



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 216 OF 2014.

STEPHEN OMONDI ODUOR.....PLAINTIFF

= VERSUS =

STEPHEN ODUOR OCHWAGO)

ROSELINE AWINO ODUOR)..... DEFENDANTS

R U L I N G

STEPHEN OMONDI ODUOR, hereinafter referred to as the Applicant filed the notice of motion under certificate of urgency dated 16th December, 2014 against **STEPHEN ODUOR OCHWAGO** and **ROSELINE AWINO ODUORI**, hereinafter referred to as 1st and 2nd Respondents for the following orders;

“ 1.....

2. That this honourable court be pleased to issue a temporary injunction restraining the Respondents their agents, servants, and or any other person or persons working under them from selling, using, alienating, trespassing, constructing on, destroying crops and trees therein is (sic) or therein in any matter interfering with ½ share of land parcel Marachi/Bujumba/1599 pending the hearing and final determination of this application and thereafter pending the hearing and final determination of this suit.

3. That costs of the application be provided for.”

The application is based on the five grounds on the face of the application and the supporting affidavit of the Applicant sworn on 16th December, 2014.

The application is opposed through the Respondents replying affidavits sworn on 24th December, 2014.

Mr. Onsongo and Jumba advocate appeared for the Applicant and Respondents respectively and made their submissions during the interpartes hearing of the application on 21st January, 2015.

I have carefully considered the grounds on the application, submissions by counsel, supporting and both replying affidavits and find as follows:-

1. That this application was filed contemporaneously with the plaint dated 16th December, 2014 in which the Applicant/Plaintiff prays for the following orders among others;-

- a. A declaration that 1st Defendant/Respondent is not the Registered owner of the suit land.
 - b. A declaration that the Applicant/Plaintiff and 1st Respondent/Defendant are entitled to half share each of the suit land by way of customary trust.
 - c. Injunction and eviction
 - d. Special damages of Kshs.71,361/=
 - e. Costs.
2. That when the matter came up for hearing of the application on 24th December, 2014 before my brother Justice Tuiyott, a consent was recorded and is summarized as follows;
 - a. That the 2nd Defendant/Respondent is to continue occupying the house that she has constructed on the disputed parcel but shall not carry out any further developments or waste of that land.
 - b. The Plaintiff/Applicant is to stay out of the disputed land.
 - c. That the orders above to remain in force pending the determination of the application dated 16th December, 2014.
 3. That going by the copy of the official search certificate issued on 8th May, 1914 and attached to the Applicant's supporting affidavit, the suit land, parcel Marachi/Bujumba/1599, was registered in the names of Ouma Owuor Ochwago on 28th April, 1999 and title deed issued. However, the Applicant contends that the suit land was **'at all. Material times....registered in my grandfather's name Ochieng Owuor....'** On the other side the 1st Respondent contends that the suit land was registered in his names, **Ouma Owuor Ochwago** by the brother to his father, **Ochieng Owuor**. The court is not in a position to pronounce itself conclusively on whether or not the person name as the proprietor of the suit land in the register is the 1st Respondent, Ochieng Owuor or some other person without hearing the parties herein.
 4. That on 24th December, 2014 the parties had agreed that the 2nd Respondent gets access to the suit land limited to the use of the house she had constructed. The court does not find any good cause to change the status quo established under the said order. The same should be maintained pending the hearing and determination of the main suit. Any loss that the applicant may stand to suffer by failure to grant the order sought in the application of 16th December, 2014 can easily be computed and recovered in damages in the event he is successful as to reinstate him on the suit land would be tantamount to deciding on the final orders without hearing the parties.
 5. That for reasons set out above, the court issues the following orders;-
 - a. That the application dated 16th December, 2014 is dismissed.
 - b. That Orders 1 and 2 of the consent of 24th December, 2014 are confirmed and are to remain in force pending hearing and determination of this suit.
 - c. That the costs of the application dated 16th December, 2014 will be costs in the cause.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 26TH DAY OF FEBRUARY, 2015.

IN THE PRESENCE OF; PRESENT.....PLAINTIFF

.....PRESENT1ST DEFENDANT

.....PRESENT.....2ND DEFENDANT.

MR. ONSONGO FOR APPLICANT.

MR. JUMBA FOR RESPONDENT.

JUDGE.