



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT CASE NO.15 OF 2015**  
**CHARLES CHEGE NJOROGE.....1<sup>ST</sup> PLAINTIFF**  
**MAHENDRA ENTERPRISES LTD.....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**RICHARD MEMBO GUYA**  
**T/A RAMOGI CHEMIST.....DEFENDANT**  
**AND**  
**SILAS OTIENO OKAL (CHAIRMAN)**  
**JULIAS AGONO (SECRETARY)**  
**PETER MARANGA (TREASURER) Suing on behalf of**  
**KISUMU MUNICIPALITY Staff**  
**Burial and Benevolent Fund.....INTERESTED PARTY/APPLICANTS**

**R U L I N G**

The Applicant, **Kisumu Municipality Staff Burial and Benevolent Fund**, through its officials namely **Silas Otieno Okal, Julius Agono** and **Peter Maranga**, filed the notice of motion under Certificate of Urgency dated 2<sup>0th</sup> February 2015 seeking to be enjoined as the 2<sup>nd</sup> Defendants in this suit. The application is based on the following six grounds marked (a) to (f).

- " (a) That the proposed 2<sup>nd</sup> Defendants has a valid Temporary occupation Liscence and has been in occupation of the suit parcel ever since 1995.
- (b) That the 1<sup>st</sup> Defendant is the proposed 2<sup>nd</sup> Defendant tenant and primarily it is their interest affected by this suit.
- (c) That the proposed 2<sup>nd</sup> Defendant is a person whose presence before court is necessary to enable court effectually and completely adjudicate upon and settle all questions involved in the suit.
- (d) That the 2<sup>nd</sup> Defendant is registered under the Society Act (Certificate of registration number

15813).

(e) That this is a proper and fit case to grant the orders sought as the 2<sup>nd</sup> Defendant intends to file a weighty counterclaim to have the plaintiff title, Kisumu/ Municipality Block 4/883, cancelled as it was obtained through blatant fraud and will be challenged in all forms.

(f) That this application is made in good faith and is deserving in equity.."

The application is supported by the affidavits sworn by Silas Otieno Okal on 20<sup>th</sup> February 2015 and 29<sup>th</sup> May 2015. The application is opposed by the 1<sup>st</sup> the plaintiff herein referred to as the Respondent through the replying affidavit sworn by Charles Chege Njoroge on 8<sup>th</sup> May 2015. The application came up for hearing on 25<sup>th</sup> June 2015 and the court directed that submissions be filed. The Counsel for the Applicant filed their submissions dated 3<sup>rd</sup> July, 2015 and the Respondent's Counsel filed theirs dated 30<sup>th</sup> June 2015.

The issue for determination is whether the Applicant has demonstrated a legal right over the subject matter of this suit that makes it necessary for their participation to enable the court determine the issues before it with a finality.

The basis of the Applicant's claim over the suit land is that the plot was allocated to the Society in 1995.

The Applicant annexed to the Affidavit sworn on 20<sup>th</sup> February 2015 a copy of their letter dated 30<sup>th</sup> August 1995 applying for a plot at Kibuye Market addressed to the Municipal Council of Kisumu and a copy of a reply dated 29<sup>th</sup> December 1995 conveying approval of the application under Minute 3 (d) 69 of 13<sup>th</sup> December 1995. The Applicant, through the further affidavit sworn on 29<sup>th</sup> May 2015 depones that while the Respondent's letter of allotment gave the size of the plot as 0.10 hectares, the lease document issued in his favour thereafter gave the size as 0.18 hectares. The deponent stated that the change in acreage shows that the Respondent had taken an extra 0.08 hectares more than that allocated. The Applicant's Counsel submitted that under Order 1 Rule 10 of the Civil Procedure Rules, the Court has jurisdiction to enjoin the Applicant as a party. The Counsel also referred the court to the decision in Warret & Co. Ltd and Another -V- Andrew Gregory & others Milimani HCC NO.2363 of 1998. However counsel did not annex a copy of the said decision to the submission. On his part the Respondent opposed the application and deponed that the Applicant's temporary occupation licence issued by the defunct Municipal Council of Kisumu on 29<sup>th</sup> December 1995 does not have any connection with the suit land and is incapable to challenge his rights as the registered proprietor. The Respondent deponed that he had initially applied for the plot in 1992 and his application was approved vide letter dated 12<sup>th</sup> February 1993. Thereafter he was allocated an allotment letter for the unsurveyed Commercial plot B measuring approximately 0.10 hectares. The Respondent then had the plot surveyed and a lease was issued in his favour for Kisumu Municipality/Block 4/876 and a certificate of lease issued in the names on 3<sup>rd</sup> February 2012. The Respondent then had the plot subdivided into parcels 883 and 884 and transferred the former to the 2<sup>nd</sup> plaintiff in 2014. That as the Respondent was placing the 2<sup>nd</sup> plaintiff into possession, he discovered that the Defendant had encroached onto the suit land and hence this suit. The Respondent's Counsel submitted that the Respondent's title to the suit land has not been challenged in accordance with the law and the Applicant's claim to the suit land on the basis of the temporary occupation licence is not maintainable in law against the Respondent. The Counsel submitted that the Applicant are not a necessary party in this suit and their application to be so enjoined should be rejected with costs. The Counsel referred the court to the decisions of Mohammed Wasame J, (as he then was) in Beyamin Kipketer Tai - V - Kenya Commercial Bank Kisumu HCC NO.87 of 2003 where the court disallowed an application to be enjoined as parties for failure to "show any legal right which would be curtailed by the parties herein."

The Court has considered the deposition in the supporting, further and replying affidavits filed herein and the annexures thereto. The court has also considered the submissions by Counsel and the

following are apparent:

(a) That the Applicant got their temporary occupation licence through the letter dated 29th December 1995. The letter asked the Applicant to "liase with the Town Engineer for the precise sitting" of the plot. It is apparent that some two years earlier the Respondent had been granted a temporary occupation licence vide letter dated 12<sup>th</sup> February 1993. In the said letter under (1), the Respondent was informed that "The parcel of land where you will operate will be identified to you by Town Planner."

The court takes it that the plot that the Respondent was given under the 1993 letter is different from the one given to the Applicant under the 1995 letter. Had the plot given to the two have been the same, complaint would have arisen immediately the Applicant went to take possession on or about 1995 or soon thereafter.

Though Counsel did not address the court on the legal regime governing the issuance of temporary occupation licences by the defunct local Government authorities, the court takes it that they were being issued under Section 144(5) of the Local Government Act Chapter 265 of Laws of Kenya (Repealed). The Local authorities were under the said provision allowed to "let, or grant to any person a licence to occupy, any land which it may possess -

(a) with the consent of the Minister for any term;

(b) without the consent of the minister, unless such consent is required by section 177 or by any written law, for a term not exceeding seven years, and may, in respect thereof, charge rents, stand premium or fees."

The Applicant has not availed any documentary evidence to show that the minister's consent had been obtained when they were granted the temporary occupation licence in 1995. It would therefore mean their allotment was for a term not exceeding seven years from December 1995. There is no evidence availed by the applicant of their temporary occupation licence being renewed after the expiry of the seven year period or that their allocation has been converted to an allocation of a longer period than seven years.

On the other hand the Respondent has exhibited documentary evidence to show that he had vide the letter dated 12<sup>th</sup> September 2000 obtained a no objection from the Municipal Council of Kisumu to his application to have his temporary occupation licence converted to a Commercial plot. The Respondent was granted a lease to the plot and on 3<sup>rd</sup> February 2012 was issued with a certificate of lease over Kisumu Municipality/Block 4/876 for a term of 99 years from 1<sup>st</sup> July 1999. There is no evidence so far provided to suggest that the plot the Applicant was granted through the temporary occupation licence of 1995 is now part of Kisumu Municipality Block 4/876 or the subdivision thereof. Even if such evidence had been availed, and in the absence of evidence renewing or extending the temporary occupation licence issued in 1995, the court find that the seven years having expired on or about 2002, the same has since expired. The said 1995 licence would be insufficient basis of challenging the Respondent's legal right conferred under the lease and certificate of lease issued in 2012.

That if it is the Applicant's case that the Respondent's title to the suit land was obtained through fraud, then it is upon the Applicant to cause the necessary legal action to be taken in accordance with the law, but until then, the court is obliged under Section 26 of the Land Registration Act No.3 of 2012 to take the Respondent as the proprietor of Kisumu Municipality/Block/ 4/876 from which parcel 883 was sub divided and transferred to the 2<sup>nd</sup> plaintiff in 2014.

From the foregoing the court finds that the Applicant has failed to show that it has a legal right over the suit land Kisumu Municipality/Block/ 4/883 that requires its being enjoined as the party in this suit. The application dated 20th February 2015 is without merit and is dismissed with costs to the Respondent/Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and Delivered 12th this October, day of 2015

IN PRESENCE OF

Plaintiff N/A

Respondent N/A

Counsel Mr Indimuli for Kimanga for plaintiff

Mr Onyango for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/10/2015**

12/10.2015

S.M. Kibunja J.

Oyugi court clerk

Court: The Ruling was for 14/10/2015 but the court will not be sitting on that day.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/10/2015

Mr Onyango for Defendant

Mr Kimanga for Plaintiff absent but I will notify him. Ruling may be read.

Mr Indimuli for Kimanga for Defendant has arrived.

Court: Ruling delivered in open court in presence of Mr Indimuli for Kimanga for plaintiff and Mr Onyango for Defendant.

Mr Onyango: We pray for leave to appeal.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/10/2015

Mr Idimuli: No objection.

Court: Leave to appeal granted.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

12/10/2015