



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 20 OF 2018**

**PHILIP OYIER KWASU.....1<sup>ST</sup> PLAINTIFF**

**CORNEL MASIMBA KWASU.....2<sup>ND</sup> PLAINTIFF**

**DANIEL OUMA KWASU.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**HENRY NDUKWE KWASU.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR – SIAYA.....2<sup>ND</sup> DEFENDANT**

**THE PRINCIPAL MAGISTRATE, SIAYA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed the undated and unsigned notice of motion on the 18<sup>th</sup> April 2018 seeking for the following prayers;

**a) Order to set aside the order dated 22<sup>nd</sup> March 2018 in Misc. App. No. 10 of 2018 and an order that the application therein be heard denovo before another court than the one that issued the order.**

**b) Stay of proceedings in Succession Cause No. 65 of 2017 before 3<sup>rd</sup> Respondent pending the hearing and determination of this suit.**

**c) Order requiring the 1<sup>st</sup> Defendant to reinstate the gate erected on North Gem/Malanga/1181 at the place and point it was before the order of 22<sup>nd</sup> March 2018 pending the hearing and determination of this suit.**

**d) Spent**

**e) Order of injunction restraining the 1<sup>st</sup> Defendant by himself or agents from trespassing on parcels North Gem/Malanga/1182, 1183, 1184 and 1185 pending hearing and determination of this suit.**

**f) Alternatively to (e) above, order restraining the 1<sup>st</sup> Defendant by himself or agent from using the access road that accesses North Gem/Malanga/1182 to 1185 pending the hearing and determination of this suit.**

**g) That the 1<sup>st</sup> Defendant be prohibited from unlawfully harassing, intimidating, threatening or interfering in any manner whatsoever with the quiet occupation and lawful enjoyment of the Plaintiffs parcels of land North/gem/Malanga/1183 to 1185 pending the hearing and determination of this suit.**

**h) Order compelling the Forest Officer Yala, to proceed to North Gem/Malanga/1183 prepare and hand over a report on the destroyed trees to the O.C.S Yala Police Station to be used in prosecuting the perpetrators of the said destruction pending the hearing and determination of the suit.**

**i) Order authorizing the Plaintiffs to erect their respective fences that were unlawfully destroyed by the 1<sup>st</sup> Defendant pursuant to the order of 22<sup>nd</sup> March 2018 pending the hearing and determination of this suit.**

**j) The O.C.S Yala Police Station to ensure compliance of the orders herein.**

**k) Any other order the court deems fit.**

**l) Costs be provided for.**

The application is predicated on the thirty four (34) grounds on its face and supported by the affidavits sworn by 1<sup>st</sup> Plaintiff on the 18<sup>th</sup> April 2018 and 13<sup>th</sup> September 2018.

2. The application is opposed by the 1<sup>st</sup> Defendant through his replying further affidavits sworn on the 21<sup>st</sup> May 2018 and 5<sup>th</sup> October 2018.
3. The application was mentioned for directions on the 30<sup>th</sup> April 2018 and reserved for ruling on the 3<sup>rd</sup> May 2018 when directions on filing and exchanging submissions among others were given. The learned Counsel for the Plaintiffs and 1<sup>st</sup> Defendant filed their written submissions dated 13<sup>th</sup> September 2018 and 8<sup>th</sup> February 2019 respectively.
4. The following are the issues for the court's determinations;

**a) Whether the Plaintiffs have made a reasonable case for the prayers sought, or any of them, to issue at this interlocutory stage.**

**b) Who pays the costs of the application.**

5. The Court has carefully considered the grounds on motion, the affidavit evidence by both sides, written submissions by both Counsel and come to the following conclusions;

a) That the suit was commenced by the Plaintiffs against Henry Ndukwe Kwasu, the Land Registrar Siaya and The Principal Magistrate Siaya, the Defendants, through the plaint dated 18<sup>th</sup> April 2018, and amended on 13<sup>th</sup> September 2018, seeking for various prayers among them, the following;

- **Declaration that 1<sup>st</sup> Defendant was registered with North Gem/Malanga/861 in trust for the Plaintiffs and the late Paulo Otieno Kwasu.**
  - **Declaration that the 1<sup>st</sup> Defendant registration with the said land was fraudulent.**
  - **“Order of Certiorari to quash” 1<sup>st</sup> Defendant’s title to the said land and have it registered with the late Reuben Kwasu.**
  - **Declaration that parcels North Gem/Malanga/1181 to 1185 were unlawfully subdivided from North Gem/Malanga/861 and unlawfully registered with 1<sup>st</sup> defendant and the late Paul Otieno Kwasu.**
  - **Order compelling 2<sup>nd</sup> Defendant and the Surveyor to do fresh subdivision of North Gem/Malanga/861 into four equal portions for the Plaintiffs and 1<sup>st</sup> Defendant.**
  - **Alternatively an order directing the Director of Survey to provide an independent surveyor other than the County Surveyor, Siaya to do a mutation which carries with the Registered Index Map (RIM) and establish beacons thereof.**
- **Order for 1<sup>st</sup> Defendant to comply with the alternative order above.**
  - **The Director of Survey be ordered to issue a new RIM and or mutation over the boundaries for North Gem/Malanga/1181 to 1185.**
  - **Declaration that 1<sup>st</sup> defendant is a vexatious litigant.**
  - **That the order of 22<sup>nd</sup> March 2018 in Misc. App. No. 10 of 2018 be set aside and the application be heard denovo.**
  - **Costs of this suit.**

b) That the basis of the Plaintiffs' claim is that the 1<sup>st</sup> Defendant, who is the elder brother to the Plaintiffs and the late Paul Otieno Kwasu, fraudulently and without consent of other family members, registered North Gem/Malanga/861 that belonged to their late father Reuben Kwasu, into his name during demarcation and adjudication in the area. That the 1<sup>st</sup> Defendant then subdivided the land into North Gem/Malanga/1181 to 1185, and unlawfully and without consultation registered each of the parcels in the name of each of the Plaintiffs, Paul Otieno Kwasu and himself. That there has been several disputes over the said parcel (s) of land between the Plaintiffs, the 1<sup>st</sup> Defendant and his family.

c) That the copies of the green card for North Gem/Malanga/861 attached to the Plaintiffs' list of exhibits, and the 1<sup>st</sup> defendant's further affidavit confirms that the land was first registered on the 26<sup>th</sup> September 1975 in the name of Henry Ndukwe Kwasu, the 1<sup>st</sup> Defendant. That the said land has never been registered in the name of the person variously described in the proceedings as Reuben Kwasu and Ruben Kwasu, who is said to be the late father to the Plaintiffs, the late Paul Otieno Kwasu, and the 1<sup>st</sup> Defendant. That the copy of the certificate of death No. 0677623 issued on the 31<sup>st</sup> October 2017, confirms that the said Ruben Kwasu passed on the 13<sup>th</sup> March 1971, which was about four (4) years, six (6) months before the 1<sup>st</sup> Defendant became the registered proprietor of the suit land. That there is no evidence tendered to show that the late Ruben Kwasu alias Reuben Kwasu ever objected to the 1<sup>st</sup> Defendant being registered with the land.

d) That in view of the finding in (c) above, there is no evidence tendered so far to suggest that North Gem/Malanga/861 formed part

of the estate of the late Ruben Kwasu alias Reuben Kwasu.

e) That the copies of the green cards attached to the Plaintiffs' list of exhibits, and the 1<sup>st</sup> Defendant's further affidavit shows that the title for North Gem/Malanga/861 was closed on the 11<sup>th</sup> March 1997 upon being subdivided by 1<sup>st</sup> defendant into North Gem/Malanga/1181 to 1185. That the subdivisions were registered as follows;

- **1181- Henry Ndukwe Kwasu**
- **1182- Paul Otieno Kwasu (deceased)**
- **1183- Phillip Oyier Kwasu (1<sup>st</sup> Plaintiff)**
- **1184- Cornel Masimba Kwasu (2<sup>nd</sup> Plaintiff)**
- **1185- Daniel Ouma Kwasu (3<sup>rd</sup> Plaintiff)**

f) That the subdivisions created out of North Gem/Malanga/861 are served by an access road as shown in the sketch attached to the Land Registrar's and Surveyor's report, procured for purposes of a criminal case, and attached to the Plaintiffs' list of exhibits, and 1<sup>st</sup> Defendant's replying affidavit. The report by the surveyor though not obtained for these proceedings, contains the following observations which are relevant;

***“It should be noted that the present boundaries were planted during the subdivision stage and they have never been altered. There is an access road of roughly 6 meters running the length of the parcels. From the surveyor's report, it is my considerate opinion that the Registered Index Map (RIM), mutation and Ground Measurements do not tally. In such a scenario, the Land Registrar takes into consideration the views and opinions of elders and other persons of interest present to reach a solution. In this case, I found out that the boundary of land parcel North Gem/Malanga/1181 has never been altered nor interfered with. It has stood from the time when the land was subdivided....”***

That the foregoing extract from the Land Registrar's and Surveyor's report shows that the dispute over the boundary involving North Gem/Malanga/1181, and the other subdivision from North Gem/Malanga/861, have been settled by the Land Registrar, in the first instance and any of the parties not satisfied would have recourse to the appropriate court of law for further determinations. That accordingly, this court is with jurisdiction to hear and determine any issue of boundary dispute that may arise in respect of any of the parcels subdivided from North Gem/Malanga/861.

g) That further to the finding in (e) and (f) above, there is no evidences presented so far to confirm that the 1<sup>st</sup> Defendant has trespassed and or interfered with the use and occupation of those registered with North Gem/Malanga/1183 to 1185 that are registered with the Plaintiffs herein. That further, the 1<sup>st</sup> Defendant has through his replying affidavit annexed a copy of the part proceedings in Siaya Succession Cause No. 65 of 2017. That the proceedings shows that the 1<sup>st</sup> Defendant is the citor, the Plaintiffs and two others are the interested parties and had on the 18<sup>th</sup> July 2017 entered a consent through their advocates that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, jointly with the 1<sup>st</sup> Defendant, do take out letters of administration in respect of the estate of the late Paul Otieno Kwasu who is registered with North Gem/Malanga/1182. That the Plaintiffs have not challenged, controverted or rebutted that consent through a further affidavit. That indeed the 1<sup>st</sup> Plaintiff confirmed the contents of the consent in paragraph 15 of his further affidavit. That as the 1<sup>st</sup> Defendant is one of the three proposed administrators of the estate of the late Paul Otieno Kwasu, any disputes or contestations over the administration and distribution of that estate is a matter for the Succession Court in accordance with the provisions of the Law of Succession Act Chapter 160 of Laws of Kenya. The Court therefore finds no basis for prayer (b) of the motion.

h) That the court had in its ruling of 3<sup>rd</sup> May 2018 pronounced itself on the import of the order of 22<sup>nd</sup> March 2018, issued in Siaya PM Misc. App. No. 10 of 2018. That the Plaintiffs had themselves in paragraph 17 of their supporting affidavit deponed that they are ***“unable to appeal the said orders.... And they cannot seek to be enjoined in that suit since it has already been overtaken by events and the court is now fuctus officio in that suit.”*** That being the position held by the Plaintiffs, the court is therefore left wondering what purpose would be served by setting aside the order and ordering the application to be heard denovo, before another court as prayed in prayer (a) of the motion. That this suit and application cannot be taken as a substitute of appeal proceedings over the decision in Siaya P.M. Misc. Appl. No. 10 of 2018, which was exparte and already finalized.

i) That the order of 22<sup>nd</sup> March 2018 in Siaya P.M Misc. Appl. No. 10 of 2018 only directed ***“the O.C.S Yala Police Station.... To provide security to the applicant (1<sup>st</sup> Defendant) during the re-fencing land parcel number North Gem/Malanga/1181.”*** That it is obvious the order did not direct any gate to be removed, and if any of the parties was aggrieved by the alleged removal of the gate to North Gem/Malanga/1181, then such a party should seek appropriate remedy in independent proceedings. That accordingly prayer (c) of the motion has no merit.

j) That having found as in (g) above that the Plaintiffs have not presented any evidence to show that the 1<sup>st</sup> Defendant has in any way unlawfully interfered and or trespassed into their parcels of land to wit North Gem/Malanga/1183 to 1185, prayers (e), (f) (g) and (i) of the motion have no basis.

k) That the processes relating to criminal prosecutions are matters best handled by the Criminal Courts and prayer (h) of the motion is therefore misplaced. That in any case the Plaintiffs should make their reports to the appropriate institutions dealing with criminal investigations and prosecutions for appropriate assistance. That there are appeal processes provided for in case the Plaintiffs are not satisfied with the decision, action or omission of any of the criminal justice actors to which they reported their complaints to and their advocates should guide them accordingly.

l) That the foregoing findings show that there is nothing the O.C.S Yala Police station can be called upon to ensure compliance of. That accordingly prayer (j) is misplaced.

m) That the Plaintiffs' motion filed on the 18<sup>th</sup> April 2018 is unsigned and undated. That the failure to sign the motion makes it irregular and hence defective, and even though the court was not addressed on that issue, it makes the application to be improperly before the Court and is liable for striking out.

n) That the Plaintiffs having failed in all the prayers, they should pay the 1<sup>st</sup> Defendant costs of the application as the latter had filed affidavits in reply, written submissions in addition to being represented by Counsel.

6. That in view of the foregoing, the undated and unsigned motion filed by the Plaintiffs on the 18<sup>th</sup> April 2018 is without merit and is dismissed with costs to the 1<sup>st</sup> Defendant.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE 2019**

**In the presence of:**

Plaintiffs Present

Defendant Present

Counsel Mrs. Odoyo for Wanyanga for Plaintiffs

Mr. Okoth for 1<sup>st</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**