



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.213 OF 2016

MARY APONDI YINDA1ST PLAINTIFF

SELINE AWUOR YINDA.....2ND PLAINTIFF

(Suing as Administrator of the estate of the late LINUS YINDA OPONDO)

VERSUS

JOICE ACHIENG OKUMU.....1ST DEFENDANT

EMILY APONDI MURENDE.....2ND DEFENDANT

JOHN OTIENOMADEDE.....3RD DEFENDANT

DISTRICT LAND REGISTRAR UGENYA/UGUNJA DISTRICT...4TH DEFENDANT

RULING

1. This ruling is for the chamber summons application dated 10th August 2016 brought under **Sections 1A, 1B, 3A and 63** of the Civil Procedure Act, **Order 40 Rules 1 and 2** of the Civil Procedure Rules and **Rule 3(1)** of the High Court (Practice and Procedure) Rules of the Judicature Act. The chamber summons is filed by **Mary Apondi Yinda** and **Seline Awuor Yinda**, the Plaintiffs, who sue as the administratrix of the estate of the late **Linus Yinda Opondo**, and seeks for temporary injunction order restraining **Emily Apondi Murende** and **John Otieno Madede**, the 2nd and 3rd Defendants respectively, from interfering, dealing, selling, transferring, constructing, building on or doing any acts that are detrimental to the interests of the Plaintiffs on the suit properties pending the hearing and determination of this suit. The application is based on eleven grounds marked (i) to (xi) on its face and is supported by the affidavits of **Mary Apondi Yinda** and **Saline Awuor Yinda** sworn on 10th August 2016 and 24th November 2016 and supplementary affidavit of John Journey sworn on 9th November 2016.

2. The application is opposed by the Defendants through the replying affidavits sworn by John Otieno Madede (3rd Defendant), Joyce Achieng Okumu (1st Defendant), and Emily Apondi Murende (2nd Defendant) on the 26th September 2016, 30th September 2016 and 14th October 2016 respectively.

3. The application came up for hearing on the 30th November 2016 when Mr. Kakinga and Mr. Omay, learned counsel for the Plaintiffs and 1st to 3rd Defendants respectively, made their oral rival submissions.

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

- a) Whether the plaintiffs have established a prima facie case with a probability of success for temporary injunction order to issue at this interlocutory stage.
- b) What orders to issue.
- c) Who pays the costs.

5. The court has after considering the grounds on the notice of motion, the affidavit evidence and oral rival submissions come to the following findings;

a) That even though the parties to this application did not avail a copy of the register (green card) for land parcel North **Ugenya/Doho/913**, they all agree that it was subdivided by **Linus Yinda Opondo** into parcels **North Ugenya/Doho/1071 to 1074**.

b) That the copies of the registers for land parcel North **Ugenya/Doho/1071 and 1073** availed to the court by both sides confirm the position in (a) above that the two parcels are subdivisions from plot No.913.

c) That copies of register for parcels **North Ugenya/Doho/1071** and 1073 further confirms that they were registered first on 8th February 2004 in the names of Linus Yinda Opondo who according to the certificate of death No.C.82016 died on the 27th October 2004.

d) That the Plaintiffs were appointed the administratrix of the estate of the late Linus Yinda Opondo in Ukwala S.R.M. Succession Cause No.6 of 2014 on the 28th June 2016.

e) That though the copies of the register for land parcels North **Ugenya/Doho/1071 and 1073** indicates that Joice Achieng Akumu, the first Defendant, got registered as proprietor on the 20th May 2014 and 13th June 2013 respectively, the Plaintiffs contention that the registration was obtained without following the provisions of the **Law of Succession Act Chapter 160 Laws of Kenya**, in respect of distribution of estates of deceased persons, has not been rebutted and on that basis, the Plaintiffs have established a prima facie case to be entitled to the orders of temporary injunction. That this is because it is probable from the evidence available that the 1st Defendant did not have a good title to the two parcels of land, and therefore could not pass a good title to the 2nd and 3rd Defendants.

f) That the titles of the 1st to 3rd Defendants over the two parcels of land are under challenge in accordance with **Section 26 of the Land Registration Act No.3 of 2012**. The suit properties should therefore be safeguarded as the suit proceeds to hearing and final determination. That further, the Defendants should take note of the position taken by the Court of Appeal in the case of **Munyu Maina –V- Hiram Gathina Maina** [2013] eKLR where it held as follows;

“We state that when a registered proprietor root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

This court is aware that at this interlocutory stage, the court is not expected to pronounce itself with finality on any question of law or fact. That it is however necessary to call the Defendant's attention to the finding in the above case.

g) That though the 1st Defendant position is that the two parcels of land, being subdivision from **North Ugenya/Doho/913**, were her late husband's, **Bernard Okumu Yinda** entitlement, she did not avail any documentary evidence to confirm that they had been registered in his names at any

one time. The 1st Defendant did not also avail a confirmed grant in respect of the estate of the late **Bernard Okumu Yinda** showing that the two parcels of land were to be transmitted to her name. That it is therefore doubtful as to whether the 1st Defendant had capacity to transfer the titles to the said lands to the 2nd and 3rd Defendants.

6. That flowing from the foregoing the court finds merit in the Plaintiffs application and it is allowed in terms of prayer (d) with costs in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF MARCH 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel M/S Masese for Kakunga for Plaintiff/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/3/2017

22/3/2017

S.M. Kibunja Judge

Oyugi court Assistant

M/S Masese for Kakunga for Plaintiff/Applicant

Court: Ruling dated and delivered open court in presence of M/S Masese for Kakunga for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/3/2017