



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
ELC. NO. 31 OF 2014 (FORMERLY HCC. NO. 47 OF 2010)
MICHAEL OMBARA AJUOGA.....PLAINTIFF
VERSUS
SAMWEL MACHIO ODANGA.....DEFENDANT
AND
MONICA FAUSTINE ADHIAMBO.....1ST APPLICANT
HILLARY OKICHI OWOCHE.....2ND APPLICANT

R U L I N G

MONICA FAUSTINA ADHIAMBO and **HILLARY OKICHI OWOCHE**, hereinafter referred to as the 1st and 2nd Applicant, filed the notice of motion dated 26th January, 2015 praying for among others, that they be enjoined in this proceedings as Defendants. The application is based on five grounds on the face of the application and the Applicants supporting affidavits, both sworn on 26th January, 2015 and further affidavit of 1st Applicant sworn on 3rd March, 2015.

MICHAEL OMBARA AJUOGA and **SAMUEL MACHIO ODONGA**, who are the initial Plaintiff and Defendant respectively, are named as the 1st and 2nd Respondent. The 2nd Respondent filed a replying affidavit sworn on 14th February, 2015 in which he supports the Applicants position generally. The 1st Respondent filed his replying affidavit sworn on 16th February, 2015 in opposition to the application.

During the hearing of the application on 16th March, 2015, M/S. Unani and M/S. Maloba submitted on behalf of the Applicants and 1st Respondent respectively, while the 2nd Respondent was in person.

The court has considered the grounds on the application, supporting, replying and further affidavits by the parties and their submissions and find as follows;-

1. That the 1st Respondent commenced the suit through the plaint dated 15th October, 2010 naming the 2nd Respondent as the Defendant.
2. The 2nd Respondent was served with the court papers but never filed any defence to the claim.

3. That the 2nd Respondent appointed the firm of Namatsi & company advocates who filed a notice of appointment dated 21st July, 2014 after the firm of Makokha Oaka & company advocates were allowed to cease acting for Defendant on 25th March, 2014.
4. That on 25th March, 2014, the 2nd Respondent was granted the last opportunity to file and serve a defence within 30 days but none has been filed to date.
5. That on 19th January, 2015, the 1st Respondent was allowed to prosecute his case and testified as PW 1. The court then reserved the judgment for 16th February, 2015.
6. That before the date set for judgment, the application dated 26th January, 2015 was filed and orders issued on the same date that it be served for interpartes hearing on 16th February, 2015 which was the date earlier set for judgment.
7. That paragraph 1, 3, 4, 5, 7, 8 and prayer 1 of the plaint clearly shows that the 1st Respondent had filed this suit against the 2nd Respondent, whom he accused of fraudulently subdividing and acquiring a portion of the suit land, in his capacity as the administrator of the estate of Bartholomew Mukhando Oluochi. The 1st Respondent had been appointed as administrator of the said estate in Busia H.C. Succession Cause No. 18 of 2009 on 6th May, 2009.
8. That a copy of the affidavit in support of the petition for letters of administration intestate attached to the 1st Respondent's replying affidavit at paragraph 4 names the two Applicants herein as among those surviving Bartholomew Mukhando Owoche. The Applicants have annexed a copy of a notice of motion dated 24th January, 2015 in Busia H.C. Succession Cause No. 18 of 2009 in which they seek the revocation of the grant issued to 1st Respondent on 6th May, 2009. There is nothing to indicate whether the application had been heard and ruling delivered by the time of the hearing of this application. That in the absence of orders revoking the grant issued to the 1st Respondent on 6th May, 2009, the 1st Respondent capacity to file and prosecute this suit cannot be faulted.
9. That the 1st Respondent's claim against the 2nd Respondent remains unrebutted or challenged as the 2nd Respondent has to date not filed any defence. It is therefore confusing that the 2nd Respondent is supporting the Applicants application to reopen the case and be enjoined as Defendants.
10. That even though the Applicants have delayed in seeking to be enjoined in this suit, the court cannot ignore their predicament now that they have come forward. This court has a duty to hear and determine the matters that come before it expeditiously while ensuring justice is done to all who come before it. The 1st Respondent had incurred expenses in prosecuting his case and was only awaiting the court's judgment. By allowing the Applicants' application, the 1st Respondent will have to incur additional costs as the matter will revert to the starting point. The Applicants should therefore meet the costs of the 1st Respondent up to the point the matter had reached.
12. That for reasons shown above, the Applicants' application dated 26th January, 2015 is allowed in the following terms.
 - a. That the proceedings that took place on 19th January, 2015 are hereby set aside.
 - b. That the Applicants are hereby enjoined as 2nd and 3rd Defendants respectively.
 - c. The Applicants, as the 2nd and 3rd Defendants respectively are granted 15 (fifteen) days to file and serve their statement of defence.

d. That the Applicants will meet the costs incurred by the 1st Respondent/Plaintiff upto the filing of this application.

e. That the costs of this application will be in the cause.

f. That the costs in (d) above are to be agreed within the next 14 days and in default to be taxed and thereafter paid within 30 days from the date of consent and or taxation.

S. M. KIBUNJA

JUDGE

DATED AND DELIVERED ON 7th .DAY OF MAY, 2015

IN THE PRESENCE OF;

PLAINTIFF/RESPONDENT...PRESENT

DEFENDANT/2ND RESPONDENT PRESENT.....

1ST APPLICANT ABSENT

2ND APPLICANT ABSENT.....

COUNSEL MR. ASHIOYA FOR MALOBA FOR PLAINTIFF AND MR. MAKOKHA FOR MASINDE FOR APPLICANTS.

JUDGE