Respondent are at liberty to pursue the same grounds during the main hearing.

(b) That the Notice of Motion dated 12th February 2015 is allowed only to the extent of requiring the 2nd and 3rd Respondents to ensure the suit land's legal status existing on 12th February 2015 is maintained pending the hearing and determination of this suit. To that end the court on its own motion issues an inhibition Order over the suit land in terms of **Section 68(1)** of the Land Registration Act.

(c) That each party bears their own costs in respect of the Preliminary Objection and the Notice of Motion.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **10th day of February 2016**

IN PRESENCE OF;

APPLICANTS Absent

RESPONDENTS Absent

COUNSEL Mr Maisiba for 1st Defendant

Mr Yogo for 2nd Defendant

Mr Nyasimi for Kangethe for 3rd Defendant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016

10/2/2016

S.M. Kibunja

Oyugi court clerk

Court: Mater for reading of ruling.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016

Mr Yogo for 2nd Defendant,

Mr Nyasimi for Kangethe for 3rd Defendant,

Peter Maisiba for 1st Defendant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016

Court: Ruling delivered in open court in presence of Mr Yogo for 2nd Defendant, Mr Nyasimi for Kangethe for 3rd defendant and Mr Maisiba for 1st Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016