



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.90 of 2016

JANE AOKO OKWACH.....PLAINTIFF

VERSUS

BARNABAS OKWACH OGUTTA.....1ST DEFENDANT

DAID NYANGUDI OKOTH.....2ND DEFENDANT

**THE COUNTY LAND REGISTRAR NYANDO MOHURONI NYAKACH.....3RD
DEFENDANT**

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. Jane Aoko Okwach, the Plaintiff, through notice of motion dated 26th April 2016 brought under **Section 1A, 1B of Civil Procedure Act, Orders 40 Rule 1, Order 51 Rule 1 of Civil Procedure Rules, Section 68 (1), 93 (2), (3), (4) of Land Registration Act, Section 6 (1) of Matrimonial Property Act**, seeks for the following orders:

- Temporary injunction restraining the 1st and 2nd Defendants from alienating, charging land parcel Kisumu/Koru/412 or the subdivisions thereof pending the hearing and determination of this suit.
- Temporary injunction restraining the 2nd Defendant, by himself or agents from “entering upon or, trespassing upon, cultivating or in any way dealing, in land parcel No. **Kisumu/Koru/1981** in any manner that would divest the Plaintiff of her property rights thereon without her consent pending the hearing and determination of this suit.”
- That an order of prohibition directed at the Land Registrar Nyando, the 3rd Defendant, be issued in respect of land parcels **Kisumu/Koru/1980 and 1981**, all formerly part of **Kisumu/Koru/412** pending the hearing and determination of this suit.

That the prayer 4 on inhibition was granted exparte on the 27th April 2016. That prayer 2 of the notice of motion was granted in the interim on the 26th May 2016. The application is based in the ten (10) grounds on its face and supported by the affidavits of the Plaintiff sworn on the 26th April 2016 and 23rd January 2017.

2. The Application is opposed by **Barnabas Okwach Ogutta**, the 1st Defendant, through his undated replying affidavit filed on 21st September 2016 and supplementary affidavit sworn on 27th January 2017.

The counsel on record for **David Nyagudi Okoth**, the 2nd Defendant, filed grounds of opposition in respect of an application “dated 4th February 2017” but there is no such application in this file.

3. That the notice of motion came up for hearing on the 26th October 2016 when directions on filing and exchanging written submission were given. The counsel for the Plaintiff filed their written submissions dated 4th February 2017 on the 7th February 2017 while counsel for the 1st Defendant filed theirs on the 16th February 2017.

4. The following are the issues for determination by the court;

a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction and prohibition order to issue at this interlocutory stage.

b) What orders to issue.

c) Who pays the costs

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both the Plaintiff and 1st Defendant, the submissions by their counsel and come to the following finding;

a) That the Plaintiff and 1st Defendant are husband and wife and had established their matrimonial home on land parcel **Kisumu/Koru/412** after acquiring it in 1969.

b) That the Plaintiff filed a caution against land parcel **Kisumu/Koru/412** on 13th June 2013 but it was removed on the 26th May 2015 without her knowledge. That the 1st Defendant admitted being the one who moved the land Registrar to lift the caution ostensibly on the basis of the family agreement or consent to subdivide it. The 1st Defendant referred to the document marked **BOO2** attached to his supporting affidavit. That the court has perused the said document which is signed by eleven persons, including the Plaintiff and the 1st Defendant, and there is nothing in it to signify that an agreement was reached to lift the caution filed by the Plaintiff or to subdivide the land between the Plaintiff and her co-wife, namely **Selfine Amolo Akwach**.

c) That the removal of the caution filed on land parcel **Kisumu/Koru/412** by the Plaintiff on the 23rd June 2013 without serving the Plaintiff with a notice contravenes **Section 73 of the Land Registration Act No.3 of 2012**. That had the 3rd Defendant served the Plaintiff with a notice in accordance with **Section 73 (2)** of the said Act, the Plaintiff would have had an opportunity to both raise her objection and to be heard before the caution was removed. The removal of the caution was therefore done irregularly and without following the set procedure.

d) That the claim by the Plaintiff that the 1st Defendant acted in collusion with the 3rd Defendant in secretly removing the caution and processing the subdivision of the land into parcels **Kisumu/Koru/1980 and 1981** cannot be said to be unreasonable as no notice of the intention to lift the caution was served on the Plaintiff. That in addition there is no evidence that the Plaintiff, who is the first wife to the 1st Defendant and whose matrimonial home was on land parcel **Kisumu/Koru/412**, was involved in applying for, obtaining consents to subdivide the land and the transfer of one portion to the 2nd Defendant.

e) That whereas there is a dispute as to whether **Selfine Amolo Akwach's** matrimonial home was ever on land parcel **Kisumu/Koru/412**, there is no doubt that it is on that land that the matrimonial home of the Plaintiff and 1st Defendant is situated. That land was acquired during the subsistence of the marriage between the Plaintiff and 1st Defendant and is evidently their matrimonial Property which can only be dealt with as such as provided for under **Section 93** of the Land Registration Act.

f) That from the foregoing the court finds that the Plaintiff has established a prima facie case for issuance of the orders sought in her notice of motion dated 26th April 2016.

6. That the notice of motion dated 26th April 2016 has merit and is allowed in terms of prayers 2, 3 and 4 with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 31ST DAY OF MAY 2017

In presence of;

Plaintiff Present

Defendants 1st and 2nd Present

Counsel M/S Nabifu for Njoga for Plaintiff

M/S Adwar for the 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2017

31/5/2017

S.M. Kibunja Judge

Oyugi Court Assistant

Plaintiff present

1st and 2nd Defendant present

M/S Nabifu for Njoga for Plaintiff

M/S Adwar for 2nd Defendant

Court: ruling dated and delivered in open court in presence of the Plaintiff, 1st and 2nd Defendant, M/s Nabifu for Njoga for the Plaintiff and M/S Adwar for 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2017