



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.62 OF 2014

ORIGINATING SUMMONS

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 (NOW REPEALED) &

LAND REGISTRATION ACT 2012.

IN THE MATTER OF AN APPLICATION BY DANIEL OTIENO AGAOLA

FOR REMOVAL OF REGISTRATION.

AND

IN THE MATTER OF L.R. NO.KISUMU/KANYAKWARD 'B'/385

TUNZA HOUSING CO-OPERATIVE SOCIETY LIMITED.....APPLICANT

VERSUS

DANIEL OTIENO AGOLLARESPONDENT

SYLVANO OTIENO KOLA.....INTERESTED PARTY

RULING

1. Tunza Housing Cooperative Society, the Applicant, filed the motion dated 30th September 2014 seeking for six prayers. The 1st and 2nd prayers are now spent and what remains are prayers 3 to 6 which are as summarized herein below;

- That Daniel Otieno Ogolla, the Respondent, be arrested and charged.
- The Land Registrar be stopped from registering Land parcel **Kisumu/Kanyakwar/B 385** in the name of the Respondent.
- That the Land Registrar be ordered to register the said land in the Applicant's name.
- Costs.

The application is supported by the affidavits sworn by Lydia Opiyo Odipo on the 30th September 2014 and 4th March 2015.

2. The application is opposed by the Respondent through his affidavits sworn on the 10th December 2014, and 27th January 2015. The Respondent also filed a notice of preliminary objection dated 10th December 2014 but he is yet to take any steps to prosecute it.

3. Sylvano Otieno Kola, hereinafter referred to as the proposed Interested Party, filed the motion dated 4th June 2015 seeking for, among others, the following prayers;

- That Sylvano Otieno Kola be enjoined as an Interested Party in this suit.
- That this suit be stayed pending the hearing and determination of Kisumu Environment and Land case No.298 of 2014.
- That the Land Registrar be stopped from registering land parcels **Kisumu/Kanyakwar B/384 and 385** in the names of Tunza Housing Co-operative Society, the Applicant, and Daniel Otieno Agolla, the Respondent.
- Costs.

The application is supported by the affidavit of the said Sylvano Otieno Kola sworn on 4th June 2015.

4. The application is opposed by the Applicant through the replying affidavit sworn by Richard Oketch on the 19th April 2016.

5. The proposed Interested Party also opposed the Applicant's application through the replying affidavit sworn Sylvano Otieno Kola on the 30th June 2015.

6. That on the 16th November 2015, directions were given that the notices of motion dated 30th September 2014 and 4th June 2015 be heard together. The court gave further directions on the 23rd February 2016 and when counsel appeared in court on the 20th April 2016, they entered a consent allowing prayer 3 of the notice of motion dated 4th June 2015 with costs in the cause. The consent brought Sylvano Otieno Kola in the suit as the Interested Party and all the other prayers in the application dated 5th June 2015 were withdrawn. The court then gave direction for filing of written submissions on the motion dated 30th September 2014. When the matter came up for mention on the 8th December 2016, only the Applicant's counsel had filed written submission dated 17th October 2016. The court proceeded to fix the application for ruling.

7. The issues for determination by the court are as follows;

- a) Whether the Applicant has established a case for setting aside the consent order of 18th March 2014 and issued on the 25th March 2014.
- b) What orders to issue.
- c) Who pays the costs.

8. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the Applicant's counsel and come to the following conclusions;

- a) That this proceedings was commenced ex parte through the originating summons dated 11th March 2014 and filed on the 12th March 2014 by Daniel Otieno Agolla, the Respondent. The application does not carry the name of any other party that was to be served nor is there any evidence of it having been served on any party.
- b) That the application was placed before the court on the 17th March 2014, but there being no party present the court directed that another date be fixed at the registry.
- c) That on the 18th March 2014, undated consent letter was filed and entered by the Deputy Registrar. The letter bears the Respondent's signature on the left bottom part and a stamp of the Applicant and a signature on the right bottom. That this is the consent that the Applicant has disputed entering into and is the one that this application seeks to challenge.

d) That the contents of the certificate of official search for land **Kisumu/Kanyakwar B/385** that is annexed to the affidavit of Lydia Opiyo Odipo sworn on the 30th December 2014 indicates that the land was registered in the name of Daniel Otieno Ogola on 23rd September 2013 under entry No.8. The Respondent has not availed evidence to dispute this element of the Applicant's deposition and it leaves the court with doubts as to the real purpose of commencing this proceedings as the Respondent was already registered with the land by the time the originating summons and letter of consent were filed.

e) That the said copy of the register for land **parcel Kisumu/Kanyakwar B/385** indicates that the Applicant had been registered as the proprietor of the suit land on 12th July 2012 under entry No.4, while Sylvano Otieno Kola, the Interested, Party had been registered as the proprietor of the said land on 1st December 1992 under entry No.2. The Applicant, Respondent and Interested party are all laying claim of entitlement to the suit land.

f) That the Interested Party has commenced Kisumu H.C. Land Case No.298 of 2014 against the Applicant, Respondent and the Attorney General as the 1st to 3rd Defendants respectively, through the originating summons dated 16th September 2014, a copy of which is attached to his affidavit sworn on the 4th June 2015. That the subject matters in that suit includes land parcel **Kisumu/Kanyakwar B/385**, which is the suit land in this proceeding.

g) That the fact that the originating summons dated 11th March 2014 were exparte, and the Applicant has disowned having been served and being party to the undated consent letter filed on 18th March 2014, on which the order issued on the 25th March 2014 is extracted from, the court finds that it is only just that the order be reviewed and set aside. This will enable the parties before the court ventilate their interests on the said land for the court to make a decision on merit.

h) That any party with evidence of any other party having committed a criminal offence in the transactions involving the land is at liberty to lodge a complaint(s) with the appropriate criminal investigating agencies for action.

9. That flowing from the foregoing the court issues the following orders;

a) That the notice of motion dated 30th September 2014 is allowed limited to setting aside the consent order of 18th March 2014 and issued on the 25th March 2014 with costs in the cause.

b) That this suit and Kisumu H.C. Land case NO.298 of 2014 be fixed for mention on the same date for further direction on how they will be heard.

c) That any party is at liberty to apply.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF APRIL 2017

In presence of;

Applicant Absent

Respondent Absent

Interested party Absent

Counsel M/S Adwar for the applicant

M/S Stausi for Interested Party

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017

5/4/2017

S.M. Kibunja Judge

Oyugi curt assistant

Parties absent

M/S Adwar for the Applicant

M/S Stausi for Interested Party

Court: Ruling dated and delivered in open court in presence of

M/S Adwar for the Applicant and M/S Stausi for Interested party.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017