



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO.255 OF 2013**

**THOMAS OMONDI OWAKO.....1ST PLAINTIFF**

**ANN AKINYI OWAKO.....2ND PLAINTIFF**

**VERSUS**

**DAVID OSCAR OWAKO.....1ST DEFENDANT**

**JOHN KENNEDY AGENGO.....2ND DEFENDANT**

**ABIRA CATHERINE.....3RD DEFENDANT**

**RULING**

1. This matter came up for directions on 27th April 2016 when Mr Onsongo for 2nd and 3rd Defendants, Mr Yogo advocate for the Plaintiffs and the Defendant in person addressed the court. Mr Osongo requested for directions on the following two issues:

a) Whether the issues in this suit should be dealt with in the related Succession cause in which the 1st Defendant has been appointed the administrator and the Plaintiffs have lodged objection proceedings.

(b) Whether the court order of 26th September 2013 stopped Kibos sugar and Allied Industries from releasing the funds to the 2nd and 3rd Defendants.

On his part of the 1st defendant, was of the view that this court has no jurisdiction to determine the issues before it in view of the Succession Cause. Secondly the 1st Defendant indicated that the Plaintiffs have no capacity to seek to stop **Kibos Industries** from releasing the money held to the 2nd and 3rd Defendants. The counsel for the Plaintiffs pointed out that his clients had filed objection and revocation proceedings in **Succession Cause 452 of 2008** which is coming up for hearing on 15th July 2016. That this suit was filed to safeguard Plaintiffs interests on the properties transferred through questionable transactions and stop the intermeddling by the Defendants. The counsel was of the view that the funds held by **Kibos Industries** should remain so held until after the Succession Cause is heard and determined and that the obtaining status quo should therefore be maintained.

2. The court has taken time to peruse the record and noted the following:

a) That the Plaintiffs commenced this case through the Plaint dated 25th September 2013 filed contemporaneously with the notice of motion even date in which they seek restraining orders

against the Defendants from dealing with land parcels **Kisumu/Muhoroni/514, 114, 1343 – 1345, Mohoroni/Songor 10817 and Municipality/16653** pending the hearing and determination of this suit and **Kisumu High Court Succession Causes No.452, 453 of 2008 and 75 of 2005**.

b) That the notice of motion dated 25th September 2013 was certified urgent and temporary injunction pending service and interpartes hearing in terms of prayers 2 granted on the 26th September 2013.

c) That the 2nd and 3rd Defendant, filed their replying affidavits sworn on 7th October 2013 in opposition to the notice of motion.

d) That the Plaintiffs then filed the notice of motion dated 19th March seeking to be allowed to serve the 1st Defendant with the suit papers through advertisement which has allowed on 24<sup>th</sup> March 2014.

e) The 1st Defendant then filed the notice of motion dated 31st July 2014 seeking to have the exparte orders of 26th September 2013 discharged Plaintiffs be stopped from interfering with the administration of the estate.

3. That having considered the submissions by counsel for Plaintiffs, the 2nd and 3rd Defendants and the 1st Defendant in person, and further having perused the court record, the following are apparent;

a) That the interpartes hearing of the Plaintiffs notice of motion dated 25th September 2013 is yet to take place and the interim orders were last extended on 3rd July 2014 to the next mention date of 22nd July 2014. The exparte orders not having been extended again has since expired in terms of order **order 40 rule 4(2) and 6** of Civil Procedure Act.

b) That the notice of motion filed by the 1st Defendant and dated 31st July 2014 is yet to be heard. There is also no evidence to confirm whether said notice of motion has been served. Further the court notes that no replying papers have been filed in respect of the notice of motion dated 31st July 2014.

c) That the 1st Defendant is yet to file any replying papers to the Plaintiffs notice of motion dated 25th September 2013.

d) That the exparte orders issued on 26th September 2013 which has since lapsed as shown in (a) above were clear that they were for a temporary injunction restraining the defendants, their servants and/or any person deriving their authority from in any way whatsoever administering, handling, dealing in, distributing, disposing of, taking over, alienating, selling, deriving benefit or profit or in any way interfering with the estate of **Imelda Akinyi Owako** (deceased) and specifically land parcels numbers **Kisumu/Muhoroni/514, 144, 1343 – 1345, Mohoroni/Songhuor/10817 and Kisumu Municipality/LR 16653**. The court is of the view that the recourse for any party who could have been unhappy with the order was to seek to have it varied reviewed and or set aside. That in view of the order in (a) above, the parties need to set the notice of motion dated 25th September 2013 for interpartes hearing in the shortest time possible to avoid any further unnecessary delay.

e) That in view of the finding in (a) above, the 1st Defendant notice motion dated 31st July 2014 may not be of much relevance to him as the order he set out to have discharged has since lapsed. The 1st Defendant should consider filing a reply as provided for under **Order 51 Rule 14** of Civil Procedure Rules to the Plaintiffs notice of motion dated 25th September 2013 without any further delay.

2. That having found as above, the court directs as follows;

a) That the exparte orders of 26th September 2013 in relation to the Plaintiffs notice of motion

dated 25th September 2013 having been last extended on 3rd July 2014 lapsed on 22nd July 2014.

b) That in view of the finding in (a) above, the 1st Defendant notice of motion dated 31st July 2014, to primarily set aside the exparte orders of 26th September 2013, which has since lapsed is hereby marked as abandoned for failure to have it served without undue delay and further having been overtaken by events.

c) That the 1st Defendant is hereby directed to file and serve his reply to the Plaintiffs notice of motion dated 25th September 2013 within the next 14 days.

d) That a hearing date for the notice of motion dated 25th September 2013 be fixed for hearing without further undue delay.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016**

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr Yogo for Plaintiffs

M/S Osongo for 2nd and 3rd Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/6/2016**

8/6/2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Mr Yogo for the Plaintiffs

M/S Onsongo for 2nd and 3rd Defendants

Court: Ruling read over in open court in presence of Mr. Yogo and M/s Osongo for Plaintiffs and 2nd and 3rd Defendants respectively.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/6/2016**