



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC 252 OF 2015

**ALICE AKINYI OGINDO (suing as administrator of the estate of the late
MELKIZEDEK OGINDO OGOLA (DECEASED)).....PLAINTIFF**

VERSUS

DAVID ODANG OGINDE.....1ST DEFENDANT

NANCY N. OGINDE.....2ND DEFENDANT

TERESA ONYANGO.....3RD DEFENDANT

RITA ONYANGO.....4TH DEFENDANT

(being sued as the administrators of the estate of the late AYUB ONYANGO OGINDO (deceased))

RULING

1. **Alice Akinyi Ogindo**, the Plaintiff, suing as the administrator of the estate of the late **Melkizedek Ogindo Ogalo** (deceased), through the notice of motion dated 29th September 2015 seeks to have **David Odang Oginde, Nancy N. Oginde, Teresa Onyango, and Rita Onyango**, sued as administrator of the estate of the late **Ayub Onyango Ogindo** (deceased), restrained from trespassing, encroaching, entering forcefully, fencing, selling, disposing, transferring, alienating, charging, stepping on, advertising, dealing and or interfering whatsoever with the Plaintiffs original parcel **Kisumu/Kogony/4672** (subdivided into **Kisumu/Kogony/6382 and 6383**) pending the hearing and determination of this suit. The application is based on the six grounds marked (a) to (f) on its face and is supported by the affidavit of Alice Akinyi Ogindo, sworn on the 29th September 2015.

2. The application is opposed by the 1st to 3rd Defendants through the replying affidavits sworn by Teresa M.A. Onyango, the 3rd Defendant, on the 15th February 2016 and undated further affidavit filed on the 2nd August 2016.

3. That the application came up for hearing on the 17th November 2016 when Mr. Odeny and Odongo, learned counsel for the Plaintiff and 1st to 3rd Defendants respectively, made their rival oral submissions.

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

a) Whether the Plaintiff has established a prima facie case for temporary injunctive orders to issue at this interlocutory stage.

b) Whether the Plaintiff has locus to file the suit and the notice of motion dated 29th September 2015 on the basis of grant of letter of administration ad litem issued on 2nd June 2015 in Kisumu H.C. P & A cause No.407 of 2015.

c) What orders to issue.

d) Who pays the costs.

5. The court has considered the grounds on the notice of motion, the affidavit evidence, the oral submission by both counsel and come to the following determinations:

a) That land parcel Kisumu/Kogony/4672 is shown by the copy of the register annexed to the supporting affidavit to have been registered first on 23rd April 2008 in the names of Ogingo Olao Melkizedek. The Plaintiff case is that she is the administratrix of the estate of the late Melikezedek Ogindo Ogalo by virtue of the limited grant of letters of administration ad litem issued on 2nd June 2015 in Kisumu H.C. P & A Cause No.407 of 2015. That a copy of the grant annexed to the supporting affidavit indicates the said deceased passed on the 26th January 2002, which is also the date of death in the certificate of death No.0045325 also annexed to the said affidavit.

b) That the said register of land parcel **Kisumu/Kogony/4672** gives the history of the land to have been a “**correction of plot No.2576 and 2586.**” That the court is not able to verify the details of the registration of those two parcels as none of the parties has availed the copies of their registers to the court.

c) That the ownership of land parcel **Kisumu/Kogony/4672** changed from Ogingo Olao Melkizedek on the 29th April 2008 to the names of Ayub Onyango Ogindo, and title deed was issued on the same date according to the register.

d) That taking Ogingo Olao Melkizedek to have been the same person known as Melkizedek Ogindo Ogalo who died on the 26th January 2002, then the change of ownership of the suit land on 29th April 2008 needed to have been done in accordance with the provisions of the **Law of Succession Act Chapter 160 of the Laws of Kenya**. That however, there is no indication in the copy of the register of parcel whether any confirmed grant was presented to the Land Registrar before the transfer was effected.

e) That the register of **Kisumu/Kogony/4672** further shows that Ayub Onyango Ogindo transferred the land to David Adang Aginde, Teresa M.A. Onyango and Nancy N. Oginde on the 3rd March 2011 and that on the 27th October 2014, the register was closed upon being subdivided into parcels 6382 and 6383.

f) That the Plaintiff has annexed copies of the certificates of official search for land parcel **Kisumu/kogony/6382** in the names of David Adang Oginde and Nancy Njoki Oginde and **Kisumu/Kogony/6383** in the names of Teresa M.A. Onyango.

g) That Evans Ogindo and Kefa Ogindo filed Kisumu East District Land Dispute Tribunal Case No.18 of 2011 over land parcel **Kisumu/Kogony/4672 and 2586** against Ayub Onyango Ogindo, David Adang Oginde, Nancy N. Oginde and Teresa Oginde as confirmed in the copy of the proceedings annexed to the supporting affidavit. The Plaintiff in the instant case was one of the witnesses in the said land dispute case. That though the Land Disputes Tribunal ruled in favour of the claimants and its award was adopted in Kisumu C.M. Land Case No.35 of 2012, the counsel for the Plaintiff informed the court in his submissions that the award was subsequently quashed in a judicial review proceedings that followed after which the plaintiff filed this suit.

h) That the main contention in this application is whether the Plaintiff has the locus standi to file

this suit and the notice of motion. The Defendants contention is that the Plaintiff is without capacity as the grant of letters of administration ad litem obtained on 2nd June 2015 authorizing her to file suit on behalf of the estate of the late Melkizedek Ogindo Ogalo within 90 (ninety) days lapsed on or before 30th September 2015 while the suit and notice of motion were filed on the 1st October 2015. The learned counsel for the Plaintiff contention is that the period of 1st August 2015 to 15th September 2015 should not be counted for purposes of the 90 days as the court was on vacation as gazetted in G.N. No.5277 of 24th July 2015. The court has perused the said gazette notice and noted it carried the following paragraph;

“During the vacation, the offices of the aforesaid courts, including registries shall be open to the public from 8.00 am. to 5.00 pm, on all weekdays other than public holidays”

There is therefore no basis why the vacation days should be excluded while the registries were open. The Plaintiff has failed to establish the legal basis of excluding the vacation period in the computation of the 90 days period within which the Plaintiff was to commence suit.

i) That the provision of **Order 50 of the Civil Procedure Rules** is relevant in the computation of time. That as the period of 90 days from the 2nd June 2015 did not extend to period of December 2015 and January 2016, the provision of **Rule 4** of the said order is not applicable in the matter. The relevant provision is therefore **Rule 8** which requires the time to be counted exclusively of the first day and inclusive of the last day. That the ninety (90) days from 2nd June 2015, exclusive of the first day, lapsed on or about 31st August 2015.

j) That in view of the finding in (h) and (i) above, the time within which the Plaintiff had been granted to commence suit under the grant of letters of administration and litem issued and dated 2nd June 2015 had expired by the time this proceedings was commenced through the plaint dated 29th September 2015 and filed in court on the 1st October 2015. That it follows that the Plaintiff was without capacity to file suit on behalf of the estate of Melkizedek Ogindoi Ogalo when she filed the suit and the same should be struck out as well as the notice of motion of even date which is based on the said suit.

6. That flowing from the foregoing, the court finds the notice of motion dated 29th September 2015 and filed in court on the 1st October 2015 is based on a suit commenced through the plaint of even date filed by a person without capacity. That accordingly the following orders are issued;

a) That both the suit, commenced through the plaint dated 29th September 2015, and the notice of motion of even date are hereby struck out.

b) The Plaintiff do pay the costs of the 1st to 3rd Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF MARCH 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel M/S Masese for the Plaintiff

Mr. Onyango for Odongo for the 1st to 3rd Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/3/2017

22/3/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/S Masese for Plaintiff/Applicant

Mr Onyango for Odongo for 1st to 3rd Defendant/Respondent

Court: ruling dated and delivered in open court in presence of M/S Masese for the Plaintiff and Mr. Onyango for Odongo for 1st to 3rd Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/3/2017