



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.282 OF 2016

LOICE ALICE ONYANGO OKOMBO1ST PLAINTIFF

TEREVY JAMES OYOMBRA.....2ND PLAINTIFF

VERSUS

ERICK OTIENO OGUTU1ST DEFENDANT

JENIOFRA AKINYI OBURU.....2ND DEFENDANT

GEORGE ADADA NYAGOWA.....3RD DEFENDANT

RULING

1. Loice Alice Anyango Okembo and Trevy James Oyombra, the 1st and 2nd Plaintiffs, seeks vide the notice of motion dated 31st October 2016 to have **George Adada Nyagawa** the 3rd Defendant, restrained by temporary injunction “ from evicting the Plaintiffs, stepping on, forceful entry, disposing, alienating, transferring, dealing and/or interfering whatsoever with the Plaintiff’s property herein known as **Kisumu/Kapuonja/2460** pending the hearing and determination of this suit.” The application is based on the six grounds on the notice of motion and is supported by the affidavit sworn by the 1st Plaintiff on the 31st October 2016.

2. The application is opposed by the 3rd Defendant through his replying affidavit sworn on the 9th March 2017.

3. The notice of motion came up for hearing on the 23rd March 2017 when M/S Masese and Mr. Olel, learned counsel for the plaintiffs and 3rd Defendant respectively, made their oral submissions.

4. The following are the issues for the court’s determinations;

- 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 considered the grounds on the notice of motion, the affidavit evidence, oral rival submissions by counsel and come to the following determinations;

a) That the Plaintiffs had entered into a land sale agreement dated 4th September 2014 under which Erick Otieno Ogutu, the 1st Defendant, was selling to them land parcel **Kisumu/Kapuonja/2460** at Ksh.2,500,000/=. That earlier on the 17th March 2014, the 1st Defendant had entered into another sale agreement with the 3rd Defendant over the same land at a purchase price of Ksh.3,000,000/=. That in both agreements, Jenifer Akinyi Oburu, the 2nd Defendant, was one of the witnesses.

b) That at the time the two sale agreements were executed, the registered proprietor of the said land was the late Samwel Oburu Ondiala who had died on the 14th October 2002. That any transfer of the suit land title that may have occurred before the Kisumu High Court succession Cause No.313 of 2013 was filed and the grant issued on 19th January 2015 and confirmed on the 10th June 2016 was irregular, unlawful and unprocedural. That such a title was not protected under **Section 26** of the Land Registration Act No.3 of 2012 and **Article 40** of the Constitution of Kenya, 2010.

c) That though the Plaintiffs and the 3rd Defendant were all interested in buying the same land as evidenced by the two sale agreements referred to above from the same vendor, the 1st Defendant, the 3rd Defendant had another sale agreement with the 2nd Defendant dated 29th November 2014 over the same land at a purchase price of Kshs.2,200,000/=. That further, the 3rd Defendant ended up being the registered proprietor of the suit land following a transfer on the 5th October 2016 by the 2nd Defendant, who had obtained a confirmed grant in respect of the registered proprietors estate on the 10th June 2016.

d) That by the time the Plaintiffs filed this suit on the 31st October 2016, the 3rd Defendant was already the registered proprietor of the suit land and this court is obligated to take him as absolute and indefeasible owner of the said land until such a time his title is successfully impugned in accordance with **Section 26** of the Land Registration Act.

e) That the 3rd Defendant knew that the Plaintiffs had taken possession of the suit land as confirmed in paragraph 30 of his replying affidavit and paragraphs 22 and 23 of his counterclaim against the Plaintiffs that was filed with the Defendants statement of defence dated 9th March 2017 and filed in court on the 13th March 2017.

f) That the fact that the Plaintiffs are not the registered proprietors of the suit land leads the court to conclude that on the basis of the affidavit evidence so far availed, they have failed to establish a prima facie case with a probability of success on the basis of which temporary restraining order could issue. The Plaintiffs have also not shown what damages or loss they are likely to suffer that is of an irreparable nature was the order sought not issued at this stage.

g) That the contents of the sale agreements that the Plaintiffs and 3rd Defendant separately entered into with the 1st and 2nd Defendants in 2014, shows that the purchasers were aware that the land subject matter of the sale agreements was not in the names of the vendors, but of a deceased person. That accordingly the balance of convenience does not tilt in favour of the Plaintiffs as they are without title to the land unlike the 3rd Defendant.

6. That in view of the foregoing, the court find no merit in the plaintiffs notice of motion dated 31st October 2016 and the same is dismissed with costs to the 3rd Defendant.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mrs Onyango for Charles Onyango for 2nd and 3rd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017

17th May 2017

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

Mrs Onyango for Charles for 2nd and 3rd Defendant

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

Mrs Onyango for Charles Onyango for 2nd and 3rd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017