



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT**

**ELC CASE NO.112 OF 2015**

**DR STEPHEN OTIENO OROT..... APPLICANT**

**VERSUS**

**DAVID OCHIENG WINYO.....1ST RESPONDENT**

**ALEX ONYANGO WINYO.....2ND RESPONDENT**

**RICHARD ODHIAMBO WINYO.....3RD RESPONDENT**

**LAND REGISTRAR KISUMU COUNTY.....4TH RESPONDENT**

**ATTORNEY GENERAL.....5TH RESPONDENT**

**RULING**

1. **Stephen Otieno Orot**, the Applicant, through the Notice of Motion under certificate of urgency dated 11th May 2015 prays for temporary injunction restraining **David Ochieng Winyo, Alex Onyango Winyo** and **Richard Odhiambo Winyo**, hereinafter referred to as 1st to 3rd Respondents, from trespassing onto, selling, disposing off or in any other manner interfering with the Applicant's use and or occupation of Land parcels **Kisumu/Konya/7078, 7079, 7072 and 7073** pending the hearing and determination of this suit. The Applicant also prays for " a restriction" to be placed on the said parcels plus costs. [see prayers 3, 4 and 6]. The first and 2nd prayers have already been dealt with vide the ex parte order of 13th May 2015. The application is based on the seven grounds on the face of the Notice of Motion and supported by the affidavit of **Stephen Otieno Orot** sworn on the 11th May 2015.

2. The Respondents opposed the application through their joint replying affidavit sworn on the 29th September 2015.

3. The counsel for the parties appeared before the court on 1st October 2015 and agreed to among others file written submissions in respect of the application. Consequently counsel for the Applicant filed their undated submissions on the 29th October 2015 while the Respondents counsel filed theirs dated 4th November 2015 on the 5th November 2015.

4. The main issues for determination are as follows:

a) Whether the applicant has established a prima facie case with a probability of success for

issuance of temporary injunction at this interlocutory stage.

b) Who pays the costs.

5. The court has after considering the grounds on the Notice of Motion, affidavit evidence by both sides and the rival submissions come to the following conclusions:

a) That the Applicant claim to the said parcels of land is based on the copies of the title deeds for the two original parcels issued on 15th January 1998 and 8th September 1997 and copies of certificates of official search both dated 28th June 2010. The documents in respect of parcel **Kisumu/Konya/3097** shows that the Applicant was entered as the registered proprietor under entry number 4 of 8th September 1997. The acreage of the land is indicated as 0.8 hectares. In respect of **Kisumu/Konya 2482**, the Applicant was registered as proprietor under entry number 3 and the acreage is shown as 0.7 hectares. The documents also show both parcels were first registered on 14th March 1991 and appear on registry map sheet number 10.

b) That 1st to 3rd Respondents claim to the two parcels of land **Kisumu/Konya/2482** and **3097** is based on the copies of the registers/green card issued on 30th May 2014, copies of certificate of official search dated 18th August 2011 and Certificate of confirmation of grant dated 11th March 2011 issued in Kisumu H.C Succession Cause No.597 of 2008 in respect of the estate of **Abira Ateng Winyo**. The copies of the register and certificate of official searches shows that the two parcels were registered in the names of the said **Abira Ateng Winyo** on 4th August 2011 as entry number 2. The first registered owner of **Kisumu/Konya/2482** is shown as **Isaac Moro Omenyo** while **Jakob Odero Omenyo** was the first registered proprietor of **Kisumu/Konya/3097**. Like in the documents presented by the Applicant, the copies of the registers presented by the Respondents indicates that the titles were first registered on 14th March 1991 and that they appear in registry map sheet number 10. The acreage for parcel **Kisumu/Konya 2482** is shown as 0.7 hectares while that for Parcel **Kisumu/Konya/3097**, the acreage is given as 1.2 hectares.

c) That the Respondents got registered as proprietors of the two parcels of land through the Succession Cause Number 597 of 2008 on 8th January 2013 and on 20th February 2013. They then had parcel **Kisumu/Konya 3097** sub divided into parcels **7072** and **7073** and parcel **Kisumu/Konya/2482** into parcels **7078** and **7079**.

d) That the finding in (c) above and the deposition of the Applicant that the land office records supporting his ownership of the two parcels are no longer available leads to one conclusion that only the Respondents' documents of registration with the suit land are still available at the lands office. This is confirmed by the certification stamp on the copies of the two registers dated 30th May 2014 which is about one year before the application was filed.

e) That a registered proprietor of a parcel of land is entitled to the rights and privileges set out under Section 24 and 25 of the Land Registration Act No.3 of 2012. This court is obligated under Section 26 of the said Act to take the certificate of title issued by the Registrar " **as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances easements, restrictions and conditions contained or endorsed, and the title of that proprietor shall not be subject to challenge, except -**

a) **on the ground of fraud or misrepresentation to which the person is proved to be a party or**

b) **where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."**

The respondents became the registered proprietors of the two parcels of land in 2013 through transmission. There is no indication that the administration of the estate of **Abira Ateng Winyo** as ordered in Kisumu H.C. Succession Cause No.597 of 22008 vide the Certificate of confirmation

dated 11th March 2011 has been successfully challenged. It is through the orders of the said Succession Court that the Respondents were registered as proprietors of the suit land. The deposition by the Applicant that he has been in peaceful use and possession of the suit lands until 2014 when an intruder attempted to fence off **Kisumu/Konya/2482** was disputed by the Respondents who deponed that they are the ones who have been working on the parcels of land as **Abira Ateng Winyo** (deceased) had no family. The Respondents' deposition has not been challenged.

f) That the foregoing shows that the Applicant has failed to establish a prima facie case with a probability of success as required [see **Giella -V- Cassman Brown Co Ltd** (1973) E.A 358.] The Applicant will need to successfully prove that the Respondents obtained registration with the suit land through fraud, misrepresentation or acquired the title illegally, unprocedurally or through a corrupt scheme during the main hearing to challenge their proprietorship of the two parcels and the subdivisions arising therefrom. The temporary restraining orders cannot be issued against the Respondents who are registered proprietors until after their title is successfully challenged.

6. That having found as above the court finds that the Notice of motion dated 11th may 2015 is without merit and is hereby dismissed with costs. Nevertheless, the court on its own motion find that there is need to safeguard the legal status of the two parcels of land and the subdivisions arising therefrom and issues inhibitions on the said titles in terms of Section 68 (1) of the Land Registration Act pending hearing and determination of this suit.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered this **24th day of February 2016**

In presence of;

APPLICANT            Absent

RESPONDENTS      Absent

COUNSEL            Mr Olel for Plaintiff/Applicant

Mr Omolo for 1st to 3rd Defendant/Respondent

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/2/2016**

ELC 112 of 2015

24/2/2016

S.M. Kibunja J.

Oyugi Court Assistant

Parties absent

Mr. Olel for Plaintiff/Applicant

Mr. Omolo for 1st to 3rd defendants/Respondents

Court: Ruling delivered in open court in presence Mr. Olel for Plaintiff/Applicant and Mr. Omolo for 1st to 3rd Defendant/Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/2/2016**