



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 337 OF 2014**

**FREDRICK OMOLLO OCHANG (Suing As legal Representative**

**And Administrator of the Estate of PATRICK ONYANGO OCHANG).....PLAINTIFF**

**VERSUS**

**MARY AUMA KASERA .....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR KISUMU.....2<sup>ND</sup> DEFENDANT**

**DISTRICT SURVEYOR KISUMU.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. **Fredrick Omollo Ochang**, the Plaintiff, suing as legal representative and administrator of the estate of **Patrick Onyango Ochang**, filed this notice of motion dated 18<sup>th</sup> February 2016 seeking to have the statement of defence filed by **Mary Auma Kasera**, 1<sup>st</sup> Defendant, dated 5<sup>th</sup> August 2015 struck out with costs for reasons that she has been charged and convicted in **Kisumu CM Criminal Case NO.342 of 2010** with offences under **Sections 347 (a) 3209 and 357 (b) of Penal Code**. The application is supported by the affidavits of **Fredrick Omollo Ochang** sworn on the 18<sup>th</sup> February 2016 and 8<sup>th</sup> July 2016.

2. The application is opposed by **Mary Auma Kasera**, the 1<sup>st</sup> Defendant, through her replying affidavit sworn on the 6<sup>th</sup> June 2016.

3. The application came up for hearing on the 11<sup>th</sup> July 2016 when Mr. Onyango and Mr. Amondi, learned counsel for the Plaintiff and 1<sup>st</sup> Defendant respectively, presented their oral rival submissions.

4. The issues for the courts determination are as follows:

- a) Whether the defence filed by the 1<sup>st</sup> Defendant raises triable issues to the Plaintiff's claim.
- b) Whether the defence filed by the 1<sup>st</sup> Defendant should be struck out.
- c) Who pays the costs of the notice of motion.

5. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties, the rival submissions by counsel and come to the following conclusion;

a) That according to the copy of the title deed of land parcel **Kisumu/Kogony/2788**, the land was first registered on 3<sup>rd</sup> February 1992 in the name of **Patrick Onyango Ochang** and title deed issued on the 24<sup>th</sup> February 1993.

b) That the copy of the grant issued on 2<sup>nd</sup> November 2012 in Kisumu H.C. **Succession Cause No.366 of 2000** the said **Patrick Onyango Ochang, who is** the first registered proprietor of land parcel **Kisumu/Kogony/2788** died on 20<sup>th</sup> March 2000. The copy of the grant further confirms that **Fredrick Omollo Ochang**, who is the Plaintiff herein, is among the three persons appointed as administrators of the estate of **Patrick Onyango Ochang**, deceased.

c) That the copy of the certificate of official search for parcel **Kisumu/Kogony/5324 and 5325** dated 21<sup>st</sup> March 2014 shows the two parcels are subdivisions from parcel **Kisumu/Kogony/2788**.

d) That the copy of the judgment in **Kisumu CM Criminal Case No.342 of 2010** confirms that the 1<sup>st</sup> Defendant had been charged and convicted for making false documents contrary to **Section 347 (a)** of Penal Code, obtaining registration by false pretenses contrary to **Section 320** of Penal Code and uttering a document with intent to deceive contrary to **Section 357 (b)** of Penal Code. That the three offences related to document, for land parcel **Kisumu/Kogony/2788** which is the subject matter in this case.

e) That the trial court in Kisumu **C.M. Criminal Case 342 of 2010** found the 1<sup>st</sup> Defendant guilty on the three counts and convicted her. The 1<sup>st</sup> Defendant was fined Ksh.60,000/= and in default serve twelve months in each of the three counts. That the 1<sup>st</sup> Defendant filed an appeal being **Kisumu H.C. Criminal Appeal NO.87 of 2011** and lost. The court held as follows among others;

***“...the appellant fraudulently had herself registered as the proprietor of land parcel number Kisumu/Kogony/2788. The further subdivision of the suit property into two portions namely Kisumu/Kogony/5324 and 5325 was fraudulently done. She obtained the title without following the lawful procedures .....*”**

f) That the current suit against the 1<sup>st</sup> Defendant and the three others is based on fraud in obtaining the said land into her name and sub-dividing the same. That the 1<sup>st</sup> Defendant filed the statement of defence dated 5<sup>th</sup> August 2015 where she among others averred as follows:

***“ 4. The defendant admits the contents of paragraph 8 that she registered the land parcel known as Kisumu/Kogony/2788 in her name and further subdivided it into two portions creating Kisumu/Kogony/5324 and Kisumu/Kogony/5325 upon selling a portion of the said parcel of land.”***

g) That a court of competent jurisdiction dealing with the Criminal charges against the 1<sup>st</sup> Defendant found her guilty on fraud related charges over the suit land documents and her appeal to the High Court was dismissed. That it is obvious the standard of proof in Criminal proceedings is beyond reasonable doubt which is higher than in civil matters, like the current suit, where proof is on a balance of probabilities. That the 1<sup>st</sup> Defendant guilty in the way she obtained the suit land has been established by the criminal court trial and to go through the motion in another trial over the same issue would be a waste of judicial time.

h) That in view of the findings above, especially in (f) and (g), the court agrees with the Plaintiff that the

statement of defence filed by 1<sup>st</sup> Defendant dated 5<sup>th</sup> August 2015, in answer to the Plaintiff's claim vide plaint dated 21<sup>st</sup> October 2014, does not disclose any triable issues in view of her conviction in the criminal charges **in Kisumu C.M. Criminal Case No.342 of 2010** which was upheld in Kisumu H.C. Criminal Appeal No.87 of 2011.

6. That the court finds that this is a clear case where the filed defence does not raise triable issues and should be struck out. That therefore the notice of motion dated 18<sup>th</sup> February 2016 has merit and is allowed as prayed and the 1<sup>st</sup> Defendant statement of defence dated 15<sup>th</sup> August 2015 is hereby struck out with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF OCTOBER 2016

In presence of;

Plaintiff            Absent

Defendants        1<sup>st</sup> Absent

Counsel            Mr Olel for the Plaintiff/Applicant.

                          Mr. Mwaisibwa for Amondi for 1<sup>st</sup> Defendant/Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**26/10/2016**

26/10/2016

S.M. Kibunja J.

Parties absent

Mr. Olel for the Plaintiff/Applicant

Court: Ruling dated and delivered in open in presence of Mr. Olel for the Plaintiff/Applicant and 1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**26/10/2016**

Mr. Mwaisibwa

I have been instructed to held brief for Mr. Amondi for 1<sup>st</sup> Defendant/Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**26/10/2016**



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