



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO.81 OF 2015

AMELEA TABITHA

ODHOCH.....APPLICANT

[Suing as Legal representative and adminIstratix of the estate of the late EDWARD KANGAH ANYUMBA]

VERSUS

JARED OCHIENG

RABURU.....1ST RESPONDENT

PHILIP TITO OKOTH

RABURU.....2ND RESPONDENT

DISTRICT LAND REGISTRAR

KISUMU.....3RD RESPONDENT

RULING

1. The notice of motion dated 24th March 2015 was filed by **Amelea Tabitha Odhoch**, the Applicant, seeking to have Jared Ochieng Raburu and Philip Tito Raburu, hereinafter referred to as 1st and 2nd Respondents, restrained from interfering with the Applicant's use of land parcel **Kisumu/Kochieng/2884** pending the hearing and determination of this suit. The Applicant listed eleven grounds on the notice of motion which is also supported by her affidavit sworn on 24th March 2015.
2. The application is opposed by the Respondents through the grounds of opposition dated 29th October 2015 and replying affidavit sworn by the 2nd Respondent on 18th November 2015.
3. The application came up for hearing on the 11th February 2016 when Mr Ouma for Applicant, M/S Adwar for Mwamu for 1st and 2nd Respondents and M/S Aliongo for the 3rd Respondent entered a consent that the application be dealt with through written submissions. The Applicant's counsel filed their written submissions dated 6th June 2016 on the same date while the 1st and 2nd Respondent's counsel had filed theirs dated 10th March 2016. The counsel for the 3rd Respondent informed the court during the mention of 14th March 2016 that they would not file any submissions.
4. The issues for the court's determination are as follows;
 - a) Whether the Applicant has established a prima facie case for issuance of injunctive orders at this interlocutory stage.

b) Who pays the costs of the application.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence filed by both parties, the rival written submission as detailed above and concluded as follows;

a) That from the copy of the register for parcel **Kisumu/Kochieng/2884**, which is hereafter referred to as the suit land availed before the court, the land was first registered on 29th May 2003 in the names of **Osewe Otieno** as the first registered owner.

b) That the Applicant's claim over the suit land is based on her being the daughter of **Edward Kangah Anyumba**, who died on 4th April 2000 as per the certificate of death No.011287, and who had reportedly bought the suit land from **Osewe Otieno**, the then registered proprietor. That the Applicant has availed a copy of a sale agreement made on 27th November 2014 between herself and **Selina Osewe and Ochieng Osewe**, who are widow and son to **Osewe Otieno**. That **Osewe Otieno** is reportedly deceased. That the said relatives of Osewe Otieno undertakes in the agreement to assist the Applicant have the suit land transferred to her husband's estate.

c) That the Applicant has obtained a limited grant ad litem issued in Kisumu High Court Probate and Administration cause **No.170 of 2015** on 26th February 2015 authorizing her to file suit for the estate.

d) That the Respondents reply to the Applicant's claim to the suit land is that they bought the land from the family of the late **Abuto Kai** who had earlier bought it from one **Phillip Nyaoke**. That the suit land register availed herein do not contain the names of **Abuto Kai** or **Phillip Nyaoke** as previous registered proprietors of the suit land.

e) That while the Respondents only got registered with the suit land on 2nd July 2013, as per the copy of the register, and have not availed evidence of occupation, the Applicant has shown that the suit land has been in possession of her father and now herself for many years and that they have carried out developments on it from which they draw rent.

f) That even though the Respondents are the registered proprietors of the suit land and that under **Section 26(1) of the Land Registration Act No.3 of 2012** they should be taken as the absolute and indefeasible owners, their title has been challenged by the Applicant. The provision of **Section 26(1) of the Land Registration Act No.3 of 2012** states as follows;

"26(1) The certificate of title issued by the Registrar under registration, or a purchase of land upon a transfer or transmission by the proprietor shall be taken by our courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of the proprietor shall not be subject to challenge, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

g) That the Applicant has challenged the Respondents title to the suit land through the plaint dated 24th March 2015 alleging fraud and it is only fair that the party in possession or occupation of the suit land continue using it pending the hearing and determination of this suit.

6. That in view of the foregoing, the court finds that the notice of motion dated 24th March 2015 has merit and is allowed in terms of prayer 3 with costs in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF OCTOBER 2016

In presence of;

Applicant Absent

Respondent s Absent

Counsel Mr Omondi for 1st and 2nd Respondents

M/S Langat for 3rd Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/10/2016

5/10/2016

S.M. Kibunja J

Parties absent

M/S Langat for 3rd Respondent

Mr Omondi for 1st and 2nd Respondents

Corut: ruling dated and delivered in open court in presence f M/s Langat for 3rd Respondent and Mr Omondi for the 1st and 2nd Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/10/2016