



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HIGH COURT CIVIL CASE NO.183 OF 2011**

**DICKSON OPOLA OKUMU.....PLAINITFF/  
APPLICANT**

**VERSUS**

**THOMAS ODHIAMBO ODARI.....1ST  
DEFENDANT/RESPONDENT**

**JOHN OWIRA ODARI.....2ND DEFENDANT/RESPONDENT**

**R U L I N G**

1. **Dickson Opola Okumu**, the Applicant, filed the notice of Motion dated 25th October 2011 contemporaneously with the plaint of even date praying for temporary injunction against **Tom Odhiambo Odari** and **John Owiro Odari**, the Respondents restraining them from interfering with the Applicant's possession and title to **Kisumu/Konya/1649**. The application is based on the two grounds on its face and supporting affidavit of **Dickson Opola Okumu** sworn on 25th October 2011.
2. The Respondents opposed the application through the affidavit sworn by **Thomas Odhiambo Odari** on 1st February 2012.
3. The Applicant's Counsel filed the written submissions dated 8th May 2015 while Respondents counsel filed theirs dated 17th June 2015.
4. The issues for determination are as follows:
  - a) Whether the Applicant has established a prima facie case with a possibility of success at the interlocutory stage for issuance of temporary injunction.
  - b) Who pays the costs.
5. The court has noted that the application had initially been granted through the ruling of 27th June 2013. The Respondents then filed the application dated 17th September 2013 for inter alia, setting the ruling aside for reasons that their replying affidavit had not been considered. The application dated 17th September 2013 was allowed through the ruling dated 7th October 2014 with an order that the application (dated 25th October 2011) be argued afresh. The reference to the application dated 17th September 2013 in the submissions in court by Mr Oyuko on 12th March 2015 and Mr Mwamu on 14th May 2015 and Mr Anyul on 15th June 2015 was therefore erroneously and the court take the reference to have been for the application dated 25th October 2011.

6. The court has considered the grounds on the notice of Motion, affidavit evidence and counsels rival submissions and come to the following finding:

a) That though the Respondents deponed that the suit land has never been registered in the names of the Applicant, they have not attached any documentary evidence to their affidavit to rebut the Applicant's documents inform of copy of title deed and certificate of official search in respect of **Kisumu/Konya/1649** which confirm that the suit land was registered in the names of the Applicant on 26th August 1998 and title issued on the same date. This court is obligated under Section 26 of the Land Registration Act No.3 of 2012 to take the person named as proprietor on the certificate of title issued by the Registrar as the " **absolute and indefeasible owner, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate, 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."**

Therefore, even though the Respondents challenges the Applicant's title, the Applicant remains the registered proprietor until such a time that the court will rule otherwise following the hearing of the main suit.

c) That the Applicant, as the suit land's registered proprietor, is entitled to the rights and privileges set out in Sections 24 and 25 of the Land Registration Act which includes right to use and possess the land. The Respondents are said to have been cultivating on the suit land without the Applicant's permission. Though the Respondents claim the Applicant got registered with the suit land through fraud, the Applicant cannot be denied the rights and privileges of a registered proprietor until after his title is successfully challenged as required under Section 26 of the Land Registration Act. The decision in the following cases are not relevant at this stage but would have relevance once evidence is adduced in the main suit:

(i) **The matter of Wilson Nzuki Ngolo** (deceased) Machakos High Court Probate and Administration Cause Number 152 of 2000 quoted in **Alloys Nyerere Omari – V- Ann Keruto Ombachi & 5 others** eKLR.

(ii) **Gitau & 2 others – V- Wandai & 5 others** (1989) KLR 231 quoted in **Alloys Nyerere Omari – V – Ann Ombachi & 5 others** [2013] eKLR.

(iii) **Onyango & Another – V- Luwayi** (1986) KLR 513 quoted in **Sironga le Tukai -V- Francis Arap Muge & 2 others** [2014] eKLR.

c) That the Applicant as the registered proprietor of the suit land has established a prima facie case with a probability of success in accordance with the principles set out in **Giella – V- Cassman Brown & Co. Limited**[1973] E.A 358 and **Mrao – V- First American Bank & 2 others** [2003] eKLR.

7. That having found as above the court finds that the application dated 25th October 2011 has merit and is allowed in terms of prayers 3 with costs.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**Dated and delivered at Kisumu this 10th day of February 2016**

IN PRESENCE OF;

APPLICANT Present

RESPONDENTS Absent

COUNSEL Mr Oyoko for Applicant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/2/2016**

**HCC No.183 of 2011**

10/2/2016

S.M. Kibunja J

Oyugi Court Assistant

Plaintiff present

Mr Oyoko for plaintiff

Court: Ruling delivered in open court in presence of the Plaintiff/Applicant and his counsel.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/2/2016**