



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC CASE NO.275 OF 2015

BENARD OMBOKE AGOTPLAINTIFF

VERSUS

PAUL ODHIAMBO ABONYO1ST DEFENDANT

SIAYA COUNTY GOVERNMENT..... 2ND RESPONDENT

RULING

1. **Benard Omboke Agot**, the Applicant, filed the notice of motion dated 13th October 2015 against **Paul Odhiambo Abonyo** and **Siaya County Government**, the 1st and 2nd Respondents respectively, seeking to restrain the Respondents from " **trespassing into and or developing plot No.6 of Bondo Subcounty Siaya County either in part or the entire parcel** " pending the hearing and determination of this suit. The application is based on the five grounds on its face and supported by the affidavit of the Applicant sworn on 13th October 2015.

2. The application is opposed by the 1st Respondent through his replying affidavit sworn on 18th January 2016.

3. The application came up for hearing on the 16th February 2016 when Mr Odhaimbo advocate for the Applicant and the 1st Respondant in person made their rival submissions. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties, submission by counsel on one part, and the 1st Respondent on the other part, and come to the following determination;

a) That for an Applicant to be successful in an application for interlocutory injunction, the Applicant must establish a prima face case with a probability of success. The Applicant should also show that unless the order sought is granted he would suffer irreparable loss and that the balance of convenience tilts in his favour. [See **Giella -V- Cassman Brown Co. Ltd** [1973] E.A 358].

b) That the facts presented by the Applicant through the copy of the Minutes of Bondo Works Trade, Planning, Housing, Education and Social Services Committee meeting of 7th July 1992 the County clerk under minute3/92 informed the members that he had discussed with the District Commissioner and proposed to allocate plot **No.6 to Okech Agot and Bernard Omboko**. The members discussed the matter and resolved to give the County Clerk time to finalise the matter with the District Commissioner to effect the allocation. There is however no evidence presented, to confirm whether the County Clerk finalized the discussion with the District Commissioner and whether the Committee minutes were adopted by the Full Council meeting. The only other documentary evidence availed by the Applicant are the copies the letters dated 26th September 2014 and 21st October 2014 plus copy of a part development plan for a proposed business cum residential plots which appears not to be approved by the relevant officers. The letters are addressed

to the Physical Planning Officer, the Manager and Secretary Siaya County government. The Applicant has in the letter complained that he was not given allotment letters for the plot No.6 contrary to the recommendation of the meeting of 7th July 1992. The applicant further states that the plot No.6 has since been taken over by the 1st Respondent who was allocated the plot thorough fraud means. The 1st Respondent has disputed the Applicant's claim and annexed a copy of letter of allotment dated 20th My 1997 showing that he was allocated unsurveyed Commercial plot No.2 Bondo measuring about 0.492 hectares. He also annexed a copy of the part development plan for the area the plot is situated which appears to be duly approved by the concerned offices. The 1st Respondent has also annexed in his list of documents copies of invoices dated 21st December 2011 and receipts for payments dated 21st December 2011 and 4th January 2012. That though the court is not expected to pronounce itself with finality on matters of law and facts at this interlocutory stage, from the facts so far availed, the 1st Respondent appears to have a better claim to the suit property described by the 1st Respondent as unsurveyed commercial plot No.2 then the Applicant. The court therefore finds that the Applicant has not discharged his duty to establish a prima facie case with a probability of success at this stage to be entitled to the interlocutory injunction order.

c) That the Applicant, not having in his possession any documentary evidence to confirm that the Committee Meeting recommendation of 7th July 1992 were adopted by the full Council Meeting or that the plot No.6 was finally allocated to him and that he has duly paid the requisite payments, there is no way he would be exposed to any loss, leave alone irreparable loss, if the injunction orders are not issued at this stage. He cannot lose what he does not have in the first place.

d) That the balance of convenience do not tilt to the favour of the Applicant as he has not shown that he is entitled to the plot allotted to the 1st Respondent.

e) That the evidence so far availed to the court does not show that the plot allocated to the 1st Respondent, and described as unsurveyed plot No.2, is the same as the plot the Applicant claim was to be allocated to him described as Plot No.6.

4. That from the foregoing, the notice of motion dated 13th October 2015, is without merit and is dismissed with costs to the 1st Respondent.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF APRIL 2016

In presence of;

Applicant Absent

Respondent s Absent

Counsel Mr Oriel for Applicant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/4/2016

13/4/2016

S.M. Kibunja J

Oyugi court clerk

Mr Oriel for Applicant

Court: Ruling delivered in open court in presence of Mr Oriel for the Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/4/2016