



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 171 OF 2017**

**DOMINIC NYAMEMA GOR.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELKANA ASILA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**HESBORN OPUKO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**EDWARD OMONDI MOLA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Dominic Nyamema Gor, the Plaintiff, vide notice of motion dated 23<sup>rd</sup> May 2017 and amended on the 27<sup>th</sup> September 2017 seeks for temporary injunction restraining Elkana Asila and Edward Omondi, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants respectively, by themselves or agents from cultivating, constructing, trespassing, charging or in any way interfering with his actual occupation of Kisumu/Pandpieri/1461. The application is based on the grounds that the Defendants fraudulently subdivided parcel Kisumu/Pandpieri/385 that belonged to Plaintiff's brother Njer Ogado, who died on 27<sup>th</sup> December 1989, into parcels 1460 and 1461; that the Plaintiff has filed Kisumu Probate and Administration Succession Cause No. 750 of 2015 in respect of his late brother's estate and the cause would be defeated if the injunction order is not granted. The application is supported by the Plaintiff's affidavits sworn on the 23<sup>rd</sup> May 2017 and two further affidavits sworn on 3<sup>rd</sup> November 2017.

2. The application is opposed by Hesbon Opuko, the 2<sup>nd</sup> Defendant, through his replying affidavit sworn on 25<sup>th</sup> September 2017. The application is also opposed by the 3<sup>rd</sup> Defendant through his replying affidavit sworn on the 9<sup>th</sup> October 2017 and supplementary affidavit sworn by one Nashon Litengwah Asila on the 9<sup>th</sup> October 2017.

3. The application was heard on the 20<sup>th</sup> September 2018 with the Plaintiff and 2<sup>nd</sup> Defendant making their oral submissions.

4. The following are the issues for the Court's determinations;

**a) Whether the Plaintiff has shown a prima facie case with a probability of success for the temporary injunction order to issue at this interlocutory stage.**

**b) Who pays the costs.**

5. The Court has after carefully considering the grounds on the application, affidavit evidence and oral submissions come to the following findings;

a) That from the certificate of official search of 16<sup>th</sup> July 2007 attached to the Plaintiff's list of documents, land parcel Kisumu/Pandpieri/385 was registered on the 2<sup>nd</sup> January 1985 in the name of Njer Ogada Wadhare and that on the 15<sup>th</sup> February 1990, the title was closed after being subdivided into parcels 1460 and 1461.

b) That the copy of the register (green card) for Kisumu/Pandpieri/1461, also in Plaintiff's list of documents, confirms that the parcel was subdivided from Kisumu/Pandpieri/385. That it also shows that the parcel was registered on the 15<sup>th</sup> February 1990 in the name of Njer Ogada Wadhare and on the same date transferred to Nashon Litengwah Asila. That the parcel was then registered in the name of Edward Omondi Mola, the 3<sup>rd</sup> Defendant, on the 5<sup>th</sup> January 2017. That the certificate of official search of the said parcel confirms that the 3<sup>rd</sup> defendant became the registered proprietor of the said land, and had the title deed issued on the 5<sup>th</sup> January 2017.

c) That from the copy of the title deed, register (green card) and certificate of official search for Kisumu/Pandpieri/1460, all in the 2<sup>nd</sup> Defendant list of documents, the parcel was first registered in the name of Njer Ogada Wadhare on the 15<sup>th</sup> February 1990. That it was then registered with Onyango Ogada through transmission on the 12<sup>th</sup> February 1993. That on the same date it was registered with Sephania Ouma Orawo and on the 6<sup>th</sup> August 1996, transferred to Hesbon Odhiambo Bengo Opuko, and title deed issued.

d) That though the Plaintiff alleged that Njer Ogada passed on the 27<sup>th</sup> December 1989, the certificate of death No. 174570 in respect of Njer Ogada Wadhare that is in the 2<sup>nd</sup> Defendant's list of documents gives the date of death as 26<sup>th</sup> November 1991 and is the same date captured in Kenya Gazette notice No. 3790 of 4<sup>th</sup> September 1992 in respect of Kisumu High Court P & A Succession Cause No. 128 of 1992, filed by Onyango Ogada Njer, "***a brother to the deceased.***"

e) That though the Plaintiff alleges that the late Njer Ogada had been registered with Kisumu/Pandapieri/385 from which parcels 1460 and 1461 were subdivided as his trustee, he has not availed any documentary evidence to confirm that. That taking the death of Njer Ogada Wadhare to have occurred as shown on the certificate of death on the 26<sup>th</sup> November 1991, then the court finds that the subdivision of Kisumu/Pandpieri/385 that occurred on the 15<sup>th</sup> February 1990 was done during his lifetime. That the court further finds that Kisumu/Pandpieri/1461 was transferred to Nashon Litengwah Ashila also during the lifetime of the late Njer Ogada Wadhare. That in view of the deposition by Nashon Litengwah Asila that he is the one who had allowed the Plaintiff to operate a Posho Mill on parcel Kisumu/Pandpieri/1461 and that he gave him notice to remove it before selling and transferring the land to 3<sup>rd</sup> Defendant, the court finds that the Plaintiff has failed to establish a prima facie case with a probability of success upon which temporary injunction order could be based at this stage.

6. That flowing from the foregoing, the court finds no merit in the Plaintiff notice of motion dated 23<sup>rd</sup> May 2017, and amended on the 27<sup>th</sup> September 2017. That the court therefore orders that the said application be and is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER 2018**

**In the presence of:**

Plaintiff Present

Defendants 2<sup>nd</sup> and 3<sup>rd</sup> present

Counsel M/s Ayieta for Onyango for 2<sup>nd</sup> Defendant

M/s Ouma for Ochuka for 3<sup>rd</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**