



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.324 OF 2015

MAXWEL OTIENO ODONGO.....PLAINTIFF

VERSUS

COROMANDELE INVESTMENT LIMITED.....1ST DEFENDANT

EDWARD MUIRU MWANGI.....2ND DEFENDANT

RICHARD ODONGO RAMBAGA.....3RD DEFENDANT

KENAGEN ENTERPRESES.....4TH DEFENDANT

THE HON THE ATTORNEY GENERAL

on behalf of REGISTRAR OF LANDS KISUMU....5TH DEFENDANT

RULING

1. Maxwell Otieno Odongo, the Plaintiff, filed the notice of motion dated 24th November 2015 against Coromandele Investment Limited, Edward MuiRU Mwangi, Richard Odongo Rambaga, Ken Gen Enterprises, The Hon. Attorney General on behalf of the Registrar of Lands Kisumu, the 1st to 5th Defendants respectively, seeking for the following:

“ i) (Spent)

ii) (Spent)

iii) That pending the hearing and determination of this suit interpartes this honorable court be pleased to grant an order of interim injunction restraining the 1st defendant or their servants, agents or any other person assigned or with their authority from interfering, erecting and or continuing to erect buildings and or fencing land parcels **No.Kisumu/Dago/947** and **Kisumu/Dago/948**.

iv) That this honorable court be pleased to grant orders compelling the 5th Respondent to produce records relating to land parcels **No.Kisumu/Dago/947** and **Kisumu/Dago/948**.

v) That costs of the application be provided; and

vi) That such further and other relief that this Honourable court may deem just and fit to grant.”

The application is based on the eight grounds on its face and is supported by the affidavit of the Plaintiff sworn on the 24th November 2015.

2. The application is opposed by the 1st Defendant through the grounds of opposition dated 22nd April 2016 and replying affidavit sworn by Christine Jerusha Achieng, a director of the 1st Defendant, on the 11th October 2016.

3. The application is also opposed by the 5th Defendant through the replying affidavit sworn by George O. Nyangweso, the County Land Registrar Kisumu, on the 14th October 2016.

4. The application came up for hearing on the 17th October 2016 when Mr. Nyanga, Muchemi and M/S Langat for the Plaintiff, 1st and 5th Defendants respectively, addressed the court. That the court then gave directions by consent of counsel present on the filing and serving a further affidavit in 14 days, filing of written submissions and fixed the matter for mention on 16th January 2017. That on the 16th January 2017, Mr. Nyanga, Muchemi and M/S Aliong'o for the Plaintiff, 1st and 5th Defendant respectively addressed the court. That it was apparent that though the Plaintiff's counsel claimed they had filed the further affidavit on the 2nd November 2016 and served, no copy was traceable in the court record. The counsel for the 1st and 2nd defendants denied having been served with the further affidavit and there was no evidence of service on the court record. The Plaintiff had also not filed and served their written submission, while the 1st and 2nd Defendants had filed theirs both dated 13th January 2017. The court declined to grant the Plaintiff any more time and fixed the application for ruling.

5. The issues for determination are as follows;

- a) Whether the Plaintiff has established a prima facie case with probability of success for temporary injunctive orders to issue at this interlocutory stage.
- b) Whether the Plaintiff has made a case for mandatory injunction order against the 5th Defendant in respect to records for the two parcels.
- c) What orders to issue.
- d) Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions filed and come to the following conclusions;

a) That from the records availed by the 5th Defendant in respect of land parcels **Kisumu/Dago/947** in the form of a copy of register (green card), the land was first registered on the 10th April 1980 in the name of Oburu Odinga. The Plaintiff herein was registered as the third proprietor under entry No.5 of the 26th February 1987 which date agrees with the one appearing on the copy of the title deed annexed to his affidavit. The register indicates that the 3rd Defendant became the fourth registered proprietor on the 25th August 2003. Then on 24th March 2004 the 4th Defendant became the fifth registered proprietor and on the 7th August 2012 the 1st Defendant became the proprietor under entry No.11.

b) That in respect of land parcel **Kisumu/ Dago/948**, the register availed by the 5th Defendant shows that the land was first registered on the 10th April 1980 in the name of Stanley Gathuru Ngata and on 24th October 1983, Daniel Clement Maboko Oganah became the second registered proprietor under entry No.5. That the Plaintiff became the third owner under entry No.7 of 5th October 1987 which date carries with the one in the copy of the title deed he provided. That under entry No.9 of 24th May 1995, the land was registered with Edward Muiruri Mwangi as the fourth

owner and on 22nd April 2003, the 3rd Defendant became the fifth owner under entry No.11. Then on the 12 February 2004, the 4th Defendant became the sixth owner under entry No.13 and on the 7th August 2012, the 1st Defendant become the seventh proprietor under entry No.15.

c) That the 5th Defendant has explained that they do not have any other records in respect of the two parcels except the registers whose copies they have availed through their replying affidavit. That as their deposition on that fact has not been disputed, the court finds that there would be no basis of ordering the 5th Defendant to provide any further records or documents.

d) That the un rebutted evidence adduced by the 1st Defendant, who are currently the registered proprietor of the two parcels of land is that they are the ones in occupation and possession of the lands. The 5th Defendant has confirmed that position. The provisions of **Section 26 of the Land Registration Act No.3 of 2012** obligates this court to take the certificate of title issued by the Land Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. That such a title can only be challenged on the ground of fraud or misrepresentation, to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. That though the Plaintiff has availed copies of title deeds issued in 1987 in his name for both parcels, the copies of the registers for those same parcels indicates that there has been subsequent transactions on those titles and the current registered proprietor is the 1st Defendant. That it follows that until such a time the 1st Defendant's title to the two parcels will have been successfully impugned, they are entitled to the rights and privileges of a registered proprietor in terms of **Sections 24 and 25 of the Land Registration Act**, and further noting that they are in possession of the said parcels, injunction orders should not be issued against them.

e) That even though the court is not expected to pronounce itself with finality on any issue of law or fact at this stage, the court finds that the Plaintiff has failed to establish a prima facie case with a probability of success for temporary injunction orders to issue against the 1st Defendant at this stage. The Plaintiff has also failed to show that he would suffer irreparable loss if the injunction orders are not granted and the balance of convenience militates against issuing of the orders at this stage for he is not in possession or currently registered as the proprietor.

7. That flowing from the foregoing, the court finds that the plaintiff's notice of motion dated 24th November 2015 and filed on the 25th November 2015 is without merit and is dismissed with costs to the 1st and 5th Defendants.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF APRIL 2017

In presence of;

Plaintiff Absent

Defendants absent

Counsel Mr. Nyanga for the Plaintiff

M/S Langat for 5th Defendant and h/B for Muchemi for 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017

5/4/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr Nyanga for Plaintiff

M/S Langat for Muchemi for 1st Defendant and appear for the 5th Defendant.

Court: The ruling dated and delivered in open court in presence of

Mr. Nyanga for the Plaintiff, M/S Langat for 5th Defendant and holding brief for Muchemi for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017