



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO.94 OF 2015

HELEKIAH ONG'ANY MASARA 1ST APPLICANT

DALMAS ALUDO HONGO..... 2ND APPLICANT

(Suing as a personal representative to the estate of

PHOEBE ALUDO HONGO(Deceased)

VERSUS

ELISHA OGUIYA OGADA alias OGUIYA OGADA.....1ST RESPONDENT

JANE AKINYI KISIA.....2ND RESPONDENT

RULING

1. Applicants, **Helekiah Ong'any Masara** and **Dalmas Aluodo Hongo**, seeks for the Respondents, **Elisha Oguya Oganda** alias **Oguya Ogada** and **Jane Akinyi Kisia**, to be restrained from any dealings, selling, disposing, transferring or otherwise interfering with **Kisumu/Wang'aya/2467 "pending hearing and final determination of this application interpartes."** The application is based on the two grounds summarized as follows:
 - a) That the applicants are proprietors of the suit land by virtue of their sale agreements dated 12th April 1978 and 5th August 1981 with the 1st Respondent.
 - b) That the sale of the suit land by the 1st Respondent to the 2nd Respondent was unlawful, illegal and constitutes a breach of their sale agreements with the 1st Respondent. The application is supported by the Applicants' joint affidavit sworn on 16th April 2015.
2. The application is opposed by the 1st Respondent through the grounds of opposition filed through his advocate and dated 4th June 2015.
3. The application came up for hearing on the 20th January 2016 and the counsel agreed by consent to file written submissions. The counsel for the Applicants' written submissions dated 26th February 2016 were filed on 1st March 2016. The submissions by the 1st Respondent's counsel dated 24th April 2016 was filed on 5th May 2016, while that by 2nd Respondent's counsel dated 11th April 2016 was filed on 19th April 2016.
4. The issues for the courts determination are as follows:
 - a) Whether the Applicants have established a prima facie case with a possibility of success for the restraining orders to issue at the interlocutory stage.

- b) Who pays the costs of the application.
5. The court has after considering the grounds on the notice of motion, the affidavit evidence, the grounds of opposition, rival written submissions come to the following conclusions;

a) That land parcel **Kisumu Wangaya/2467** over which the Applicants have filed the claim is registered in the names of **Jane Akinyi Kisia**, the 2nd Respondent since 20th November 2013. The 2nd Respondent became the registered proprietor following the transfer effected by **Elisha Oguya Ogada** the 1st Respondent.

b) That the Applicants have never been registered as proprietors of the said land as their names do not appear in the copy of the register of that parcel annexed to the 2nd Respondent's list of documents. The agreement of sale documents annexed to the joint supporting affidavit of the Applicants do not signify that the 1st Respondent had transferred his legal interest on the whole or part of the suit land at the time they were made or any other time thereafter.

c) That as correctly submitted by counsel for the 1st Respondent, the suit land was agricultural land and therefore any agreements for its sale was subject to a consent being obtained from the Land Control Board in accordance with **Section 6 (1) of the Land Control Board Act** Chapter 302 of Laws of Kenya.

That where consent is not obtained within six months the sale agreement becomes void and the recourse the purchaser has, under **Section 7** of the said Act, is to get a refund of the monies paid under the sale agreement.

d) That the Applicants have not disclosed whether their sale agreements with 1st Respondent had received the land control board consents. That if the requisite consents were not obtained then the sale agreement became void after six months.

e) That this court is obligated under **Section 26 of the Land Registration Act No.3 of 2012** to take the 2nd Respondent as the bona fide registered and absolute owner of land parcel **Kisumu/Wang'aya/2467** on the production of the title issued by the Land Registrar. The 2nd Respondent is entitled to the privileges and rights of a registered proprietor as provided for under **Section 24 and 25** of the said Act.

f) That as the Applicants are not the registered proprietors of the suit land and have not yet successfully challenged the title of the 2nd Respondent to the said land, the court finds that they have failed to establish a case upon which temporary injunction would issue against the Respondents at this interlocutory stage.

g) That the application as drawn sought for temporary injunction “**pending hearing and final determination of this application interpartes**” which event was now passed. The order sought was not for pending hearing and determination of the suit.

6. That based on the foregoing, the notice of motion dated 16th April 2015 is without merit and is dismissed with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 29TH DAY OF JUNE 2016

In presence of;

Applicants Absent

Respondents 2nd Respondent present

Counsel Mrs Olango for Applicants

Mr Baganda for Okero for 2nd Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/6/2016

29/6/2016

S.M. Kibjunja J.

Oyugi court Assistant

2nd Defendant present

Mr Baganda for Okelo for 2nd Defendant

M/s Olango for plaintiffs/Applicants

Court: Ruling delivered in open court in presence of the 2nd Defendant, M/S Olango for Plaintiffs/Applicants and Mr Baganda for Okero for 2nd Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/6/2016