REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.327 OF 2013

CONSOLATA PANDE.....1ST PLAINTIFF

JENIFER OLOO OLIECH.....2ND PLAINTIFF

(Suing as Legal representatives of the estate of ABOMA OTENGO (deceased)

VERSUS

ASHISH BHUPENDERA PATEL.....1ST DEFENDANT

KARIA NISHMA RAMESH KARIA.....2ND DEFENDANT

SHADRACK OKELLO CHAN.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. **Consolata Pande and Jenifer Oloo Oliech**, the Plaintiffs, suing as legal representatives in the estate of **Abomo Olengo,** deceased, vide notice of motion dated 25th November 2015, seeks for temporary injunction restraining **Ashish Bluependra Patel and Karia Nishma Ramesh Karia**, the 1st and 2nd Defendants respectively, by themselves or their agents from "disposing of, subdividing, mortgaging, charging, selling, transferring or leasing out land parcel **Kisumu/Ojola/2103** pending the hearing and determination of this suit." The notice of motion is brought under **Order 40 Rule 1 and 2, Order 51 Rule 1** of the Civil Procedure Rules, **Section 1A, 1B and 3A of Civil Procedure Act.** The application is based on the seven grounds on its face and supported by the affidavit of the Plaintiffs sworn on the 25th November 2015.

2. The application is opposed by the 1st and 2nd Defendants through the replying affidavit sworn by Hishma Karia, the 2nd Defendant, sworn on the 20th May 2016.

3. The Land Registrar Kisumu and the Attorney General, the 4th and 5th Defendants respectively, also opposed the application through the replying affidavit sworn by George Orwaru Nyangweso on the 14th March 2016.

4. The notice of motion came up for hearing on the 8th December 2016 when counsel for the parties

agreed to file written submissions. The counsel for the Plaintiffs filed the written submissions dated 10th March 2017 while counsel for the 1st and 2nd Defendants filed theirs dated 28th January 2017.

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

a) Whether the Plaintiffs have established a prima facie case with a probability of success for temporary injunction order to issue at the interlocutory stage.

b) Who pays the costs.

6. The court has after carefully considering the grounds on the notice of motion, affidavit evidence filed, written submissions by both counsel concluded as follows;

a) That the Plaintiffs obtained a Grant Ad litem in respect of the estate of **Aboma Otengo** in Kisumu Succession Cause No.918 of 2015 on the 28th September 2015. The Grant was limited for a period of 90 days. This suit was commenced through the plaint dated 25th November 2015 and filed on 30th November 2015 vide receipt Number 7163471, and therefore within the lifetime of the limited Grant. The Plaintiffs therefore have authority under the said Grant Ad litem to commence this suit for the estate of the said **Aboma Otengo**, deceased.

b) That the subject matter of this suit is land parcel **Kisumu/Ojola/2103** which was initially registered in the name of **Aboma Atengo**, the deceased, on the 21st July 1978. That the said deceased died on the 12th September 1978, and even though the Plaintiffs position is that no confirmed grant of his estate had been obtained before the land was transmitted to the name of their step uncle, namely Shadrack Okello Chan who is the 3rd Defendant, the 4th Defendant's replying affidavit annexed a copy of certificate of confirmation issued in Kisumu H.C. succession Cause No.38 of 2002 in respect of the estate of Aboma Atengo indicating that the grant had been issued to the 3rd Defendant and that he was to inherit land parcel **Kisumu/Ojola/2103** which is the suit land.

c) That though the Plaintiffs alleges that the 3rd Defendant had disclosed that he had not obtained a confirmed grant when he transferred the suit land to himself, the confirmed grant refered to in (b) above tells a different story and as he has not filed any replying papers to confirm the Plaintiffs contention, the court can only take the Plaintiffs' claim on that issue to be heresy at this stage.

d) That the Plaintiffs have annexed to their supporting affidavit a copy of a **limited grant ad colligenda bon** in Kisumu H.C. Succession Cause No.38 of 2002 in respect of the estate of Barrack Odhiambo Gumbe who died on 11th August 200l. The grant was issued on 23rd of undisclosed month in year 2002 to **Angeline Atieno Ngonga.** That though the cause number in that cause and the one refered to in (c) above are the same, they relate to different estates, and are issued to different persons.

e) That the replying affidavit sworn by the 2nd and 4th Defendants have clearly indicated that the person who effected the transfer to the 1st and 2nd Defendants was Silvanus Onyiego Nyawaga and not the 3rd Defendant. That the copies of the green card for parcel **Kisumu/Ojola/2103** confirmed that the 3rd Defendant became the registered proprietor on the 13th November 2002 while Silvanus Onyiego Nyamwaga became the registered proprietor on the 4th December 2002 and that he transferred the land to the 1st and 2nd defendants on the 28th February 2014.

f) That the Plaintiffs have not taken any steps to enjoin the said Silvanus Onyiego Nyawaga in this proceedings. The contents of the green card record would mean there was no contract between the 3rd Defendant and the 1st and 2nd Defendants over the suit land. The court is therefore of the considered finding that the Plaintiffs have failed to establish a prima facie case with a probability of success for temporary injunction order to issue against the 1st and 2nd Defendants. The Plaintiffs

have not established what irreparable damage they stand to suffer should the order sought not be granted and the balance of convenience tilts against issuing the order.

7. That flowing from the foregoing, the court finds the notice of motion dated 25th November 2015 to be without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr. Yogo for the 1st and 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr Yogo for the 1st and 2nd Defendant

Court: The ruling dated and delivered in open court in presence of Mr. Yogo for the 1st and 2nd Defendants only.

S.M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

14/6/2017