



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC CASE NUMBER E002 OF 2022

STEPHEN ALUOCH K'OPOT.....PLAINTIFF

VERSUS

FREDRICK OTIENO OTIENO.....DEFENDANT

RULING

Introduction

1. By a Plaintiff dated 24/01/2022, the plaintiff filed suit against the defendant seeking several orders including: a declaration that he has an overriding interest over a portion of land parcel number **NORTH GEM/MALUNGA 571** [**“the suit property”**]; a declaration that the defendant’s claim over the said portion was finally and fully determined in **Kisumu ELC Number 74 of 2016** and that the orders of the court be registered against the title documents of the suit property until such time that the court on a separate application orders for such subdivision of a portion of the suit property.
2. The defendant entered appearance on 10/02/2022 but did not file a defence.
3. In tandem with his plaint, the plaintiff filed a motion dated 24/01/2022 under a certificate of urgency. This motion is the subject matter of this ruling.

The plaintiff’s case

4. The motion is brought within the provisions of **Sections 7, 9 and 17 of the Limitation of Actions Act, Section 68 of the Land Registration Act and Order 40 Rule 1(a) and Rule 2 (1) of the Civil Procedure Rules and Section 48 of the Evidence Act**. Prayers 1,3,4 and 5 of the motion are spent and the main prayers pending for determination are as follows:

a) An order of inhibition be registered against title to the suit property to inhibit all dealings on title adverse to the plaintiff’s interests in the portion until further orders of the court.

b) Upon hearing of this application inter-parties, the interim orders issued in prayer 3 be confirmed.

5. The Motion is based on the grounds set out on the face of the motion and on the supporting affidavit of the plaintiff, **Stephen Aluoch K’opot** dated 22/01/2022.
6. The plaintiff contended that he and the defendant resided in neighbouring portions within the suit property. He asserted that he accrued a right over the portion he occupied vide an agreement of sale between him and the defendant’s father dated 22/12/1999 but, the defendant’s father died before he obtained a Land Control Board Consent or transferred a portion of the suit property to the him.
7. The Plaintiff contended that he had a residence on a portion of the suit property and he had been in occupation of this portion openly, peacefully and uninterrupted for a period of 15 years. He asserted that the defendant had caused wanton destruction of his portion of the suit property. He contended that in another suit; **Kisumu ELC Number 74 of 2016**, the defendant’s suit against him for trespass over the suit property was dismissed for want of prosecution. The plaintiff asserted that he was willing to pay damages and stated that on a balance of convenience, the scales tilted in his favour.

The defendant’s case

8. The plaintiff’s motion is opposed by grounds of opposition dated 24/02/2022 and a replying affidavit dated 24/02/2022.

9. In his grounds of opposition, the defendant stated that the plaintiff's motion was frivolous, vexatious and an abuse of the court process. He contended that the plaintiff had concealed material facts and averred that the plaintiff's occupation of the suit property was fraught with fraud.

10. In his replying affidavit, the he stated that he was aware that the suit property was previously in the names of his deceased father and deceased uncle and that each one of them held one half share and that he was not privy that his father had sold a portion of the suit property to the plaintiff. He contended that the suit property was registered in his name on 12/06/2014.

The plaintiff's written submissions

11. The plaintiff filed written submissions dated 15/02/2022. In it, he set out the principles of temporary injunction: the applicant ought to prove that he had a prima facie case; demonstrate that he would suffer irreparable injury if the orders sought are not granted and; demonstrate that on a balance of convenience, it tilts in his favour. On this, the plaintiff relied on case of **Sweetland Limited & another v Transnational Bank Limited [2017] eKLR**.

12. The plaintiff contended that as evidenced by the facts of his pleadings, he had established a prima facie case. He asserted that an award of damages would not be adequate compensation given that he had significantly developed the suit property.

13. On an order of inhibition, the plaintiff placed reliance on the case of **Japhet Kaimenyi M'Ndatho v M'Ndatho M'Mbwiria [2012] eKLR** which laid out the conditions for grant of an order of inhibition: The applicant must demonstrate that the suit property is at risk of being disposed or alienated or transferred to the detriment of the applicant; The refusal to grant orders of inhibition would render the suit nugatory; The applicant must have an arguable case and; Where there are genuine concerns or fears that the title of the suit property would be interfered with.

The defendant's written submissions

14. Despite service, the defendant did not file written submissions.

Analysis and determination

15. Before considering the merits or otherwise of the motion, there is an important issue pleaded by the plaintiff in paragraphs **12(1)(a)(ii)** and **12(5)** of his plaint. In the former he asserts the defendant's claim over the suit property was determined in **Kisumu ELC Number 74 of 2016** while in the latter he asserts that the court will on a separate application order a subdivision and registration of title in his favour.

16. In paragraph **(e)** of grounds in support of his motion, he has similarly asserted that the defendant's suit against him was dismissed for want of prosecution in **Kisumu ELC Number 74 of 2016** and an application to reinstate the suit was declined by the court.

17. In annexure "SAK-6" of his supporting affidavit, he has annexed pleadings, a ruling and his bill of costs in **Kisumu ELC Number 74 of 2016**. From these annexures, it is obvious that the parties in **Kisumu ELC Number 74 of 2016** and this case are similar whereby the plaintiff in this case was the defendant in **Kisumu ELC Number 74 of 2016** and he had filed a counter-claim. Further, the two suits relate to the suit property.

18. From this bundle of documents, it is clear that the defendant's suit in **Kisumu ELC Number 74 of 2016** was dismissed for non-attendance by the Court on 14/05/2018 and that the defendant vide an application dated 7/02/2019 unsuccessfully sought to have the suit reinstated.

19. The status or fate of the plaintiff's counterclaim in **Kisumu ELC Number 74 of 2016** has not been disclosed in these pleadings and the effect therefore is that there is high likelihood that the counterclaim in **Kisumu ELC Number 74 of 2016** is either; pending determination, determined or dismissed and this may have the effect of rendering this suit *res subjudice* or *res judicata*. As neither of the parties availed proceedings of this other suit, the appropriate order that behoves this court at this stage is to order that the proceedings in this suit be stayed and direct the plaintiff to avail to this court the entire proceedings of this other suit. Ultimately, I issue the following disposal orders;

a) I hereby order that this suit shall forthwith be stayed pending the remittance by the plaintiff of the entire pleadings and proceedings of Kisumu ELC Number 74 of 2016 to this court.

b) Mention for further directions on 3/5/2022.

20. It is so ordered.

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF MARCH 2022.

In the Presence of:

Fredrick Otieno Otieno – the defendant.

N/A for the plaintiff.

Court assistant: Sarah Ooro.

HON. A. Y. KOROSS

JUDGE

10/3/2022