



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.79 OF 2011

MARY OWINO OMONDI.....PLAINTIFF

(SUING AS AN ADMINISTRATOR OF THE ESTATE OF PAUL OMONDI SUJI- DECEASED)

VERSUS

JAMASAWA SAMUEL CHIAJA .....1<sup>ST</sup> DEFENDANT

THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

(ON BEHALF OF THE DISTRICT LAND REGISTRAR SIAYA)

LAND REGISTRAR, SIAYA.....3<sup>RD</sup> DEFENDANT

RULING

1. **Mary Owino Omondi**, suing as administrator of the estate of **Paul Omondi Suji**- deceased, filed the notice of motion dated 26<sup>th</sup> April 2012 and amended on 1<sup>st</sup> July 2016 against **Jamasawa Samuel Chiaji, Attorney General** and **the Land Registrar Siaya**, hereinafter referred to as the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively seeking for the following;

a. Striking out of the statement of defence dated 25<sup>th</sup> July 2011 filed by the 1<sup>st</sup> Defendant and the Amended statement of defence dated 25<sup>th</sup> February 2015 for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and judgment be entered for the Plaintiff against the Defendants.

b. That upon striking out of the defences and entry of judgment, a preliminary decree be issued in terms of prayers (a) to (c) as the matter proceeds to formal proof on prayer (d).

c. Costs of this application.

The application is based on the three grounds on its face and supporting affidavit sworn by the Plaintiff on the 26<sup>th</sup> April 2012 summarized as follows:

d. That **Samuel Owenga Aduol**, who has since died, and herself were appointed administrators of the estate of **Paul Omondi Suji**, deceased, in Kisumu H.C. Succession Cause No.150 OF 2009.

e. That the said **Paul Omondi Suji** died on 12<sup>th</sup> November 1983 leaving land parcel **South Gem/Rera/546** in his names. That in 2006, the plaintiff discovered that the 1<sup>st</sup> defendant was laying

claim on the land and on conducting a search found that the land had allegedly been transmitted to one **Jeckona Aduol** on 19<sup>TH</sup> February 1999 who on the same date transferred it to the 1<sup>st</sup> Defendant.

f. That she and other family members lodged a complaint with the land Registrar (3<sup>rd</sup> Defendant) who summoned all the parties to appear before him on 19<sup>th</sup> January 2006 but the 1<sup>st</sup> Defendant declined to attend.

g. That the Plaintiff engaged counsel who wrote to the Defendants for details of the succession cause under which the land was transmitted to Jeckona Aduol but the 3<sup>rd</sup> Defendant responded that they could not trace any such documents. That the advocate then issued demand notice to the Defendants before filing this suit.

h. That the transfer of the land from the names of the deceased without a confirmed grant was illegal and could only have been done recklessly, negligently, through collusion and fraudulently.

2. The application is opposed by 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through the four grounds of opposition dated 24<sup>th</sup> May 2012 summarized as follows;

i. That they have a good defence in this case.

ii. That the court should in accordance with Article 159 of the constitution Sections 1A and 1B of the civil Procedure Laws of Kenya not give undue regard to technicalities and should allow the suit to proceed to hearing and be decided on merit.

iii. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not admitted fraud, negligence and recklessness and no proof has been offered.

iv. That the application is misconceived lacks merit, bad in law and fact and should be dismissed.

3. The application came up for hearing on 29<sup>th</sup> September 2016 in the absence of the Defendants. The 1<sup>st</sup> Defendant had not filed any replying papers as required under **Order 51 Rule 14** of the Civil Procedure Rules while counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was present on 30<sup>th</sup> June 2016 when the hearing date was fixed. The court therefore allowed counsel for the Plaintiff to prosecute the application.

4. The issues for determination are as follows:

a. Whether any of the statement of defence filed raises triable issues to the Plaintiff's claims that can proceed to trial.

b. Whether judgment should be entered and preliminary decree issued .

c. Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, the pleadings filed by all parties, the Plaintiff's counsel oral submissions and concluded as follows:

a. That the Plaintiff's claim against the Defendants is essentially to have the entries made on the register of **South Gem/Rera/546** on 19<sup>th</sup> February 1999 declared irregular, illegal, null and void and the register rectified for the title to revert to **Paul Omondi Suji**, deceased.

b. That while the 2<sup>nd</sup> entry of 19<sup>th</sup> February 1999 transferring the land to Jeckonia Aduol is indicated to be through transmission, the 3<sup>rd</sup> Defendant vide their letter dated 14<sup>h</sup> November 2008 to the counsel for the Plaintiff indicated that the succession documents used were not traceable in the registry.

c. The 1<sup>st</sup> Defendant's statement of defence dated 25<sup>th</sup> July 2011 denies being involved in any fraud, irregularity, being negligent or reckless, in the process of obtaining the land registered in his names. That though 1<sup>st</sup> Defendant did not file a response to the notice of motion as required under **Order 51 Rule 14** of the Civil Procedure Rules his filed defence raises triable issues. That 1<sup>st</sup> Defendant has pleaded that he was an innocent purchaser for value and is therefore not a trespasser. That the said defence raises triable issues and the court is of the view that the issues raised can best be settled through evidence.

d. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants amended statement of defence dated 25<sup>th</sup> February 2015 also joins issues with the Plaintiff's claim by disputing the particulars laws of fraud, negligence or recklessness. They aver that their action regarding the suit land was lawful, procedural and free from any irregularities. That in view of the foregoing the court makes a finding that the defence raises triable issues with the Plaintiff's claim that can best be dealt with through moving to hearing of the suit on merit.

6. That flowing from the foregoing the court finds that the notice of motion dated 26<sup>th</sup> April 2012 and amended on 1<sup>st</sup>

July 2016 is without merit and is dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER 2016**

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Siganga for Otieno for Plaintiff

M/S Kyamazina for Aboge for 1<sup>st</sup> Defendant

Mr Mutai for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/12/2016**

14/12/2016

S.M. Kibunja judge

Parties absent

Mr. Matai for 2<sup>nd</sup> & 3<sup>rd</sup> Defendant

M/S Kyamazina for Aboge for 1<sup>st</sup> Defendant

Mr. Siganga for Otieno for the Plaintiff

Court: Ruling dated and delivered in open court in presence of Mr. Siganga for Otieno for Plaintiff, M/S Kyamazina for Aboge for 1<sup>st</sup> Defendant and Mr. Mutai for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/12/2016**



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