



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.664 of 2015

[FORMERLY HIGH COURT CIVIL SUIT NO.123 OF 2011]

IN THE MATTER OF SECTION 38 OF THE LIMITATION

OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. KISUMU/WATHOREGO/114

AND

IN THE MATTER OF ACQUISITION BY ADVERSE POSSESSION

BETWEEN

MARY AGUMBA NJERA.....PLAINTIFF

VERSUS

WILFRED CALEB OTIENO CHRISTOPHER OMONDI.....DEFENDANT

AND

IN THE MATTER OF AN APPLICATION FOR INJUNCTION

BETWEEN

WILFRED CALEB OTIENO CHRISTOPHER OMONDI.....APPLICANT

VERSUS

MARY AGUMBA NJERA.....RESPONDENT

RULING

1. By notice of motion under **Order 40 Rule 1, 2 & 4, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules** dated 1st July 2013, **Wilfred Caleb Otieno Christopher**

Omondi, the Applicant, seeks for temporary injunction restraining **Mary Agumba Njera**, the Respondent, by herself or agents, from “trespassing onto, cultivating, alienating, developing or in any other way howsoever interfering with the Plaintiff’s (sic) quiet and lawful occupation, use and or ownership of the suit land herein, designated as **Kisumu/Wathorego/144.**” The application is based on four grounds on the notice of motion and supported by the affidavit sworn by Wilfred Caleb Otieno Christopher Omondi on the 1st July 2013.

2. The application is opposed by the Respondent through the replying affidavit sworn by Mary Agumba Njera on the 7th October 2013.

3. That the court issued directions for filing of written submissions on the 8th October 2013. The only submission filed are by counsel for the applicant dated 28th November 2016.

4. The following are the issues for determination;

a. Whether the Applicant has established a prima facie case with a probability of success for temporary injunction to issue at this interlocutory stage.

b. Who pays the costs.

5. The court has considered the grounds on the notice of motion, the affidavit evidence, the submission by the Applicant’s counsel and come to the following findings.

a. That this proceedings was commenced by the Respondent through the originating summons dated 28th July 2011 and filed on the 9th August 2011 vide receipt No.2103801. The subject matter of the suit is land parcel **Kisumu/Wathorego/114** which according to the copy of the green card, certified as true copy on 2nd March 2009 and certificate of official search dated 18th March 2008 was registered in the name of **Wilfred Caleb Otieno Christopher Omondi**, the Applicant, on the 29th November 1994.

b. That the Respondent’s pleadings are to the effect that she has been in occupation of the suit land for “an uninterrupted period of 47 years” by the time of filing this suit. That even though the applicant has in his reply to the originating summons deponed that he has been visiting the land frequently and had not noted any physical invasion, the issue of who between the two parties has told the truth will wait the final determination of the originating summons.

c. That in the notice of motion dated 1st July 2013, which is the subject matter of this ruling, the Applicant want the Respondent to be injected against interfering with land parcel “**Kisumu/Wathorego/144**”. The supporting affidavit at paragraph six also refers to “the Respondent again moved in and cultivated the land parcel designated as **Kisumu/Wathorego/144** when well aware of the pending of the case herein.” That even though the copy of the title deed marked **WCOCO -1** that is annexed to the supporting affidavit is in respect of land parcel **Kisumu/Wathorego/144**, the temporary injunction sought is in respect of a different parcel of land that is **Kisumu/Wathorego/144**.

d. That as land parcel **Kisumu/Wathorego/144** is not the subject matter of the suit commenced through the originating summons and as the Applicant has not availed documentary evidence of ownership of that land, the court find that he has failed to satisfy any of the grounds set out in **Giella –V- Cassman Brown** [1973] E.A. 358.

6. That in view of the foregoing, the notice of motion dated 1st July 2013 is without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiff/Respondent Absent

Defendant/Applicant Absent

Counsel Mr. Owiti for Otieno Njoga FOR Defendant/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2017

S.M. Kibunja Judge

Parties Absent

Mr.Owiti for Njoga for Defendant/Applicant

Court: The ruling dated and delivered in open court in presence of Mr. Owiti for Otieno Njoga for the Defendant/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017