



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT AND LAND COURT

PETITION NO.1B OF 2014

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40, 48 and 50 AS READ

TOGETHER WITH ARTICLES 19,20,21,22,23 and 24 OF THE CONSTITUTION OF KENYA AND SECTION 19 OF THE

SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA

BETWEEN

DAVE ODHIAMBO ORICHO1ST APPLICANT

BENEDATE KASYOKA MBALA.....2ND APPLICANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COUNTY REGISTRAR OF LAND KISUMU.....2ND RESPONDENT

THE DIRECTOR OF SURVEYS.....3RD RESPONDENT

AND

GRACE AWUORINTERESTED PARTY

RULING

1. **Dave Odhiambo Oricho and Benedate Kasyoka Mbala**, hereinafter referred to as 1st and 2nd Applicants filed amended Notice of Motion dated 17th February 2014 for five prayers marked 1 to 5 respectively. The first two prayers have been spent following the exparte Orders of 19th February 2014. This ruling is concerned with prayers 3,4, and 5 for injunction pending the hearing and determination of the petition, mandatory injunction and for costs. The applicants named the **Hon. Attorney General, The County Registrar of Lands Kisumu, and The Director of Surveys** as the 1st to 3rd Respondents and

they will be referred to as such hereinafter. **Grace Awour**, hereinafter referred to as the interested party filed the Notice of Motion dated 17th September 2014 seeking to be enjoined in the petition. The application was allowed on 18th September 2014. The counsel for the parties appeared before the court on 25th February 2015 and directions were issued that submissions on the amended notice of motion be filed. The counsel for the Applicants filed their submissions dated 5th March 2015 while counsel for the Respondents filed their submissions dated 18th May 2015 on the 20th May 2015. The counsel then appeared before the court on 13th October 2015 and counsel for the interested party indicated that they would be relying on the submissions filed by the Applicants counsel.

2. The main issues for determination is whether the Applicants have established a *prima facie* case with possibility of success for issuance of temporary injunction. Secondly whether the Applicants have established a special circumstance for issuance of the Mandatory injunction at the interlocutory stage. Thirdly who pays the costs.

3. The court has considered the two ground on the amended notice of motion, the affidavit evidence and rival submissions filed by the parties counsel and come to the following findings:

(a) That the copies of the land registers and title deeds annexed to the filed affidavits confirms that title to land parcel **Kisumu Wathorego/139** was closed on 13th July 2009 upon being subdivided into land parcels **3488 to 3490** and registered in the joint names of **Domnic Odhiambo Odongo , Kesia Atieno Osodo, Mathews Owuor Ojany** and **Otieno Ojany**.

(b) That title to parcel **Kisumu/Wathorego/3488** was on 23rd March 2010 closed upon being subdivided into parcels **3634 to 3636**. That parcel **3489** was on 3rd September 2010 transferred to the name of **Joash Nyabwari Ondigo** while parcel **3490** was on 21st March 2011 transferred to **Grace Awuor**, the interested party. That parcel **3634** was transferred to **George Otieno Ojany** on 7th October 2010 and on the 12th November 2010 it was again transferred to **Hezbourne Ouma Ongelleh**. Parcel **3635** was transferred to **George Otieno Ojany** on 7th October 2010 and on 19th April 2013 it was further transferred to the Applicants.

(c) That though the parties did not avail the copy of the decree issued in Kisumu CMCC NO.1 of 2011, they have annexed to their respective affidavits a copy of a letter

dated 7th November 2013 by the Land Registrar communicating that all the subdivisions from **Kisumu Wathorego/139** have been cancelled following the court Order and all parcels reverted to the original title.

(d) That the Applicants' amended Petition and notice of motion are primarily challenging the 1st Respondent's action of implementing the decree issued by the chief Magistrate's court Kisumu in **Civil Case number 1 of 2011**. The Orders issued by a court of Law are meant to be obeyed by all and sundry. Any Party aggrieved by a court order has no alternative but to move the court for review or appeal as appropriate.

(e) That the Respondents submission that the **Kisumu CMCC NO.1 of 2011** decision to revert all titles of subdivisions emanating from **Kisumu/Wathorego/139** back to the original title has not been quashed and or appealed against. From the materials so far presented before this court, there is nothing on which to fault the action taken by the 1st Respondent to revert all the subdivisions to the original title, **Kisumu/Wathorego/139**, as it was in compliance of the said court Order. That being the case, then this court do not find special circumstances that calls for the issuance of mandatory injunction at this interlocutory stage. The applicants needed to establish a special circumstance to have the mandatory injunction issued at this stage as shown in the case of **Industrial and Commercial Developments Corporation - V- Kenya Bus Services & 2 others [2007] eKLR** in which **Waweru J**, stated;

" with regard to mandatory injunction, however there is a further requirement; it ought not be granted on an interlocutory application in the absence of special circumstance, and then only in clear cases, either where the court thinks that the matter ought to be decided at once, or where

the injunction is directed as a simple and summary act which can be remedied, or where the defendant has attempted to steal a match on the plaintiff. It was so stated by the court of appeal in the case of Kenya Breweries Limited -V- Okeyo [2002] IEA 109."

This is not a suitable case where mandatory injunction can issue at the interlocutory stage as it would have the effect of stopping or interfering with the implementation of the lower Court order without this court being formally moved to stay those orders. In the same breath, to allow the injunction orders issued on 19th February 2014 to remain in force pending the hearing and determination of the petition would also have a similar effect of interfering with the implementation the lower court order in **Kisumu CMCC NO.1 of 2011** without any formal stay orders being applied for. The court find that the Applicants have not established any of the three grounds in **Giella – V- Cassman Brown Co Ltd (1973) E.A 358** for issuance of temporary injunctions.

4. That for reasons set out above the court finds that the Applicants amended Notice of Motion dated 17th February 2014 is without merit and is dismissed with costs.

The interim orders issued on 19th February 2014 are hereby vacated.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 27th **day of January 2016**

In presence of;

APPLICANTS 1st applicant only

RESPONDENTS N/A

INTERESTED PARTY N/A

COUNSEL Mr Emukula for Petitioners/Applicants

Mr Kirega for Respondents

Mr Nyauma for Respondents.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/1/2016

27/1/2016

S.M. KIBUJA J.

1st Petitioner/Applicant present

Mr Kirenga for P. Ochieng for the interested party.

Mr Emukula or the petitioner /Applicant.

And Mr Nyauma for the Respondent present.

Court: Ruling delivered in open court in presence of the 1st Petitioners/Applicants, Mr Emukule for Petitioner/Applicants, Mr Kirenga for Ochieng for the interested party and Mr Nyauma for the Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/1/2016