



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 466 OF 2015

EDWARD MAKORI OGANDA 1ST PLAINTIFF

STEPHEN AMWOLMA MAGOGO 2ND PLAINTIFF

VERSUS

JOHNSON AYIENDA alias ORANGI 1ST DEFENDANT

JACQUES ORANGI AYIENDA 2ND DEFENDANT

DONALD BOSIRE AYIENDA 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The plaintiffs claim is that they are the registered owners of land parcels **West Kitutu/Mwakibagendi/2858, 2859, 2860 and 2861** which are subtitles out of land parcel **West Kitutu/Mwakibagendi/1395** having purchased the same from the 1st defendant. The plaintiffs by the plaint dated 15th October 2015 claim that the 1st and 2nd defendants unilaterally and without any notice to the plaintiffs initiated proceedings before the Marani Land Disputes Tribunal in Tribunal Case No. 115 of 2011 which made a decision revoking their aforesated titles. The plaintiffs claim the decision by the tribunal was null and void and by the plaint seeks a declaration annulling the tribunal's decision and an order of permanent injunction.

2. The plaintiffs by an application dated 4th December 2015, the subject of this ruling seeks interalia the following interlocutory orders:-

1. Pending the hearing and determination of the instant suit, the court be pleased to stop the County Surveyor and the Land Registrar, Kisii County from in any way acting on the order issued in Kisii CMCC Misc. App. No. 415 of 2010.

2. The honourable court be pleased to grant order for maintenance of the status quo, over and in respect of LR No. West Kitutu/Mwakibagendi /1395 more particularly, pertaining to the title, occupation and possession thereof.

3. The honourable court be pleased to grant an inhibition, directed to and/or against any dealings, transaction and/or disposition, relating and/or concerning transactions in respect of LR Nos. West Kitutu/ Mwakibagendi/1395 to last pending the hearing and determination of

the suit.

4. Costs of the application be borne by the defendants/respondents.

3. The plaintiffs application is supported on the grounds that are set out on the face of the application and on the supporting affidavit sworn by Edward Makori Oganda the 1st plaintiff herein. The plaintiffs claim is that they were bonafide purchasers of the parcel of land namely **West Kitutu /Mwakibagendi/2858, 2859, 2860 and 2861** (all curved out of land parcel **West Kitutu/Mwakibagendi/1395**) from the 1st defendant. The plaintiffs aver that the 2nd defendant referred a dispute to Marani Land Disputes Tribunal who heard the dispute in the absence of the plaintiffs and made a decision that the titles issued to the plaintiffs be cancelled. The decision of the Land Disputes Tribunal was adopted vide Kisii CMCC Misc. App. No. 415 of 2011 and a decree (annexed and marked “**EM03**”) was issued which was executed with the result that the titles registered in the plaintiffs name were cancelled and the original title being **West Kitutu/Mwakibagendi/1395** was restored in the register. The plaintiffs aver that they were neither afforded an opportunity to be heard before the land disputes tribunal and/or before the chief magistrates court when the land disputes tribunal decision was adopted as judgment and decree of the court.

4. The plaintiffs contend their rights and interest in the suit properties were trampled upon by the defendants without due process being adhered to and for that reason they seek the preservation of the suit property by an order of status quo and inhibition of any dealings with the suit property until the present suit is heard and determined to enable them to ventilate their rights and interests and have the court determine on the legality or otherwise of the tribunal proceedings.

5. The 2nd defendant, Jacques Orangi Ayienda swore an affidavit in reply to the plaintiffs’ application dated 8th February 2016 in opposition thereof. In the replying affidavit, the 2nd defendant avers that land parcel **West Kitutu/Mwakibagendi/1395** was ancestral property and that the 1st defendant/respondent at all times held the same in trust for his benefit and for the benefit of successive generations. The 2nd defendant further contends when the alleged sales to the plaintiffs took place, the plaintiffs knew the 1st defendant had more than one family and that the family members had not been consulted in regard to the intended sale of their ancestral land to the plaintiffs. The 2nd respondent further states the dispute that was referred to Marani Land Disputes Tribunal related to a dispute between his two (2) houses of the 1st defendant in respect of the 1st wife and 2nd wife in regard to the use and occupation of land parcel **West Kitutu/ Mwakibagendi/1395**. The 2nd defendant further avers that the plaintiffs could not have been bonafide purchasers as they knew or ought to have known the land they were buying was ancestral land held in trust by the 1st defendant and that the 1st defendant’s family had an overriding interest over the same. The 2nd defendant further states that the plaintiffs application cannot satisfy the threshold for grant of injunction arguing that no prima facie case has been established and it has not been demonstrated that damages would not be an adequate remedy.

6. The plaintiff filed written submissions dated 31st march 2016 and 2nd and 3rd defendants filed their submissions dated 10th may 2016 to ventilate their respective positions. I have reviewed the pleadings and the application by the plaintiffs together with the affidavits sworn in support and in opposition thereto. I have equally reviewed and considered the written submissions filed on behalf of the parties and the issue for determination at this stage is whether on the basis of the material placed before the court the plaintiffs have established a case to warrant the court to make an order for the parties to maintain the status quo and for preservation of the suit property by way of registration of an inhibition under the provisions of Section 68 of the **Land Registration Act, No. 3 of 2012**.

7. From the evidence placed on record by the plaintiffs and the defendants it is evident that land parcel **West Kitutu/Mwakibagendi/1395** was subdivided into four parcels namely parcel Nos. **West Kitutu/Mwakibagendi/2858, 2859, 2860 and 2861** (copies of titles annexed as “**EMO2**”). The abstract of title for parcel **1395** annexed to the replying affidavit of the 2nd defendant as “**J4**” indicates the title was on 15th November 2010 closed on subdivision into subtitles **2858 – 2861**. Before the Land Disputes

Tribunal during the hearing there was evidence adduced that the 1st defendant had subdivided and sold part of the suit land though the buyers had not been enjoined to the dispute. The plaintiffs state they were innocent buyers and the respective parcels that they purchased were transferred to them after due process. The plaintiffs have contended that the tribunal acted ultra vires as it dealt with title to land which under the provisions of Section 3 (1) of the Land Disputes Tribunal Act, it had no jurisdiction to entertain. This is a critical issue for the court to determine but the court cannot determine the issue at this stage as it would entail taking of evidence which can only be done at the trial.

8. The 2nd and 3rd defendants claim the 1st defendant was a trustee over the family land and any sale and/or transfer to the plaintiffs as alleged would be subject to the overriding interests of the family members pursuant to section 28 (3) of the **Land Registration Act No. 3 of 2012**. I cannot determine the issue whether or not the sale and transfer of the portions of the land to the plaintiffs was subject to any overriding interests at this stage as that again would necessarily require to be proved by evidence at the trial.

9. Although the question of occupation and possession has not come out clearly from the affidavits in support and in opposition of the application, I am persuaded that the most appropriate order that would serve the ends of justice would be one that requires that the parties do maintain and observe the status quo obtaining at the present moment so that the party who is in occupation and possession will remain and continue in possession until the suit is heard and determined and further that no party shall undertake any developments of a permanent nature on the portions that are in dispute and it is hereby so ordered. To preserve the property the subject of the suit, I hereby further make an order for the land registrar to cause an inhibition to be registered against land parcel **West Kitutu/ Mwakibagendi/1395** restraining the registration of any dealings and/or transaction affecting the said land until the suit is heard and determined and/or until further orders of the court.

10. Having regard to the attendant circumstances of this matter, I will make no order as to costs and the parties will bear their own costs of the application.

11. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 15th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiffs

..... for the defendants

..... for the Court Assistant

J. M. MUTUNGI

JUDGE