



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND COURT

LAND CASE NO.274 OF 2014

JOHNSON EZEKIEL OKOTH OWINO.....1ST APPLICANT

PAMELA AKINYI OTIENO2ND APPLICANT

VERSUS

NEHEMIAH INTERNATIONAL REGISTERED TRUSTEES..... RESPONDENT

RULING

1. **Johnson Ezekiel Okoth Owino** and **Pamela Akinyi Otieno**, hereinafter referred to as the Applicants, filed the Notice of Motion dated 17th September 2014 seeking for temporary injunction against **Nehemiah International Registered Trustees**, the Respondent, restraining them from interfering with the Applicants possession of Land reference number **10416/3** registered as **IR Number 21/17/16** situated at Kisumu. The application is based on the 13 grounds on the Notice of Motion and the affidavit of **Johnson Ezekiel Okoth Owino**, sworn on the 17th September 2014. The Applicants counsel appeared before the court on 18th September 2014 and obtained ex parte orders in terms of prayer 1 and 2 pending interpartes hearing.
2. The application is opposed through the replying affidavit of **Michael Ndeda**, who is one of the three trustees to the Respondent, sworn on 18th November 2014.
3. The Applicants then filed the supplementary affidavit sworn by **Johnson Ezekiel Okoth Owino** on 9th March 2015 in response to the depositions in the replying affidavit. The parties counsels appeared before the court on 4th May 2015 for the hearing of the application and agreed to file written submissions. Since then, there has been several mentions to confirm the filing of submissions but only the Applicants filed theirs dated 12th May 2015 by the time the ruling date was fixed on 22nd October 2015.
4. The main issues for determination are as follows:
 - (a) Whether the Applicants have established a case for issuance of temporary injunction at the interlocutory stage.
 - (b) Who pays the costs.
5. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties and the submissions by the Applicants and has come to the following conclusions:
 - (a) That both parties are in agreement that the Applicants are the proprietors of Land

Reference **10416/3 (I.R 84770) Kisumu** having bought it from the Respondent under the sale agreement dated 2nd December 2013.

(b) That both parties are in agreement that the Applicants are entitled to take possession of the said land and enjoy the rights and privileges under Section 24 and 25 of the Land Registration Act No.3 of 2012. That from the deposition of the of removing or uprooting the posts that they had elected on the beacons. The Respondent has denied uprooting the posts and takes the position that the Applicants should have lodged a complaint with the Land Registrar in terms of Section 18 of the Land Registration Act so as to identify the said parcel's boundaries on the ground. The court do agree with the Respondent that it would have been desirable to have involved the Land Registrar to sought out the issue of marking the boundary of the suit land on the ground.

(c) That there is no evidence or allegation of the Respondent having encroached onto the Applicants land. There is also no evidence or allegation that the Applicants have been stopped by the Respondent from using the suit land. The only problem appear to be the position of the boundary of the suit land on the ground. In view of the provision of Section 18 (2) of the Land Registration Act, the forum to seek Justice for in the first instance, is the Land Registrar's office. The court is of the considered view that without the Land Registrar's input and or report, the court would not be in position to conclusively determine whether the point the Applicants intends to plant the fence is the correct position of the boundary or not at this stage.

6. That flowing from the foregoing the court find that the Applicants have not established a prima facie case with a probability of success. They have also not shown that they would suffer irreparable loss if the temporary injunction was not issued. The balance of convenience also tilt against the Applicants. {see the case of Giella – v- Cassman Brown & Company Limited [1973] E.A 58 and American Cynamid Co. -V- Ethicon Ltd [1975] AC 396. The application dated 17th September 2014 is therefore dismissed with costs and interim orders of 18th September 2014 vacated.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **9th day of February 2016**

In presence of;

Applicants]

Respondent] NONE

Counsel]

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016

9/2/2016

S.M. Kibunja J

Mr Indimuli for C.W. Ngala for Applicant

Oyugi court Assistant

Court: Ruling delivered in open court in presence of Indimuli for Ngala for Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016