



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.796 OF 2015

FRANCIS SIGU OKELLOPLAINTIFF

VERSUS

JANE ADHONGA STAUSI

T/A ANDHOGA STAUSI & COMPANY ADVOCATES...1ST DEFENDANT

WILLIAM STEPHEN ODONGO.....2ND DEFENDANT

RULING

1. **Jane Adhoga Stausi T/A Adhoga Stausi & Company Advocates**, the 1st Defendant, filed the ex parte notice of motion dated 26th February 2015 seeking for the following three main prayers among others;

- a) An order compelling the Land Registrar, Kisumu to lift the caution filed by Gordon Orure Kaoko, the proposed third Party, from land parcel **Kisumu/Kapuonja/2197**.
- b) An order compelling the land Registrar, Kisumu to reconstruct the green card in respect of land parcel **Kisumu/Kapuonja/2197**.
- c) An order directing the Land Registrar, Kisumu to register the mutation in respect of the subdivision approved by the Land Control Board on the 28th May 2012.

2. The application is based on the nine grounds on the notice of motion marked (a) to (c) reproduced herein below;

- “a) That this Honourable court issued an order on the 27/10/2014.
- b) Pursuant to the Order of this Honourable court, the same was served upon the Land Registrar, Kisumu Land Registry (Kisumu County).
- c) Notwithstanding the foregoing, the Land Registrar has failed to vacate the caution placed on the subject.
- d) Consequent to the failure and/or neglect by the Respondent to heed the terms of the order herein, the Defendant’s/Applicant’s herein has been denied and/or deprived of the benefits of the order of the Honourable.
- e) In any event, the enforcement of the order herein shall vindicate the dignity and integrity of the

court.

- f)** Unless the orders sought are granted, the Defendant/Applicant shall not actualize the fruits of the order.
- g)** Defendant/Applicant shall suffer undue prejudice, if the instant application is not allowed.
- h)** This is a fit and proper application to be allowed Ex- Debito justitiae.
- i)** It is in the interest of justice that the Application herein be allowed.”

3. The notice of motion is supported by the affidavit sworn by Jane A. Stausi on the 26th February 2015, summarized as follows:

- a)** That the 1st Defendant has the power of attorney donated by the 2nd Defendant, William Stephen Odongo, giving her power of transfer, sale, lease and conveyance over land parcel **Kisumu/Kapuonja/2197** among others.
- b)** That the court order declared this suit abated under the order of 28th October 2014 but the Land Registrar has not registered that order or removed the caution filed on the title by Gordon Orure Kaoko.
- c)** That the said Gordon Orure Kaoko had applied to be enjoined as a Third Party in this case through the application dated 10th November 2010 which he never prosecuted and therefore never became a party in the suit.
- d)** That the said Gordon Orure Kaoko had fraudulently filed a caution over the suit land on 28th November 2012 allegedly till the determination of this suit to which he was never a party to.
- d)** That the deponent has been informed by the land Registrar that a continuation of the green card for the said land was missing and needed to be reconstructed through a court order.
- f)** That the 2nd Defendant had received approval from the Land Control Board on 8th May 2013 and the caution filed by Gordon Orure Kaoko needed to be lifted to enable the mutation on the subdivision of land parcel **Kisumu/Kapuonja 2197** to be registered.

4. The notice of motion came up for hearing on the 27th September 2016 when the 1st Defendant made her submissions *ex parte*. The court reserved the ruling to today so as to study the pleadings and the court record. The following is a brief history of this case;

- a)** That the Plaintiff, **Francis Sigu Okello** filed a suit against the two Defendants vide the plaint dated 2nd June 2010 claiming land parcel **Kisumu/Kapuonja/2197** which he averred the 1st Defendant had fraudulently transferred to the 2nd Defendant instead of to Gordon Orure Kaoko, to whom the Plaintiff had sold it to.
- b)** That Gordon Orure Kaoko filed chamber summons dated 10th November 2010 seeking to be enjoined as an interested party.
- c)** That the 1st Defendant filed a statement of defence dated 14th April 2011. The 1st Defendant avers that she received the discharged title document of the suit land from the financiers and transmitted it to the Plaintiff upon payment of the costs of the suit. That later the Plaintiff took to her the title document and an agreement of sale of the suit land in favour of the 2nd Defendant who was out of the country to transact. That the Plaintiff obtained the relevant statutory approval and she represented the 2nd Defendant to have the land transferred to him upon payment. That the

Plaintiff and 2nd Defendant had agreed that the purchase would be Ksh. 520,000/=. The 1st Defendant denied the allegations of fraud and sort for the suit to be dismissed with costs.

d) That the 1st Defendant filed a notice of motion dated 19th November 2013 seeking to have the Plaintiff's suit marked abated following his death on 15th June 2011. The application was granted on the 27th October 2014 and the order was extracted and issued on the 28th October 2014.

e) That the proposed Third Party/Interested Party filed a notice to raise a preliminary objection dated 6th March 2015 to the 1st Defendant notice of motion dated 26th February 2015. The preliminary objection was heard on the 11th May 2015 and a ruling delivered dated 28th April 2016 dismissing it for among other reasons that the said Gordon Orure Kaoko was not a party in this suit. That the suit has since abated and hence the said Gordon has no capacity to participate in the proceedings herein.

5. The court has carefully considered the notice of motion dated 26th February 2015 brought under **Sections 63 (e), 73 (1) and 78 (2)** of the Civil Procedure Act, the grounds thereon, the supporting affidavit, the court record and come to the following determinations;

a) That the parties in this suit were Francis Sigu Okello as the Plaintiff, Jane Adhoga Stausi and William Stephen Odongo as the 1st and 2nd Defendants respectively.

b) That Gordon Orure Kaoko, who had applied to be enjoined as an Interested Party, never became a party as the suit was finalised through the abatement order of 27th October 2014 before his application could be heard and determined.

c) That following the abatement orders of 27th October 2014, what remained to be done in this proceedings was the taxations of bill of costs, if any, and execution proceedings thereof. That the notices of motion by the 1st Defendant dated 26th February 2015 seeks for orders directed at the Land Registrar, Kisumu, who was not a party in this suit and who has not been served with the application which as drawn is indicated as exparte. That were the prayers sought granted, the court would be doing so in contravention of the cardinal constitutional right to accord each party an opportunity to be heard.

d) That the notice of motion contain prayers about a caution, reconstruction of a green card and registration of mutation forms for subdivisions of the suit land which are matters not raised in the pleadings filed by the Plaintiff and the 1st Defendant in this case. The fact that the caution filed on the register of land parcel **Kisumu/Kapuonja/2197** by Gordon Orure Kaoko, who is not a party in this suit, purportedly claiming purchaser's interest until determination of Kisumu HCC. No.82 of 2010, does not make the issue of the caution a matter to be decided upon in this suit.

e) That as the caution described above was not filed through an order issued by the court in this suit, the provisions of **Section 73** of the Land Registration Act No.3 of 2012 requires any party desirous of having such a caution lifted to move the Land Registrar. That the provisions relating to the withdrawal of a caution requires the cautioner (the person by whom the caution was filed) to be involved in the process of its removal. That the notice of motion dated 16th December 2014 that among others seeks to have the caution filed on the suit land by one Gordon Orure Kaoko lifted is exparte. The court has in its ruling dated 28th April 2016, on the preliminary objection dated 6th March 2015, ruled that the said Gordon would not participate in its hearing. That the application cannot be granted without giving the said Gordon Orure Kaoko an opportunity to be heard.

f) That as the said Gordon Orure Kaoko, who filed the caution on the suit land, and the Land Registrar, Kisumu, against whom the three mandatory injunctive orders are sought, are not parties in this suit, and noting further that the 1st Defendant has not obtained orders for them to be enjoined as parties first, the orders sought, including that of costs cannot be issued against them.

7. That flowing from the foregoing, the 1st Defendant's notice of motion dated 26th February 2015 is without merit and is dismissed with no orders as to costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 16TH DAY OF NOVEMBER 2016

In presence of;

Plaintiff	Absent
Defendants	1 st Defendant present
Counsel	M/S stausi for 1 st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/11/2016

16/11/2016

S.M. Kibunja Judge

Oyugi court assistant

1st Defendant present

M/S Stausi for 1st Defendant

Court: Ruling dated and delivered in open court in presence of 1st Defendant and M/S Stausi for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/11/2016