



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 63 OF 2007

BETWEEN

CHARLES ANTHONY ONDIEK.....1ST PLAINTIFF

ESAYA OYOO WARIRO.....2ND PLAINTIFF

WILLIAM ODHIAMBO WARIERO.....3RD PLAINTIFF

VITALIS OTIENO WARIERO.....4TH PLAINTIFF

AND

THOMAS ODHIAMBO NYONJE.....1ST DEFENDANT

GIDEON OKECH RAYOLA.....2ND DEFENDANT

STEPHEN NYANJWA OTIENO.....3RD DEFENDANT

JACINTA M. KWAME (legal

representative of WILLIAM

KWAME OTIENO(deceased).....4TH DEFENDANT

EVALYNE ACHIENG OKOTH

(legal representative of CHARLES

OKOTH WARIERO(deceased).....5TH DEFENDANT

EMANUEL OTIENO ONAYNGO.....6TH DEFENDANT

REGISTRAR OF LANDS KISUMU.....7TH DEFENDANT

RULING

1. By their Notice of Motion dated 03rd September, 2019 and filed on 20th September, 2019, brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 51 Rule 10 of the Civil Procedure Rules, 2010 and all enabling provisions of the law, the Plaintiffs/Applicants pray for orders **THAT**:

1) A supervisory order be directed to the Officer Commanding Station (OCS) Kisumu Central Police Station to supervise and provide security during the enforcement of Order No. 8 of the Decree dated 02nd October, 2018 ordering the removal of any structures erected on any of the suit parcels namely KISUMU/KANYAKWAR/893 or the resultant titles namely KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019;

1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028.(*suit properties*)

2) That the costs of this application be provided for

2. The application is based on the grounds among others **THAT:**

1) The Plaintiffs are the beneficial owners of the suit property known as **KISUMU/KANYAKWAR/ 'B' formerly 299** which was later re-surveyed and mutated to produce parcels **KISUMU/KANYAKWAR/ 'B' 892; 893; 894; 895; 896; 897; 898; 899; 900 and 901** against which the cancelled parcels **KISUMU/KANYAKWAR/ 'B'1005 to 1028** were illegally created

2) The High Court at Kitale vide a judgment dated 27.09.18 ordered for the removal of any structures erected on any of the suit parcels namely **KISUMU/KANYAKWAR/'B'893** or the resultant titles namely **KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019; 1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028.**

3) Subsequently a decree was issued by the court on 02.10.18

4) In compliance with the court judgment, the Land Registrar Kisumu has advertised and vide Gazetted Notice No. 11080 dated 26.10.18 gazetted the loss of decree dated 02.10.18 cancelling all parcels of land known as **KISUMU/KANYAKWAR/'B'893** subdivided into **KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019; 1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028.**

5) There have been attacks and invasion on and destruction of perimeter fences on the suit property by unknown persons suspected to be claimants of the cancelled parcels namely **KISUMU/KANYAKWAR/ 'B' 1013; 1023; 1026 and 1027** on the night of 21st and 22nd June, 2019

3. The application is supported by an affidavit sworn by **CHARLES ANTHONY ONDIEK (1st Applicant)** on 03rd September, 2019 in which he reiterates the grounds on the face of the application. He avers that the orders sought will assist to enforce **Order No. 8** of the Decree dated 02nd October, 2018 ordering the removal of any structures erected on any of the suit parcels namely **KISUMU/KANYAKWAR/893** or the resultant titles namely **KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019; 1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028.**

4. Annexed to the affidavit is the judgment in this matter dated 27.09.18 (**CAO1**); decree issued by the court on 02.10.18 (**CAO2**); advertisement dated 22.10.18 for loss of decree issued by the court on 02.10.18 (**CAO3**) and vide Gazetted Notice No. 11080 dated 26.10.18 gazetting the loss of decree dated 02.10.18 cancelling all parcels of land known as **KISUMU/KANYAKWAR/'B'893** subdivided into **KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019; 1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028 (CAO4)** and photos showing the current state of the suit property (**CAO5**).

5. The application was duly served on all counsel representing the Respondents. Counsel for the 1st to 4th Respondents appeared and submitted that the application was not opposed. The 5th to 7th Respondents neither appeared nor filed any response to the application.

Analysis and Determination

6. I have considered the Notice of Motion dated 03.09.19 filed on 20.09.19 in the light of the supporting affidavit and annexures thereto.

7. Order No. 8 of the Decree dated 02nd October, 2018 ordered the removal of any structures erected on any of the suit parcels namely **KISUMU/KANYAKWAR/893 or the resultant titles namely KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019; 1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028. (suit properties).**

8. Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities. (See **Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 Others [2019] eKLR**).

9. The Applicants who have a judgment in their favour have not been able to enjoy the fruits of the judgment. Most Constitutions guarantee the right to property. Nuisance and trespass laws give every property owner the right to use and enjoy his or her property reasonably, without unreasonable interference by others. Not even the Government can interfere with that right and the Bill of Rights guarantees that protection. It is in the context of this protection of a land owner by the law that the contest in this application should be understood.

10. The Court does not, and ought not to be seen to make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people. It is therefore incumbent upon a Court of Law to make any such Orders that will aid or assist the effectuation or implementation of an Order it has made.

11. The court granted an order for removal of any structures erected on the **suit properties**. The enforcement of the said court order is likely to receive some resistance and the Applicants' prayer that the implementation of the orders be supervised by the police is necessary to ensure law and order is maintained and that the removal is lawful and procedurally carried out.

12. Consequently, Notice of Motion dated 03rd September, 2019 and filed on 20th September, 2019 is allowed on the following terms:

1) A supervisory order be and is hereby issued directed to the Officer Commanding Station (OCS) Kisumu Central Police Station to supervise and provide security during the enforcement of Order No. 8 of the Decree dated 02nd October, 2018 ordering the removal of any structures erected on any of the suit parcels namely KISUMU/KANYAKWAR/893 or the resultant titles namely KISUMU/KANYAKWAR/ 'B'1005; 1006; 1007; 1008; 1009; 1010; 1011; 1012; 1013; 1014; 1015; 1016; 1017; 1018; 1019; 1020; 1021; 1022; 1023; 1024; 1025; 1026; 1027 and 1028.(suit properties)

2) That the costs of this application shall be borne by the 1st to 6th Defendant/Respondents.

DELIVERED AND SIGNED AT KISUMU THIS 31st DAY OF October 2019

T. W. CHERERE

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF-

Court Assistants - Amondi/Okodoi

For Plaintiffs/Applicants - Mr. Onyango hb for Mr. Oluoch

For 1st, 2nd, 3rd and 4th Defendants/Respondents -N/A

For 5th and 6th Defendants/Respondents - N/A

For 7th Defendants/Respondents - Ms. Langát