



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC APPEAL CASE NO.20 OF 2016**

**JAMES ONUNGA OGUTU.....APPELLANT**

**VERSUS**

**JESSICA OGADA .....1<sup>ST</sup> RESPONDENT**

**OLIECH OGOLA.....2<sup>ND</sup> RESPONDENT**

**THOMAS AGO.....3<sup>RD</sup> RESPONDENT**

**JAGERO OGALO.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. **James Onunga Ogutu**, the Appellant, filed the notice of motion dated 22<sup>nd</sup> September 2016 under certificate of urgency seeking for temporary injunction orders against **Jessica Ogada, Oliech Ogola, Thomas Ago** and **Jagero Ogalo**, the Respondents, restraining them from interring the body of **Ouko Ogada** on L.R. No. **Kisumu/Korandu/822** pending the hearing of the appeal. The application is based on seven grounds on its face marked (1) to (7) and supported by the affidavit of James Onunga Ogutu, sworn on the 22<sup>nd</sup> September 2016 whose depositions are as summarized hereinbelow;

- a) That he was not satisfied with the ruling of the Resident Magistrate, Kisumu of 22<sup>nd</sup> September 2016 in Kisumu CM CC NO.398 of 2015 and instituted an appeal.
- b) That his appeal has a high chance of success.
- c) That unless the temporary injunction is granted to prevent the interment of the body of the deceased on his land, he will suffer hardship, trauma and inconvenience.
- d) That he is prepared to abide by any conditions the court will prescribe.

2. The court granted interim orders in terms of prayer 2 exparte on the 23<sup>rd</sup> September 2016.

3. The application is opposed by the Respondents through the grounds of opposition dated 6<sup>th</sup> October 2016 summarized as follows:

- a) That matter relates to burial dispute and not land ownership and hence the court has no jurisdiction.

b) Application is bad in law, incurably defective and an abuse of the court process.

c) The application is guilty of leaches especially the court order of 30<sup>th</sup> June 2015 and an affront to the overriding objectives of the court.

4. The application came up for hearing on 31<sup>st</sup> January 2017 when Mrs. Opondo and Mr. Oguso, the learned counsel for the Appellant and Respondents respectively made their oral rival submissions.

5. The following are the issues for determination;

a) Whether the Appellant has established a case with probability of success at this interlocutory stage.

b) What orders to issue.

c) Who pays the costs.

6. The court has considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, oral submissions by counsel, court record and come to the following findings;

a) That without making definite findings on matters of fact lest the court appear to pronounce itself on the pending appeal, the availed annexure shows that the Appellant had commenced Winam S.R.M CC NO.87 of 2014 through plaint dated 3<sup>rd</sup> June 2014. That thereafter the Appellant filed Kisumu Environment and Land Court Misc. Civil Appl. No.113 of 2014 in which the court issued the three orders on the 24<sup>th</sup> June 2014.

- That Winam SRM CC NO.87 of 2014 be transferred to Environment and Land Court for hearing and determination.
- Staus quo be maintained pending the hearing and determination of the application.
- That the application be heard interpartes on 8<sup>th</sup> July 2014.

b) That after the interparties hearing, the court rendered its ruling on 30<sup>th</sup> June 2015 in which the Honourable Judge started by observing in the opening paragraph 1 that the prayer to transfer Winam SRM CC No.87 of 2014, was granted before proceeding to set out the other prayers being 2, 3, 4 and 5. The Honourble Judge at paragraph 11 ordered as follows;

**“The orders sought cannot be granted. The application is therefore dismissed with costs.”**

c) That the application subject matter of the orders of 24<sup>th</sup> June 2014 and 30<sup>th</sup> June 2015 has not been availed to this court for perusal, That however, the ruling of 30<sup>th</sup> June 2015 did not vacate, set aside or review the orders of 24<sup>th</sup> June 2014 transferring Winam S.R.M CC No.87 of 2014 to this court.

d) That counsel for the parties appeared before the lower court on the 31<sup>st</sup> July 2015 in respect of Winam S.R.M. CC No.87 of 2014 where the learned trial magistrate gave the following directions:

**“Court – The order of Environment and Land Court issued on 24<sup>th</sup> June 2014 seen. Parties to take further proceedings relating to this matter in the Environment and Land Court since this suit stands transferred as ordered by the Environment and Land Court on 24<sup>th</sup> June 2014”.**

e) That the Appellant then filed Kisumu C.M. CC. NO.298 of 2015 through the plaint dated 3<sup>rd</sup> August 2015 seeking similar orders to those in Winam S.R.M.CC No.87 of 2014 and against the

same parties, who are the Respondents herein. The Appellant also filed a notice motion seeking temporary orders of injunction stopping the Respondents from burying Ouko Ogada's body on land parcel L.R. No. **Kisumu/Korando/822**, among other prayers. The application was heard and an order dated 9<sup>th</sup> October 2015, issued on the same date, has been availed and reads as follows:

**“1. The Respondents replying affidavit dated 7<sup>th</sup> August 2015 is hereby struck off.**

**2. There is no evidence that Winam Civil case No.87 of 2014 was withdrawn and consequently the application is dismissed.”**

f) That the Appellant then filed the notice of motion dated 9<sup>th</sup> October 2014 in Kisumu CM. CC No.398 of 2015 seeking for among others that order 2 of 9<sup>th</sup> October 2015 be stayed, the order of 9<sup>th</sup> October 2015 be varied, set aside and or vacated and the injunction order prayed in the application dated 3<sup>rd</sup> August 2015 be allowed. The application dated 9<sup>th</sup> October 2015 was heard and dismissed with costs.

g) That the Appellant was dissatisfied and filed this appeal through the memorandum of appeal dated 22<sup>nd</sup> September 2016. The Appellant also filed the notice of motion of even date subject matter of this ruling.

h) That having considered the history of the litigation between the parties as set out above in 6(a) to (g), it becomes quite clear that the parties and subject matter in Winam S.R.M CC No.87 of 2014 and Kisumu CMCC NO.398 of 2015 are the same. The Winam S.R.M. CC NO.87 of 2014 was transferred to this court for hearing and determination vide this court order of 24<sup>th</sup> June 2014 which has not been varied, set aside and or successfully appealed against. The court has not been told by the parties what reference was given to that case in the Environment and Land court register.

i) That it follows that the parties seeking any orders from the court should pursue for such order through Winam SRM CC No.87 of 2014, specifically in the Environment and Land Court file that it was allocated after the transfer. That to file another matter like the Appellant did in filing Kisumu C.M.CC No.398 of 2015 over the same subject matter and between the same parties would be a contravention of **Section 6** of Civil Procedure Act **Chapter 21** of Laws of Kenya.

j) That the appeal herein was filed on the same day the order appealed against was made. That even though there was no delay in filing the appeal and the application for temporary injunction, the findings above shows that the Appellant's has failed to show that the appeal has a probability of success for the interlocutory orders to be issued.

7. That in view of the foregoing the notice of motion dated 22<sup>nd</sup> September 2016 is without merit and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH 2017

In presence of;

Appellant

Present

Respondents            Absent

Counsel                Mrs. Opondo for the Appellant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**1/3/2017**

1/3/2017

Before S.M. Kibunja judge

Oyugi court assistant

Appellant present

M/S Opondo for Applicant/Appellant

Court: Ruling delivered and dated in open court in presence of the Appellant/Applicant and his counsel Mrs. Opondo Advocate.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**1/3/2017**