



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.98 OF 2014
ONERY ODIWUOR SADIAPLAINITFF
VERSUS
JOSIAH AGWAYO RADING..... DEFENDANT

RULING

1. By notice of motion dated 18th September 2014, **Onery Odwuor Sadia**, the plaintiff, prays for **Josiah Agwayo Rading**, the Defendant, to be punished by way of imprisonment for a period not exceeding six months or be fined or his property be attached and sold for being in contempt of this court's Order of 9th April 2014 which was served on him on the 11th April, 2014. The Plaintiff has listed four grounds on the application. The application is supported by the Plaintiff's affidavit sworn on 18th September 2014.
2. The application is opposed by the Defendant through his replying affidavit sworn on 22nd June 2015.
3. The court has carefully considered the grounds on the notice of motion, the supporting and replying affidavits and found as follows:

a) That when the plaintiff filed this suit through the plaint dated 8th April 2014, he contemporaneously filed the notice of motion of even date under certificate of urgency seeking for restraining order against the Defendant in respect of land parcel **North Gem/Got Regea/1025**. The counsel for the plaintiff appeared before the court on the 9th April 2014 and the application was certified urgent and restraining Order in terms of prayers 2 was granted pending the hearing and determination of the application.

b) The court order was extracted and issued by the Deputy Registrar on the same date with a penal notice at the foot. Though the Defendant denies that the Order was among the documents served on him on the 11th April 2014, the plaintiff has availed an affidavit of service sworn by **Paul Okech** on 18th September 2014 which confirms that the Order of 9th April 2014 were among the documents served on the Defendant on 11th April 2014. A copy of the Order with a signature and name of Defendant and dated 11th April 2014 at the back has been annexed to the plaintiff supporting affidavit. The court takes note of the fact that the Defendant did not challenge the writings on the back of the order in his replying affidavit or during the hearing of this application.

c) That though the plaintiff has deponed in paragraph 7 of the supporting affidavit that the Defendant has "**continued to destroy my crops**" and annexed two photographs in support, the two photographs only show a house, growing crops and trees and a person bending but

no evidence of damage. The photograph contains a date of 8th August 2014. The plaintiff also annexed a third photograph at paragraph 8 of the supporting affidavit showing that the Defendant was carrying out constructions on the suit land contrary to the Order of 9th April 2014. The Defendant has responded by saying that the house had been built and completed by the time the Order was served on him. The photographs carry a date of August 2014. The court is aware photographs and other electronic and digital materials are admissible in evidence. [See Section 78A of the Evidence Act Chapter 80 of Laws of Kenya]. In determining the weight to be accorded such evidence the court is expected to consider several things including;

i) the reliability of the manner in which the photos material was generated, stored and communicated;

ii) the reliability of the manner in which the integrity of the photographs was maintained.

iii. the manner in which the originator of the photographs was identified. In this instant case the plaintiff has not provided evidence on who took the photograph, processed and printed them and a certification to that effect. The court cannot therefore place much emphasis on the three photographs especially on the dates they were taken, the person who took them and their contents.

d. That the Defendant has through his filed statement of defence and counter claim dated 6th June 2014 laid a claim on the suit land. It would therefore be desirable that the obtaining **status quo** be maintained to enable the parties move to the hearing of the main suit so that the issue of entitlement of the suit land can be decided one way or another.

4. That flowing from the foregoing the plaintiff's application dated 18th September 2014 is dismissed with costs in the cause.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2016

In presence of;

Plaintiff Present

Defendant Present

Counsel Mr Ariko for Onyango for Plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016

ELC 98 OF 2014

9/3/2016

S.M. Kibunja J

Court Assistant Oyugi

Mr Ariko for Onyango for Plaintiff

Defendant: My advocate has not come.

Court: Ruling delivered in open court in presence of the parties, Mr Ariko for Onyango for Plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016