



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 5 OF 2016**

**ROSEMARY MORAA OBARA ..... PLAINTIFF**

**VERSUS**

**JESSE NG'ANG'A MBOCHI ..... DEFENDANT**

**RULING**

1. The plaintiff by a plaint dated 13<sup>th</sup> February 2016 claims her deceased parents were co-owners of land parcel **Kisii Municipality/Block III/97** with two other proprietors with each one of them owning  $\frac{1}{4}$  share. The plaintiff avers that the defendant on or about 7<sup>th</sup> January 2016 caused a surveyor to subdivide the suit property whereby the defendant was to own  $\frac{3}{4}$  of the plot as opposed to  $\frac{1}{2}$  portion of the plot he having bought out two of the co-owners with the plaintiff's parents. The plaintiff claims that the late William Obara and is late wife Tabitha Obara both owned  $\frac{1}{2}$  portion of the suit land while the defendant and one other proprietor held the other  $\frac{1}{2}$  portion such that the suit property was held by the four (4) proprietors in equal shares with each owing  $\frac{1}{4}$  portion.

2. The plaintiff by the plaint seeks interalia an order prohibiting any dealings with land parcel Kisii Municipality/Block III/97 and a declaration that the late William Obara and Tabitha Obara are each entitled to a  $\frac{1}{4}$  share of the suit land. Simultaneously with the plaint the plaintiff filed a notice of motion application premised under Order 40 Rule 2 of the Civil Procedure Rules and section 63 (c) of the Civil Procedure Act seeking an order that:-

**1. The honourable court be pleased to issue a prohibitory order prohibiting any transaction on the suit land until the suit is heard and determined.**

**2. The costs of the application be provided for.**

3. The application is supported on the grounds that appear on the face of the application and on the affidavit sworn in support by the plaintiff/applicant dated 13<sup>th</sup> January 2016 and further by the supplementary affidavit sworn by the plaintiff/applicant on 15<sup>th</sup> February 2016. The defendant opposes the plaintiff's application and has filed a replying affidavit in opposition sworn on 5<sup>th</sup> February 2016 and a further affidavit in reply sworn on 15<sup>th</sup> March 2016.

4. The facts that do not appear to be in dispute are that the late William Obara and Tabitha Obara (both father and mother of the plaintiff) each held  $\frac{1}{4}$  share of Plot No. 96 Kisii Municipality and the other  $\frac{1}{2}$  share of the plot was held by Laban Aungo and Moreka Ondimu with each holding  $\frac{1}{4}$  share. The defendant purchased the share held by Laban Aungo and he therefore became entitled to  $\frac{1}{4}$  share. As the allottees of plot No. 96 and Plot No. 97 erroneously at the time of developing their respective plots did their developments on the physical location of the plot of the other on the ground, an order of rectification

of the register was issued by the court in **Kisii HCCC No. 31B of 2003: Harrison Obonyo and 3 Others –vs- William Obara & 4 others** such that the allottees of Plot No. 96 were registered as allottees (owners) of Plot No. 97 where they had constructed and vice versa. Consequently the plaintiff's parents together with Moreka Ondimu and the defendant who had purchased Laban Aungo's share became registered as proprietors of land parcel **Kisii/Municipality Block III/97** as tenants in common in equal shares.

5. The plaintiff maintains that her parents share in plot number 97 remains  $\frac{1}{2}$  share since the parcel was held by the 4 proprietors in equal shares but the defendant stated that Laban Aungo whose share he purchased was vide Kisii HCCC No. 44 of 1982 by consent awarded  $\frac{1}{2}$  of Plot No. 96 which later became Plot No. 97. The defendant points to a consent order dated 4<sup>th</sup> May 1998 allegedly signed by the parties in the suit where the plot was to be divided into 2 equal portions "A" and "B" and portion "B" was to be given to Laban Aungo. The plaintiff disputes this alleged consent and avers that the same was never approved and/or adopted by the court with the result that it cannot be relied upon. A copy of the certificate of search annexed dated 8<sup>th</sup> January 2016 marked "RM01" indicates the said William Obara, Tabitha Bwari, Mokera Ondimu and Jesse Nganga Mbochi were registered as proprietors of land parcel **Kisii/Municipality Block III/97** on 2<sup>nd</sup> December 2009 and they were so registered as tenants in common in equal shares.

6. The defendant avers that he has purchased the share of Mokera Ondimu which he states constituted  $\frac{1}{3}$  share of the portion held by the plaintiff's parents and the said Mokera Ondimu following the consent order in Kisii HCCC No. 44 of 1982. The plaintiff contests this and avers that all the 4 proprietors each held  $\frac{1}{4}$  share of the plot and states that if the defendant has purchased Ondimu's share he would only be entitled to  $\frac{1}{2}$  share of the plot and not  $\frac{3}{4}$  share that the defendant wants to appropriate.

7. The defendant has additionally argued that Kisii HC Succession cause No. 87 of 2011 relating to the estate of Tabitha Bwari Obara has not been finalized and therefore the plaintiff lacks the *locus standi* to sustain the instant suit. From the order annexed as **J2**, the plaintiff is a co-administrator of the estate of Tabitha Bwari Obara. In the plaint the plaintiff has made disclosure that she is bringing the suit as one of the administrator's of the estate of Tabitha Obara who is one of the registered proprietors of the suit property. The plaintiff as one of the administrator's of the estate of the late Tabitha Bwari Obara in my view would have locus to sustain these proceedings to the extent that she is doing no more than seeking to protect the interest of the estate of the deceased awaiting the determination of the suit. The defendant equally would have no basis to deal with a property held jointly in common with a deceased person without getting the legal representatives of the deceased party to be involved. The interest of the deceased person can only be taken care of by a legal representative and the plaintiff is one of the administrator's of the estate of Tabitha Bwari Obara.

8. There is no dispute that at least two parties who are deceased have an interest in the suit property. The question whether or not the defendant is entitled to  $\frac{3}{4}$  or  $\frac{1}{2}$  share of the Plot is highly contested. The defendant cannot resolve that question without the participation of the legal representatives of the deceased parties. I note from the defence filed by the defendant that the defendant avers **parcel 97** was subdivided into two to create **Kisii Municipality/ Block III/613** and **614** and thus **parcel 97** does not exist. The issue arises as to how this was achieved and if the persons who are acknowledged to be deceased (William Obara & Tabitha Obara) and who were co-owners of the suit property were involved in those transactions. That would definitely be an issue that can only be canvassed at the trial and not at this stage. This also does not explain the copy of the search certificate issued on 8<sup>th</sup> June 2016 which indicates land parcel **Kisii/Municipality Block III/97** to be in existence.

9. On the basis of the analysis I have made herein above I am satisfied there is a basis to make an order preserving the suit property until the suit is heard and determined. I accordingly direct the land registrar, Kisii County to place an inhibition in the register of land parcel **Kisii Municipality/Block III/97** and/or against any subtitles resulting from any subdivisions of the same in terms of section 68 of the **Land Registration Act, 2012** inhibiting the registration of any dealing with the land until this suit is heard and determined and/or until further orders of the court. I make no orders for costs and each party will bear their own costs of the application.

**Ruling dated, signed and delivered at Kisii this 15<sup>th</sup> day of July, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff  
..... for the defendant  
..... for the Court Assistant

**J. M. MUTUNGI**

**JUDGE**