



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.303 OF 2016

MWANAISHA KIRIALE MOHAMED.....PLAINTIFF

VERSUS

BASHIRI HABIBU SWEDI.....1ST DEFENDANT

EDWARD OMONDI MARIENGA.....2ND DEFENDANT

RULING

1. **Mwanaisha Kiriale Mohamed**, the Plaintiff, seeks vide notice of motion dated 17th November 2015 but filed on the 18th November 2016, for temporary injunction restraining **Bashiri Habibu Swedi and Edward Omondi Marienga**, the 1st and 2nd Defendants, respectively, their employees, servants, workers and or agents from carrying out any construction, excavation, building any fence, farming, cutting down trees, or any other activity on the land parcel **Kisumu/Manyatta "A"/1481**, pending the hearing and determination of this suit. That Plaintiff also seeks for an order cancelling the title to the said land issued in favour of the Defendants. The application is based on the eleven (11) grounds marked (a) to (k) on its face, and is supported by the affidavit of the Plaintiff sworn on the 17th November 2016.

2. That the application was served and Edward Omondi Marienga, the 2nd Defendant, entered appearance through memo dated 29th November 2016, through M/S Ken Omollo & Co. Advocates. The application came up for mention on the 30th November 2016 with Mr. Sala and Ken Omollo advocates representing the Plaintiff and 2nd Defendant respectively. That the court granted the interim orders of injunction in terms of prayer 2 pending the interpartes hearing on the 8th March 2017. The court further gave the 2nd Defendant leave to file and serve reply to the application in 14 days. That by the 5th December 2017 when this matter was last in court, no replying papers or submissions had been filed by the 2nd Defendant or on his behalf. The counsel for the Plaintiff filed their written submissions dated 14th June 2017 pursuant to the courts direction of the 8th March 2017.

3. The following are the issues for the court's determination;

- a) Whether the Plaintiff has established an arguable case with a probability of success for temporary injunction to issue at this stage.
- b) Whether the Plaintiff has established a case for cancellation of the title issued to the 2nd Defendant at this stage.
- c) Who pays the costs.

4. The court has carefully considered the grounds on the notice of motion, affidavit evidence by the Plaintiff, written submissions by counsel for the Plaintiff and come to the following findings;

- a) That the Plaintiff obtained a Limited Grant of Letters of Administration Ad litem on the 16th November 2016, vide Kisumu C.M. Succession Cause No.102 of 2016 in respect of the estate of Sania Mwedih Hausi who died on the 9th January 2014 limited for the purposes of filing suit.
- b) That the copy of the title deed for land parcel **Kisumu/Manyatta "A"/1481** confirms that the said land was first registered on the 3rd November 1995. That the land was then registered in the name of Sania Swedih Hausi under entry No.2 on the 2nd May 1996. That it is not clear from the copy of the certificate of official searches and title deed availed to the court who the first registered proprietor was under entry No.1.
- c) That the copies of the certificate of official searches dated 25th February 2015 and 16th November 2016 confirms that the 1st

Defendant became the registered proprietor under entry No.5 on the 2nd July 2013, while the 2nd Defendant obtained proprietorship under entry No.10 on the 10th March 2016.

d) That the Plaintiff has challenged the Defendants title to the said land alleging fraud under paragraph 19 of her plaint dated 17th November 2016. That even though the 2nd Defendant is the registered proprietor of the said land, the Plaintiff's deposition challenging the legality of the title has not been rebutted and controverted in any way by both Defendants.

e) That in view of the findings in (d) above, the court finds that the Plaintiff has established a prima facie case for issuance of temporary injunction in terms of prayer 3 of the application.

f) That the Plaintiff has however not made a case for cancellation of the 2nd Defendant's title to the said land at this interlocutory stage, and prayer 4 will wait for evidence to be taken before it can be considered on merit under prayer (e) of the plaint.

5. That flowing from the foregoing, the court finds merit in the Plaintiff's notice of motion dated 17th November 2015, and filed on 18th November 2016, which is hereby allowed in terms of prayer three (3) only, with costs in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF MARCH 2018

In presence of;

Plaintiff Absent

Defendants Absent

Counsel M/S Khapoya for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/3/2018

14/3/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

M/S Khapoya for Plaintiff/applicant

Mr. Omolo Omolo for 2nd Defendant absent

The 1st Defendant never entered appearance.

S.M. KIBUNJA

ENVIRONMENT & LAND JUDGE

14/3/2018