



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT KISUMU**

**ELC PETITION NO. 6 OF 2018 (FORMERLY SIAYA C.P. NO.13/2018)**

**IN THE MATTER OF ARTICLES 2(1), 22(2) (b), (3) (d), 23(1), (3)  
& 165(3) (a), (b), (d), (i), (ii) OF THE CONSTITUTION OF KENYA 2010 AND  
IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 27(1), (2), 28, 40(1) (a) (b),  
(3), (4), 43, (1) (b), (f), 47(1), (2), 50(1) AND 63 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

DORSILA AJUOGA OWUOR.....1<sup>ST</sup> PETITIONER  
MOSES DEDE OWUOR.....2<sup>ND</sup> PETITIONER  
JOSHUA DANADA OWOUR.....3<sup>RD</sup> PETITIONER  
(Being the Administrators of the Estate of PETRO OWUOR OYOO)

**-VERSUS-**

SAMSON ISAAC OTIENO OSINO.....1<sup>ST</sup> RESPONDENT  
STEPHEN RANGAR OSINO.....2<sup>ND</sup> RESPONDENT  
COLLINS OYOO OSINO.....3<sup>RD</sup> RESPONDENT  
(Being the Administrators of the Estate of JACTON OSINO OYOO)  
THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION.....5<sup>TH</sup> RESPONDENT

**RULING**

1. The Petitioners filed the Notice of Motion dated the 18<sup>th</sup> September, 2018 with the Petition of even date, seeking primarily for the following prayers:-

- a. That there be a stay of proceedings in H.C.C ELC No. 63 of 1987 pending the hearing and determination of this petition.
- b. That there be a stay of execution of decree to evict the Petitioners from the suit property pending the hearing and determination of this petition.

**c. That the 1<sup>st</sup> to 3<sup>rd</sup> Respondents be prevented by way of injunction from dealing in any way or transferring the property known as North Sakwa/Maranda/7 pending the hearing and determination of this petition.**

**d. That the 1<sup>st</sup> to 3<sup>rd</sup> Respondents be prevented by way of injunction from harassing and or destroying the crops of the Petitioners pending the hearing and determination of this petition**

**e. That the order of stay be served upon the O.C.S Bondo Police station for compliance.**

**f. That costs be provided for.**

The application is based on the six (6) grounds marked (i) to (iv) on its face and supported by the affidavit sworn by the 1<sup>st</sup> Petitioner on the 18<sup>th</sup> September, 2018.

2. The application is opposed by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents through the affidavit in reply sworn by the 1<sup>st</sup> Respondent on the 14<sup>th</sup> November, 2018.

3. The application came up for hearing on the 29<sup>th</sup> January, 2019 when the court was informed that the Petitioners, and 1<sup>st</sup> to 3<sup>rd</sup> Respondents had filed their submissions dated the 20<sup>th</sup> December, 2018 and 24<sup>th</sup> January, 2019 respectively.

4. The 4<sup>th</sup> Respondent filed notice of preliminary objection dated the 21<sup>st</sup> November, 2018 on the 22<sup>nd</sup> January, 2019 but subsequently withdrew it vide the Notice of withdrawal dated the 27<sup>th</sup> February, 2019 and filed on the 5<sup>th</sup> March, 2019. That the 4<sup>th</sup> Respondent then filed their written submissions dated the 20<sup>th</sup> March, 2019 on the same date.

5. The following are the issues for the court's determinations:-

**a. Whether the Petitioners have made out a reasonable case for issuance of orders of stay of proceedings, execution, and temporary injunction at this interlocutory stage.**

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

6. The court has carefully considered the grounds on the motion, affidavit evidence by the Petitioners, and 1<sup>st</sup> to 3<sup>rd</sup> Respondents plus the written submissions by the learned counsel for the Petitioners, 1<sup>st</sup> to 3<sup>rd</sup> Defendants, and the 4<sup>th</sup> Defendant and come to the following findings:-

a. That these proceedings were commenced through the Petition filed together with the motion both dated the 18<sup>th</sup> September, 2018 in Siaya High Court as Constitutional Petition No. 13 of 2018. That the matter having been filed under certificate of urgency, was heard ex parte by Lady Justice Aburili of Siaya High Court on the 25<sup>th</sup> September, 2018, who rightfully found the High Court was without jurisdiction and directed the matter to be placed before this court. That the record confirms that the matter was mentioned before this court first on the 2<sup>nd</sup> October 2018, when directions on service were given. The matter was also given the current registration of Kisumu ELC Petition No. 6 of 2018.

b. That though the Petitioners are seeking "stay of proceedings in H.C.C ELC No. 63 of 1987", the documentary evidence attached to the Affidavit in reply of the 2<sup>nd</sup> Respondent shows that the said suit has since been heard and concluded as particularized herein below:-

· **Judgement by Mr. Justice Mango of Kisumu High court on the 21<sup>st</sup> July, 1993 in favour of Jecton Osino Oyoo who was the Plaintiff and the patriarch to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents herein. That the last paragraph at page 7 of the judgment contains the court's verdict that "I do accordingly enter judgement for the Plaintiff as against the Defendants which simply put, means that the defendants must give possession of the portions they are occupying to the plaintiff and remove themselves and their families and/or those claiming under them from the land...give the defendants three months to move i.e until 21<sup>st</sup> October, 1993. Thereafter if they refuse to move, the plaintiff is entitled to forcefully remove them by the help of the nearest District Officer and police station in the area...."**

· **That before Kisumu H.C.C No. 630 of 1987, there was Bondo District Magistrate Court Land Case No. 61 of 1967 which was ruled in favour of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' patriarch. That an appeal No. 56 of 1971 before Kisumu Resident Magistrate was dismissed on the 22<sup>nd</sup> June, 1974. That a subsequent appeal to Kisumu High court Civil Appeal No. 38 of 1972 was filed, heard and dismissed on the 22<sup>nd</sup> June, 1974.**

· **That during the adjudication process of the land in dispute, one Odhiambo Owino, who was the 1<sup>st</sup> Defendant in Kisumu H. C. C. No 63 of 1987 filed objection proceedings against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents patriarch which was heard and dismissed on the 12<sup>th</sup> August, 1975.**

· **That the Defendants application dated 3<sup>rd</sup> August, 2012 in Kisumu H.C.C No. 63 of 1987 was dismissed with costs by Kaniaru J. in the ruling of the 8<sup>th</sup> May, 2014.**

· That Dorcilla Ajwoga, the 1<sup>st</sup> Petitioner herein, moved the Court of Appeal in Kisumu Civil Application No. 58 of 2014 (UR 42/2014) seeking for extension of time to file memorandum and record of appeal out of time in the intended appeal from the ruling of 8<sup>th</sup> May, 2014 by Kaniaru J. but the application was dismissed with costs to Samson Isaac, the 1<sup>st</sup> Respondent in both that application and these proceedings. That the court of appeal summarized the history of the various disputes over the suit land at paragraph 5 to 9 and at paragraph 10 observed that “Given this history, even if I were to accept that the Applicant’s failure to file the notice of appeal in time was due to inadvertence on the part of her lawyers, it is clear that the Applicant has no arguable appeal at all. Granting her the leave she seeks will therefore be an exercise in futility which will only serve to waste valuable court time....”

That from the foregoing among other documentary evidence, it is clear that the court have already issued eviction order against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and in view of the Court of Appeal ruling of 19<sup>th</sup> May, 2015 there is no pending litigation between the Petitioners and Respondents before that court or this court over the suit land. That further there are no pending proceedings or execution in Kisumu H.C.C No. 63 of 1987 that can be stayed.

c. That the 5<sup>th</sup> Respondent has not participated in these proceedings as they have not entered appearance, or filed replying papers or submissions on the application. That further the copy of the letter dated the 14<sup>th</sup> December, 2016 by the Siaya County Coordinator, National Land Commission addressed to the CEO/Secretary National Land Commission, attached to the Petitioners supporting affidavit and marked “DAO4” does not amount to evidence that the 5<sup>th</sup> Respondent has already heard and determined the dispute, contrary to the Petitioners claim. That the court takes the letter to be a report and recommendation of the 5<sup>th</sup> Respondent’s Siaya County Coordinator for the attention and necessary action by the 5<sup>th</sup> Respondent. That position is strengthened by the copy of the letter dated 30<sup>th</sup> July, 2018 by Deputy Director Legal Affairs and Enforcement of the 5<sup>th</sup> Respondent addressed to their Siaya County Coordinator, 1<sup>st</sup> Petitioner, and Jacton Osino inviting them for a hearing on the 16<sup>th</sup> August, 2018 at the Kisumu County Hall, at 9.00am. The letter is attached to the 1<sup>st</sup> Respondent affidavit in reply and marked S.T.O Osino. That as there is no documentary evidence availed by all the Petitioners and Respondents about any decision having been made by the 5<sup>th</sup> Respondent after the hearing set for 16<sup>th</sup> August, 2018, the court finds and holds that no decision has been made on the matter by the National Land Commission. That the letter by the Deputy Director refers to the National Land Commission powers under **Article 67 (2) of the Constitution and Section 6 and 15 of the National Land Commission Act** as the basis of the invite. That **Article 67(2) (e) of the Constitution** sets out one of the functions of the Commission “**to initiate investigations, on its own initiative or on a complaint, into present or historical land injustice and recommend appropriate redress;**” That **Section 6 of the National Land Commission Act No. 5 of 2012** restates the powers of the Commission while **Section 15 of the said Act** provides among others what a historical land injustice means or entails. That **subsection (3)** sets the criteria to be met for a historical land claim to be admitted, registered and processed by the commission to include the following:

“(a).....

**(b) the claim has not or is not capable of being addressed through the ordinary court system on the basis that:-**

i. ....

**ii. the claims is debarred under Section 7 of the Limitation of Actions Act or any other law.”**

That in view of the lengthy litigations already engaged by the Petitioners and the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, and before them their patriarchs, over the suit land’s ownership or title as well set out in the Court of Appeal ruling of 19<sup>th</sup> May, 2015 in Kisumu C. A Civil Application No. 58 of 2014 (UR 42/2014), among others, it is doubtful as to whether the dispute over ownership of the suit land is a matter that can fall under the National Land Commission powers.

d. That in view of the findings above, the Petitioners’ motion dated the 18<sup>th</sup> September, 2018 cannot be anything but another attempt to get what they have already failed to get through the previous , including Kisumu H.C.C No. 63 of 1987, where determinations on the ownership of the suit land has already been made by courts of competent jurisdictions. That accordingly, only a court of a higher pecking order than the one which passed the judgement and rulings in H.C.C.C. No. 63 of 1987, may entertain further proceedings on the ownership of the suit land. That this court is **functus officio** and motion must therefore fail. That the Petitioners will meet the costs for the 1<sup>st</sup> to 4<sup>th</sup> Respondents for the application.

7. That flowing from the foregoing the court finds no merit in the Petitioners’ motion dated the 18<sup>th</sup> September, 2018 and is dismissed with costs to the 1<sup>st</sup> to 4<sup>th</sup> Respondents.

Orders accordingly.

**S. M. KIBUNJA**

**ENVIRONMENT & LAND - JUDGE**

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JULY, 2019.**

**In presence of;**

Petitioners Absent

Respondents Absent

Counsel M/s Ochieng for Okero for 1<sup>st</sup> to 3<sup>rd</sup> Respondents

M/s Langat for 4<sup>th</sup> Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**