



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL CASE NO.21 OF 2002**

**DOUGLAS RAPEMO ADERO.....1ST PLAINTIFF**

**WILLIAM ADERO RAPEMO.....2ND PLAINTIFF**

**VERSUS**

**I.C.D.C LIMITED.....1ST DEFENDANT**

**JULIUS OLOO AMIMO..... 2ND DEFENDANT**

**URTHUR OMONDI OJEE.....3RD DEFENDANT**

**R U L I N G**

1. **Douglas Rapemo Adero** and **William Odero Rapemo**, hereinafter referred to as the 1st and 2nd Plaintiffs, filed the notice of motion under certificate of urgency dated 23rd September 2015 under Sects 1A, 1B and 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya against **I.C.D.C Limited**, **Julius Oloo Amimo** and **Urthur Omondi Ojee**, hereinafter referred to as 1st to 3rd Defendants respectively seeking for stay of proceedings or any other action by the Defendants pending the hearing and determination of the plaintiffs application dated 25th August 2015. The plaintiffs also pray that their quiet enjoyment of the land in question be sustained pending the hearing and determination of the application". The application is based on five grounds on the notice of motion including that the 2nd Defendant had served the 1st Plaintiff with a notice of eviction from the suit parcel. The application is supported by the affidavit of **William Odero Rapemo** sworn on 23rd September 2015.

2. The 1st Defendant has opposed the application through the five grounds listed on the notice of grounds of opposition dated 28th September 2015. The grounds includes that the application is brought under the wrong provisions of the law and hence defective, misconceived, incompetent and an abuse of the process of the court.

3. The matter came up in court on 1st October 2015 and directions were issued that written submissions be filed in respect of the application dated 23d September 2015 within 14 days. The matter came up again for mention on 12th November 2015 and Mr Mwamu and M/S Alinative for plaintiffs and 2nd Defendant were present. The court was told that the submissions for the plaintiff and 2nd Defendant had been filed and the matter was placed for ruling today.

The court has perused the record and found the two written submissions both dated 26th October 2015. That by the 2nd Defendant counsel was filed on 26th October 2015 while that by the plaintiffs counsel was filed on 27th October 2015. The two submissions are in respect of the notice of motion dated 27th August 2015 as is discernable on their headings. The court has nevertheless continued to prepare its ruling on the application dated 23rd September 2015 even though no submissions have been filed by

either party as no directions on filing of written submissions had been taken on the application dated 27th August 2015.

4. The court has carefully considered the grounds on the notice of motion dated 23rd September 2015, the grounds of opposition by the 1st Defendant and the supporting affidavit by the 2nd plaintiff. The court has further perused the court record and come to the following determinations:

a) That from the date the dismissal order of 13th July 2015 was made there are only two applications that have been filed by the Plaintiffs. These are the notice of motion dated 27th August 2015 and filed in court on the same date and that dated 23rd September 2015 and filed on the same date. There is no application filed by the Plaintiffs dated 25th August 2015 as suggested in prayer 2 of the notice of motion dated 23rd September 2015. the court cannot therefore consider issuing stay orders awaiting the hearing and determination of an application that is not in this proceedings and for that reason prayer 2 cannot be granted.

b) That according to the plaint dated 23rd January 2002 and amended on 15th May 2002, the Plaintiffs had sought orders declaring "that the purported sale of land parcel No. **Kisumu/Manyatta 'A'/3220** by the 1st Defendant through the Public Auction to the 2nd Defendant and its consequential changes of hand and or registration are null and void for all purposes and a declaration that the 2nd Plaintiff has acquired possession by adverse possession." the plaintiff also prays that the 3rd Defendant be injected from evicting them from the suit land until the suit is heard and determined and " a declaration that 1st Plaintiff was holding the land in trust for the 2nd Plaintiff and other family members." By the court's order of 13th July 2015, the suit was dismissed with no orders as to costs under Order 17 Rule 2 of the Civil Procedure rules. There is therefore nothing to stay about the plaintiffs case as the same stands dismissed for want of prosecution and their notice of motion dated 27th August 2015 seeking to resubstate it yet to be heard and determined.

c) That prayer 3 about suntaning the Plaintiff quiet enjoyment of the land in question is unclear. If the plaintiffs were seeking for an order restraining the Defendants, then a specific prayer citing the appropriate provision of the Civil Procedure rules should be pleaded as the plaintiffs are represented by counsel. That aside, a restraining order is incapable of being considered favourably where it is not based on a main suit or claim. The main suit in this case stands dismissed by virtue of the order dated 13th July 2015. though article 159(2) (d) of the constitution requires the court to do justice without regard to procedural technicalities and **Section 1A, 1B and 3A of the Civil Procedure Act** sets out the objectives, duty of the court and inherent powers of the court respectively, the said provisions cannot come to the aid of the Plaintiffs in respect of the notice of motion dated 23rd September 2015. the said application is without merit in its entirety.

5. That for reasons set out above the plaintiffs notice of motion dated 23rd September 2015 is dismissed with costs.

It is so ordered.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered at Kisumu **02nd day of MARCH 2016**

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr Omondi for plaintiff/Applicant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**2/3/2016**

2/3/2016

S.M. Kibinja J

Court Assistant Oyugi

Parties absent

Mr Ayaya for Amondi for Plaintiff

Court: Judgment delivered in open court in Presence of Mr Ayaya for Amondi for Plaintiff.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**2/3/2016**