



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.48 OF 2014

PETER NYAGARA AWITI..... APPLICANT

VERSUS

JULIUS OCHOLA OJUNG'A.....1ST RESPONDENT

OCHIENG OYOO.....2ND RESPONDENT

RULING

1. **Peter Nyagara Awiti**, the Applicant, filed the Notice of Motion dated 11th February 2015 seeking to restrain **Julius Ochola Ojung'a** and **Ochieng Oyoo**, the Respondents from interfering with his use of land parcel **No.Kisumu/Nyalunya/3118** pending the hearing and determination of this suit,. The notice of motion is based on seven grounds on the application and the supporting affidavit of **Peter Nyagara Awiti** sworn on 11th February 2015. The main basis of the application is that the Applicant is the registered proprietor of the said land since 1st September 1995 and that there has been a long running dispute with the Respondents who have been interfering with his use of the land.

2. The 1st Respondent filed a replying affidavit, whose date of commissioning is not indicated, denying the Applicant's allegations. He depones that he has no land that neighbours that of the plaintiff and therefore could not have encroached into his land. He further deponed that the plaintiff bought the suit land from his father from parcel **Kisumu/Nyalunya/219**. That his father also sold parcel **Kisumu/Nyalunya/3791** to 2nd respondent from the same parcel **Kisumu/Nyalunya/219**.

3. The 2nd Respondent also filed a replying affidavit whose date of commissioning is also not indicated. He deponed that he bought Kisumu Nyalunya/3791 from **John Ojunga Nyandiko** (deceased) in 1979. He added that his parcel neighbours that of the Applicant but denied encroaching into his land.

4. The parties counsel appeared before the court on 10th March 2015 and agreed to file written submission on the application. The Applicant's counsel filed the written submissions dated 16th October 2015 on the 23rd October 2015. The Respondents' counsel's submissions dated 15th May 2015 were filed on the 18th May 2015. The following are the main issues for the court's determination.

a) Whether the Applicant has established a case for issuance of temporary injunction at the interlocutory state.

b) Who pays the costs.

5. The court has considered the grounds on the Notice of Motion, the affidavit evidence by both parties and written submissions by both counsel and come to the following findings.

a) That the Applicant is the registered proprietor of **Kisumu/Nyalunya/3118** while the 2nd Respondent is the registered proprietor of **Kisumu/Nyalunya/3791**.

That the two parcels are reportedly subdivisions from **Kisumu/Nyalunya/219** that belonged to the 1st Respondent's father who is now deceased. That though the Applicant has alleged that the Respondents have encroached onto his land, the acreage of encroachment, if any, has not been disclosed.

b) That the available evidence confirms that the Applicant's and 2nd Respondent's parcel of land neighbours each other. It is however not disclosed how the 1st Respondent, who has denied owning any land that borders that of the Applicant could have encroached onto the Applicant's land. The 1st Respondent deposition that he owns no such land has not been disputed by the Applicant through a further or supplementary affidavit.

c) That though the Applicant has deposed that there has been a long running dispute with the Respondents over the portions of his land, he did not disclose the date which the alleged encroachment or interference by the Respondents or either of the two commenced. He has also not disclosed whether the County Land Registrar has been approached to confirm whether there has been any encroachment onto parcel **Kisumu/Nyalunya/3118** by any other parcel of land.

d) That as the Respondents have disputed encroaching onto the Applicant's land, the Applicant has the duty to present evidence of encroachment. No such evidence has been presented to the court, apart from the Applicant's statement. The provision of

Section 18 of the Land Registration Act No.3 of 2012 places the responsibility of the dealing with boundary disputes in the first instance on the Land Registrar. The Applicant has not shown whether that route has been pursued in trying to establish whether the portion in dispute is indeed part of **Kisumu/Nyalunya/3118** or **3791**.

e) That for the Applicant to get the order of injunction against the Respondents, he needed to establish a prima facie case with a probability of success, which he has failed to do [See the case of **Giella – V-s Cassman Brown Limited** [1973] E.A 358.] The Applicant has also not shown that he stands to suffer irreparable loss if the temporary injunction is not issued. In any case the Applicant has stated that the dispute has been in existence for long. The balance of convenience favours that the main suit be heard and decision on merit made.

6. That having found as above, the court find that the notice of motion dated 11th February 2015 lacks merit and is dismissed with costs. The interim orders of 24th February 2015 are hereby vacated.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 10th day of February 2016

In presence of;

APPLICANT Present

RESPONDENTS Absent

COUNSEL Mr Ariko for Anyumba for Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016

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10/2/2016

S.M. Kibunja J

Oyugi Court Assistant

Plaintiff present

Mr Ariko for Anyumba for Plaintiff/Applicant

Court: Ruling delivered in open court in presence the Applicant and Mr Ariko for Anyumba for the Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016