



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CIVIL CASE NO.140 OF 2015

ALI GADAFI HAMISI1ST PLAINTIFF

KHALED HAMISI2ND PLAINTIFF

(Suing as the administrators of the estate of the late HAMISI SHABAN OTINGA)

VERSUS

DEPHINE N. SHIRAHO & MARGARET A. SHIRAHO

(Being sued in the capacities as the administrators

of the estate of the late RICHARD SHIRAHO (DECEASED).....1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. a) **Ali Gadafi Hamisi and Khaled Hamisi** (suing as the administrators of the estate of the late **Hamisi Shaban Otinga**) hereinafter referred to as 1st and 2nd Plaintiffs, commenced their claim against **Dephine N. Shiraho and Margaret A. Shiraho** (being sued in their capacities as the administrators of the estate of the late **Richard Shiraho**). **The National Land Commission** and the **Honourable Attorney General**, hereinafter referred to as 1st to 3rd Defendant's respectively, through the plaint dated 9th July 2015.

b) That M/S Otieno, Ragot & Co. Advocates filed a memorandum of appearance dated 24th June 2015 on behalf of the 1st Defendant.

c) That the Litigation Counsel filed the Memorandum of appearance dated 14th July 2015 and statement of defence dated 13th July 2015 on behalf of the 3rd Defendant.

d) That M/S Bruce Odeny & Company Advocates for the Plaintiffs filed notice of withdrawal of suit against 3rd Defendant dated 17th July 2015 on the 20th July 2015.

e) That the Plaintiff's counsel subsequently filed two requests for judgment against the 1st and 2nd Defendants dated 28th July 2015 on the 4th August 2015. The interlocutory judgment was entered on 20th August, 2015.

f) Then on the 4th September 2015, the Plaintiffs filed the chamber summons dated 1st September

2015 seeking to have the Attorney General added as the 3rd Defendant. The application was allowed on 12th April 2016.

g) The 1st Defendant statement of defence dated 13th April 2016 was filed on 14th April 2016 and a reply thereto dated 2nd May 2016 was filed by the Plaintiffs' counsel on 13th May 2016.

h) The Plaintiff filed an amended plaint dated 11th May 2016 on the 16th May 2016.

2. That the Plaintiffs then filed the notice of motion dated 13th May 2016 seeking for the following main prayers;

"2. That a temporary injunction do issue directed at the 1st Defendants, their employees, workers, agents and/or whomsoever jointly and severally restraining them from trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, evicting the Plaintiff, dealing and/or interfering whatsoever with land parcel Kisumu Municipality Block 5/973 (formally unsurveyed plot No.96 Kaloleni, Kisumu) pending the hearing and determination of this application.

3. That a temporary injunction do issue directed at the Defendants, their employees workers, agents and/or whomsoever jointly and severally restraining them from trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, evicting the Plaintiff dealing and/or interfering whatsoever with land parcel Kisumu Municipality/Block 5/973 (formally unsurveyed Plot No.96 Kaloleni, Kisumu) pending the hearing and determination of this suit."

3. That the counsel for 1st Defendant then filed the notice of preliminary objection dated 8th June 2016 and a replying affidavit sworn by **Bephine Shiraho** on the same date.

4. The application dated 13th May 2016 came up for hearing on 9th June 2016. The Counsel for the 3rd Defendant indicated that the application do not touch on their client and opted out of its hearing. The court heard counsel for the Plaintiffs and the 1st Defendant and directed that the preliminary objection be heard first as it related to both the main suit and the notice of motion. Both counsel made their oral rival submissions which are summarized hereinbelow;

A. 1ST DEFENDANT'S COUNSEL SUBMISSIONS:

i) The learned counsel submitted on two grounds that the proceedings are vexatious and that the suit is res judicata. The counsel referred to the previous suits between the same parties, being Winam Senior Resident Magistrates Court **Civil No.495 of 2004, Francis Muhia Mutungo & Richard Shiraho -V- Ali Gaddaffi Hamisi & Farida A. Salim** which proceeded to full hearing and a decision rendered on 20th June 2013. That the issues in that case were the same in this case. That the only difference in the earlier case and the current one is the addition of the 2nd and 3rd Defendants in this matter as they were not parties in the earlier case.

ii) That following the Winan Court decision the Plaintiffs lodged Kisumu Environment and Land **Civil Appeal No.48 of 2013** which is still pending and in terms of explanation **4 of Section 7 of the Civil Procedure Act**, this case is res judicata as the issues herein have been adjudicated and determined by a competent court. In view of **Section 22 of Schedule 6 of the Constitution 2010** and the Chief justice practice directions on how the pending environment and land cases were to be handled, the lower court was a competent forum to deal with the matter.

iii) That had the Plaintiffs had any claim against the 2nd and 3rd Defendants, they should have applied to enjoin them under **Order 7 Rule 3 and 8** of the Civil Procedure Rules through filing a counterclaim in the Winam Court case. That what the Plaintiffs are attempting to do is to prosecute their claims in piecemeal which is against **Order 3 Rule 4** of the Civil Procedure Rules.

vi) That the Plaintiffs have made two previous applications similar to the notice of motion dated 13th May 2016. The applications are the notice of motion dated 4th June 2013 and 22nd May 2015 in the ELC C.A NO.48 of 2013 which were dismissed vide the rulings dated 7th May 2015 and 12th May 2016 respectively.

B. PLAINTIFFS' COUNSEL'S SUBMISSIONS:

i) The learned counsel submitted that the preliminary objection has not raised pure points of law as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd -V- West End Distributors Ltd** 1969 E.A 698 and should therefore be dismissed with costs.

ii) That this case is not res judicata and therefore **Section 7 of the Civil Procedure Act** does not apply as the parties in the Winam court case are different from the parties herein. That the Defendant in the Winam case is not a party in this suit while the 2nd and 3rd Defendants herein were not parties in the Winam court case.

iii) That the subject matter in the Winam court case was restraining orders in respect of Plot No.96 against a party who is now not a party in the current case, while the subject matter in this case is **Kisumu Municipality Bloc 5/973** and orders sought are for mandatory injunction.

iv) That the facts herein are in dispute and the preliminary objection has no basis.

4. That Article **162 (2) (b)** of the constitution established the Environment and Land Court and that the Environment and Land Court Act commenced on 30th August 2011 giving the Environment and Land Court exclusive jurisdiction. That by then the Winam Court case was still pending and the subordinate court admitted that it had no jurisdiction to deal with the issue of fraud. That the High court in Malindi has recently stayed the provisions of the law that gave the lower courts jurisdiction in environment and land cases.

vi) That the issues before this court are matters that the Winam Court indicated that it did not have jurisdiction on. That the appeal on the Winam court case cannot be taken as another suit in view of **Order 3 Rule 1** of Civil Procedure Rules which defines what a suit is.

5. The following are the main issues for the courts determination;

- a) Whether this suit is res judicata
- b) Whether this suit is vexatious and an abuse of the court process.
- c) Who pays the costs.

6. The court has carefully considered the grounds on the notice of preliminary objection dated 8th June 2016, the rival submissions by both counsel, and come to the following conclusions:

a) That in Winam R.M. C.C. NO.495 OF 2004, **Francis M. Mutungo and Richard Shiraho** were the 1st and 2nd Plaintiff, according to the amended plaint dated 15th July 2004. The said plaint indicated that **Ali Gaddafi Hamisi** and **Farida Salim** were the 1st and 2nd Defendants respectively. It is also apparent that at paragraph 4 of the said plaint, the 2nd Plaintiff (**Richard Shiraho**) averred that he "**was and still is the proprietor of all that unsurveyed parcel of land known as Plot No.96 Kaloleni, Kisumu Municipality**" The Plaintiff had at paragraph 5A of the said plaint averred that the "**Defendants have unlawfully trespassed onto the suit parcel of land by encroaching thereon without the consent and/or authority of the 2nd Plaintiff and the 2nd Plaintiff has suffered loss and damages and is likely to continue doing so unless the Defendants are restrained by this court.**" The Plaintiffs main prayer was for "**a permanent injunction restraining the defendants by themselves, servants, agents and/or any person on their behalf from encroaching/trespassing or constructing any structures or fencing of the**

suit plot No.96 Kaloleni."

The Defendants filed amended statements of defence dated 28th February 2005 disputing that the 2nd Plaintiff was the proprietor of the said plot and alleging fraud on the 2nd Plaintiff in "**misleading Kisumu Municipality Council to allow him to pay rates and Council fees even after the allotment letters had been cancelled**" and "**presenting to court false letters of ownership.**"

That the judgment delivered on 20th June 2013 by the learned Trial Magistrate Hon. C.M. Sindani clearly shows that the 2nd Plaintiff (**Richard Shiraho**) had died while the suit was pending and was replaced by **Elizabeth K. Shiraho**. The said judgment further show that the 1st Defendant had confirmed during cross examination that "**plot No.96 Kaloleni was indeed KSM/Block 5/973**". That after the learned trial magistrates had considered the evidence before the court, he made the following finding;

"I note that the Defendant amended their defence to plead fraud on the part of the 2nd Plaintiff but this was never established at the trial of the case. And I should add that should even fraud could have been proved, the court could not interfere with the title as that could have been the reserve of the High Court and the now Environment and Land Court. Accordingly since the 2nd Plaintiff is the registered owner with title, I hold that his claim is superior to that of the Defendants. The claim is sustained and judgment entered in his favour as prayed in the plaint. And further since it was brought to the attention of this court that some structures were erected on the suit premises in clear defiance of court orders prohibiting developing and maintaining status quo, it is ordered that the same shall be demolished. The Plaintiff has costs of the suit. Orders accordingly."

b) That it has not been disputed that the Defendants in the Winam court case, whose details are set out in (a) above, have preferred Kisumu H.C.C.A NO.48 of 2013 challenging the trial court judgment. The prayer in the memorandum of appeal dated 2nd July 2013 is for "**this appeal to be allowed with costs and the judgment dated 20/6/2013 of the learned magistrate to be set aside with costs and the same be substituted with an order dismissing the Plaintiff's suit in the original Winam SRMCC No.495 of 2004 with costs.**"

The said appeal is still pending before this court. That what prayer (c) in this instant suit seeks to do is obviously to overturn the orders of the learned Trial Magistrate of 20th June 2013 in disguise and without following the appeal process.

c) That the Appellants, namely **Ali Gaddafi Hamisi** and **Farida A. Salim**, in **Kisumu H.C.C.A NO.48 of 2013**, who were also the Defendants in the Winam court case had filed notice of motion dated 4th July 2013 and 22nd May 2015 seeking for among others "**stay of execution of the judgment**" in **Winam SRMCC NO.495 of 2004** dated 20th June 2013. That the two applications were heard and dismissed with costs on 7th May 2015 and 12th May 2016 respectively. That the notice of motion dated 13th May 2016 in this matter seeks more or less similar orders to those in the two applications that have been dismissed.

d) That the instant suit was filed by **Ali Gaddafi Hamisi** and **Khaled Hamisi** who are suing as the administrators of the estate of the late **Hamisi Shaban Otinga**. Their plaint state that they have filed "**this suit on behalf of the estate of the deceased**". The Plaintiff at paragraph 5 of the plaint dated 9th June 2015 avers that "**the deceased plaintiff was the bona fide and equitable owner of all that parcel of land known as unsurveyed plot No.96 Kaloleni now registered as Kisumu Municipality/Block 5/973**" The plaintiffs at paragraph 6 of the said plaint further alleges that the 1st Defendant, **Belphine N. Shilaho** and **Margaret A. Shiraho** being sued as administrators of the estate of the late **Richard Shiraho**) "**fraudulently obtained a similar allotment letter and then proceeded to unlawfully register himself as the proprietor thereof**"

The Plaintiffs prayers summarized as follows;

i) A declaration that the allotment letter in favour of the 1st Defendant and subsequent registration as proprietor of **Kisumu Municipality/Block 5/973** was illegal and null.

ii) That 3rd Defendant be ordered to rectify the register of the said land by removing the 1st Defendant's names and substituting thereon with the names of **Hamisi Shaban Otinga** (deceased).

iii) Permanent injunction against 1st Defendant over the suit land.

e) That from the foregoing it is crystal clear that the subject matter in both Winam Court Civil Case No.495 of 2004 and this suit is essentially ownership and possession of land parcel **Kisumu Municipality/Block 5/973** which was formerly unsurveyed Residential **Plot No.96- Kaloleni, Kisumu Municipality**.

f) That in the Winam court case No.495 of 2004, the Plaintiffs therein prayed for and obtained permanent injunctive orders against the Defendants from the suit property. That the Plaintiffs in the current suit are also seeking permanent injunctive orders against the 1st Defendant over the same suit property. That it is therefore important to establish the relationship between the parties in the Winam court case and the parties herein.

g) That **Francis M. Mutungu**, the 1st Plaintiff in the Winam court case was a peripheral party in that he was on the plot as a tenant. The 2nd Plaintiff **Richard Shiraho** had claimed ownership of the suit property. The said **Francis M. Mutungu** is not a party in the current suit. That when the Winam court case was still pending, **Richard Shiraho** passed on and one **Elizabeth K. Shiraho**, a daughter to the deceased, came on board on the strength of letters of administration.[see pages 1 and 2 of the judgment].

That **Ali Gaddaffi and Farida A. Salim**, who were the 1st and 2nd Defendants in the Winam court case were husband and wife as confirmed in the learned trial magistrate's judgment at page 3. Their claim of entitlement to the suit land was laid out at paragraph 7 of the 1st Defendant amended defence dated 28th February 2005 in the following terms:

" 7. The 1st Defendant contends that he being the lawful son of Hamisi Shaban (deceased) who is the rightful allottee of UNS. RESIDENTIAL PLOT 96 KALOLENI KISUMU MUNICIPALITY, he has the right of his deceased father's plots of which he and his brother KHALED KHAMISI SHAMBANI has filed Succession Cause being KISUMU HIGH COURT SUCCESSION CAUSE NO.717 OF 2004 to succeed their deceased father."

h) That in the instant suit **Ali Gaddaffi Hamisi and Khaled Hamisi**, are suing as administrators of the estate of their deceased father, **Hamisi Shaban Otinga**, are the Plaintiffs. They have exhibited in their list of documents the grant issued in **Kisumu H.C. Succession cause No.717 of 2004** on 23rd September 2004. The Plaintiffs interests are that of a beneficiary to the estate as they would stand to benefit if they are successful to have the suit land land become part of their deceased father's estate. That **Ali Gaddaffi Hamisi** as the 1st Defendant in the Winam court case, had used a similar defence in that suit but was not successful. The learned Trial Magistrate upheld the title of **Richard Shiraho** over that claimed by **Ali Gaddaffi** and issued permanent injunction against him. The learned Trial Magistrate further ordered demolition of some structures built on the suit land while the case was pending in court. What the Plaintiffs seems to seek under **prayer (c)** in this suit is a reversal of the learned Trial Magistrate's judgment in the Winam court case without following the usual appeal process. This court is aware that **Kisumu H.C.C. A NO.48 of 2013** which is an appeal over the Winam Court case judgment is still pending before this same court and it would not be wise to say more on the merit or otherwise of the appeal. That it suffices to say that the Winam court pronounced itself on the ownership and possession of the suit land as between **Richard Shiraho and Hamisi Shaban Otinga** and, or those claiming under them. The proper forum to challenge that is through the appeal process and not to file another suit over the same

subject matter by the same party or parties or by those claiming under them as to do so contravenes **Section 7 of the Civil Procedure Act** Chapter 21 of Laws of Kenya.

i) That **Belphine N. Shiraho** and **Margaret A. Shiraho** are sued in this suit as administrators of the estate of the late **Richard Shiraho** who was the 2nd Plaintiff in the Winam Court case. That as administrators, they are beneficiaries of their late father's estate which includes the suit property. That as already pointed out in (h) above, the forum to challenge the learned Trial Magistrate's orders in the Winam court case is through an appeal and not filing another suit over the same issues that have already been decided upon between the same parties and or those they claim under.

j) That the principle of res judicata is captured in the Kenyan statutes under **Section 7** of the Civil Procedure Act (Supra) as follows:

" No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. "

That this court has already made a finding that the subject matter in the decided Winam court case is the same with the subject matter in the instant case. That the prayer of injunction from the suit land in the Winam court is substantially similar to prayer (c) in the instant case. That the issue of fraud in the way **Richard Shiraho**, the 2nd Plaintiff in the Winam court case, was raised by the defendant therein, who is also the 1st Plaintiff in this suit, and the learned trial magistrate pronounced himself on it. That the fact that **Farida A. Salim** who was the 2nd Defendant in the Winam court case is not a party in the instant case does not alter the basis of the defence they had offered which is more or less similar to the foundation of the case of the Plaintiffs in the instant matter.

k) That had the Defendants in the Winam court case or any other person with beneficial interest in the estate of **Hamisi Shaban Otinga**, including **Khaled Hamisi** (2nd Plaintiff), wanted to participate in those proceedings they ought to have applied to be enjoined in that previous case. The Defendants and such other claiming under the said **Hamisi Shaban Otinga** would also have raised their defence and or counter claim to the claim raised by **Richard Shiraho** and or those claiming under him in that previous case.

l) That the foregoing shows clearly that the issue of ownership and possession of the land parcel **Kisumu Municipality/Block 5/973**, formerly unsurveyed Residential **Plot No.96 Kaloleni**, Kisumu Municipality, as between **Richard Shiraho** and **Hamisi Shaban Otinga** or those claiming under them was decided in Winam court case **No.495 of 2004** on 20th June 2013 and this suit is therefore res judicata as between the Plaintiffs and 1st Defendants herein.

m) That the Plaintiffs suit against the 1st Defendants is therefore vexatious and an abuse of the courts process in view of the existence of the judgment of the learned Trial Magistrate dated 20th June 2013 which is subject matter of the pending **Kisumu H.C.C.A NO.48 of 2013**.

h) That the Plaintiffs herein have already filed two notices of motion dated 4th July 2013 and 22nd May 2015 seeking for injunctive orders in **Kisumu HC.C.A. No.48 of 2013** and lost with costs. The prayers in the notice of motion dated 13th May 2016 are also injunctive in nature and are indirectly and primarily aimed at stopping the execution of the learned Trial Magistrate's orders of 20th June 2013 in the Winam Court case. That in other words, what the Plaintiffs herein seeks to get is what the Appellants licants in Kisumu H.C.C.A NO.48 of 2013 have failed to get and is to say the least an abuse of the courts process.

7. That the 1st Defendant preliminary objection is upheld and the following orders issued;

a) That the plaintiffs suit against the 1st Defendant is res judicata, vexatious, and an abuse of the courts process in view of the previously decided case being **Winam RMCC NO.495 OF 2004**.

b) That the plaintiffs suit against the 1st Defendant is consequently struck out with costs.

c) That the Plaintiffs notice of motion dated 13th May 2016 as against the 1st Defendant is also struck out with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF JULY 2016

In presence of;

Plaintiffs Absent

Defendant s Absent

Counsel Mrs. Onyango for Ragot for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016

13th July 2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Mrs. Onyango for Ragot for 1st Defendant.

Court: Ruling delivered in open court in presence of Mrs Onyango for Ragot for the 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016