



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 3 OF 2018

IN THE MATTER OF ARTICLES 3, 19, 20, 22, 23, 40, 50, 64 & 159 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 AND 64 OF THE COSTITUION OF KENYA

AND

REGISTERED LAND ACT (NOW REPEALED) – CHAPTER 300.

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

THE LAND ACT 2012

AND

IN THE MATTER OF CONTRAVENTION OF RIGHT TO PROPERTY

IN THE MATTER OF FRAUDULENT REGISTRATION AND PURPORTED ACQUISITION WITHOUT COMPENSATION OF TITLE NO. KISUMU/NYALENDA ‘B’/463

BETWEEN

FRANCIS OKECH OGNEDO.....PETITIONER

VERSUS

RAELI CHEPKURGAT CHELUGET, JOHNSTONE KIPKOECH LANGAT, LAURENCE

KIMMUTAI LANGAT AND KENNETH KIPYEGON LANGAT sued as the

administrators of the estate of ISAYA CHELUGET.....1ST – 5TH RESPONDENTS

LAND REGISTRAR KISUMU DISTRICT LAND REGISTRY.....6TH RESPONDENT

RULING

1. Francis Okech Ogendo, the Petitioner filed the notice of motion dated the 18th June 2018, citing “*Articles 22, 23 and 159, the Sixth Schedule, Article 19 of the Constitution, Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2014, the Inherent Jurisdiction of the Court, and all enabling provisions of law as set out in the various statutes cited in support of the Petition*”, praying for a conservatory order restraining Rael Chepkurgat Cheluget, Johnstone Kipkoech Langat, Laurence Kimmutai Langat and Kenneth Kipyegon Langat, sued as the administrators of the estate of Isaya Cheluget, and Land Registrar, Kisumu, the Respondents, by themselves, agents or assigns from selling, dealing in and or transferring parcel Kisumu/Nyalenda ‘B’/463, pending the hearing and determination of the petition filed contemporaneously with the application. The application is based on the four grounds marked (a) to (d) and summarized as follows;

- That the Respondents have obtained confirmed grant of administration before the expiry of six months.

- **That the Respondents have commenced the process of selling the suit property to the County Government of Kisumu and unless stopped, it will prejudice the Petitioner who will be dispossessed.**

The application is supported by the affidavits sworn by the Petitioner on the 18th June 2018 and 7th November 2018 in which he depones as follows, among others;

- **That Respondents have moved the succession court through the summons for confirmation of grant dated 7th May 2018, filed in Kericho H. C. Succession Cause No. 14 of 2017, so as to sell the suit property.**
- **That upon spotting the Governor of Kisumu County Government at the suit property, their Lawyer wrote to him the letter dated 14th May 2018 notifying him of the existence of case number 123 of 2017, in which the family of Slivester Odembo Wamburi seeks to nullify the title of the late Isaya Cheluget to the suit property.**
- **That the Respondents have removed the restriction filed against the land by the Petitioner's late father without following the due process. That the Petitioner's advocate did a letter to the 2nd Respondent dated 15th May 2018 on the matter.**
- **That the Petitioner's grandparent had not sold the land to the late Isaya Cheluget and no written sale agreement has been availed.**
- **That the late Isaya Cheluget never took possession of the land as the wall and structures he had attempted to erect were destroyed.**
- **That the land is his ancestral land that was fraudulently taken by the late Isaya Cheluget.**

2. The application is opposed by the 3rd Respondent through the replying affidavit sworn by Lawrence Kimmutai Langat on the 1st October 2018 in which he among other depones as follows;

- **That they obtained the letters of administration intestate on the 24th January 2018 in Kericho H. C. Succession Cause No. 14 of 2017.**
- **That the suit land is part of their late father's estate having been registered as proprietor on the 28th March, 1990 after buying it from the Petitioner's grandfather and two others in 1974.**
- **That their late father had been in exclusive possession of the suit land from the date of death on the 26th June 1974.**
- **That the Petitioner's father had trespassed onto the land in 1994 and was arrested and later released on condition that he kept peace.**
- **That the Petitioner's claim to recover the suit land is time barred and that is why he has approached the court through the petition.**
- **That the petitioner has Kisumu C. M. Citation Cause No. 123 of 2017 pending, in which he obtained orders on the 9th May 2018.**

3. The court gave directions on filing and exchanging written submissions on the 15th November 2018. The Petitioner's counsel had by then filed theirs dated the 14th November 2018 and the 1st – 5th Respondents filed theirs dated the 22nd November 2018 on the 23rd November 2018.

4. The following are the issues for the courts determinations;

- a. Whether the Petitioner has established an arguable case on possibility of violation of his Constitutional rights unless conservatory order is issued over the said property.**
- b. Whether the Petitioner deserves the order sought.**
- c. Who pays the costs.**

5. The Court has after carefully considering the grounds on the motion, the affidavit evidence and the written submissions come to the following conclusions;

a. That land parcel Kisumu/Nyalenda 'B'/463 the suit property, measuring 1.2 hectares was first registered on the 28th March 1990 in the name of Isaya Chelugat. That the Petitioner alleges that the land was his ancestral land that was obtained and registered in the name of the late Isaya Cheluget, then Provincial Commissioner, fraudulently. The Respondents (1st to 5th) case is that their late father bought the suit land from the Petitioner's late grandfather and three others in 1974 and 1980, and after adjudication the land was registered in his name as the first registered proprietor. That in the 1994, the father to the Petitioner trespassed onto the said land and was arrested but later released on condition he maintained peace. That while the Petitioner disputes that his late grandfather had sold the land or received the purchase price from the late Isaya Cheluget, there is no evidence adduced to show whether his late grandfather and his father lodged any objection proceedings or appeal during the Land adjudication in accordance with **Section 26 and 29 of the Land Adjudication Act, Chapter 284 of Laws of Kenya**. That there is also no evidence availed that his grandfather and father had filed any suit against the late Isaya Cheluget to challenge his registration with the land before his reported demise in 2017.

b. That the Court takes the intention of the Petitioner in filing Kisumu C.M. Citation Case No. 123 of 2017 was to get a Succession

Cause in respect of the estate of the late Isaya Cheluget, who was registered as proprietor of the suit land, filed. That by the time the Petitioner filed this petition, he already knew of the existence of Kericho H. C. Succession Cause No. 14 of 2017, as he had obtained a copy of the summons for confirmation of Grant dated the 7th May 2018 filed therein, and which is attached to his supporting affidavit herein. That there is therefore nothing stopping the Petitioner from moving the Succession Court for the orders he desired when he field the citation at the Chief Magistrate's Court Kisumu.

c. That as the occupation and possession of the suit land by the late Isaya Cheluget until his demise in 2017, without having been displaced since 1994, when the trespassers were reportedly arrested and released on condition that they keep peace, the court finds that the Petitioner has failed to show what irreparable loss he is likely to suffer if the conservatory order is not issued. To issue the order may be taken by the Petitioner as a green light to enter into possession of the suit land before his evidence is tested through the trial processes to find out whether it suffices to impugn the title of the late Isaya Cheluget.

d. That as under **Section 26 of the Registration of Land Act No. 3 of 2016**, the court is obligated to take the person registered in the register issued by the Land Registrar as the absolute and indefeasible owner of the land described therein, the balance of convenience tilts against the Petitioner.

6. That in view of the foregoing, the court finds no merit in the Petitioner's notice of motion dated the 18th June 2018 and the same is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2019

In the presence of:

Petitioner Absent

Respondents Absent

Counsel Mr. Nyamweya for Petitioner

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE