



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 559 OF 2015**

**(FORMERLY HCCC NO. 231 OF 2011)**

**IN THE MATTER OF SALE OF TITLE NO. KISUMU/FORT- TERNAN/856 PURSUANT TO A SALE AGREEMENT DATED  
6<sup>TH</sup> FEBRUARY, 2009**

**ALICE MBINYA OMBAYO.....1<sup>ST</sup> PLAINTIFF**

**JACOB ODHIAMBO OMBAYO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY ISINYA NDISI.....1<sup>ST</sup> DEFENDANT**

**BOAZ OKELLO.....2<sup>ND</sup> DEFENDANT**

**JUDITH OKELLO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Alice Mbinya and Jacob Odhiambo Ombayo, the Plaintiffs, filed the notice of motion dated the 16<sup>th</sup> May 2016 seeking for temporary order of injunction restraining Henry Isinya Ndisi, Boaz Okello and Judith Okello, the Defendants, their employees, agents, representatives, assigns or any other person acting through their directions from trespassing upon, building upon or in any other way dealing in or interfering with the Plaintiffs' land parcel number Kisumu/Fort-Tenan/856, pending the hearing and determination of the suit. They also seek for an order of prohibition to issue against title number Kisumu/Fort-Tenan/856 stopping and or preventing any transfer, subdivision or any interference with the said title. They also seek for an order to serve the Defendants through substituted service. The application is based on the nine (9) grounds on its face and supported by the affidavits of Alice Mbinya Ombayo and Jacob Odhiambo Ombayo, sworn on the 16<sup>th</sup> May 2016. The Plaintiffs' case is that they had started buying the suit land and paid Kshs. 4.5 million, leaving a balance of Kshs. 1.5 million. That they were placed into possession, erected a house on the land and have been farming thereon peacefully until the Defendants illegally and without any colour of right started trespassing thereon.

2. The application is opposed by Henry Isinya Ndisi, the 1<sup>st</sup> Defendant, through the six (6) grounds of opposition dated the 12<sup>th</sup> March 2018, summarized as follows;

**a) That the application is misconceived, frivolous, vexatious and premised on the wrong law.**

**b) That the Plaintiffs came to court with unclean hands and have no cause of action against the Defendants.**

**c) The Plaintiffs are guilty of laches and have not completed paying the purchase price under the agreement dated 6<sup>th</sup> February 2009.**

3. The application came up for hearing on the 14<sup>th</sup> March 2018 when directions on filing and exchanging written submissions were given. The learned Counsel for the Plaintiffs filed theirs dated 8<sup>th</sup> June 2018, and served upon the 1<sup>st</sup> Defendant's Counsel on the 11<sup>th</sup> June 2018. That the 1<sup>st</sup> Defendant's Counsel has not filed any submission despite being given opportunity to do so.

4. The following are the issues for the Court's determination;

**a) Whether the Plaintiffs have established a prima facie case with a probability of success for temporary injunction order to issue at this interlocutory stage.**

**b) Whether the Plaintiffs have made a reasonable case for prohibition order, against the suit land's title, to issue.**

**c) Who pays the costs.**

5. The Court has after considering the grounds on the application, grounds of opposition, the affidavit evidence and submissions by Counsel for the Plaintiffs come to the following conclusions;

a) That the existence of a sale agreement between the Plaintiffs as purchasers, and the 1<sup>st</sup> Defendant as vendor, of land parcel Kisumu/Fort-Tenan/856 dated 6<sup>th</sup> February 2015 has not been disputed. That it is also clear the Plaintiffs have not paid the whole purchase price as they have acknowledged in their pleadings that a balance of KShs. 1.5 million is outstanding.

b) That the payments made under the sale agreement as detailed by the Plaintiffs has not been rebutted by the Defendants as they have not filed any replying affidavits or statement of defence to date.

c) That the Plaintiffs' claim that they are in possession of the suit land, and that they have done considerable development thereon including erecting a house, has also not been rebutted by the Defendants.

d) That the Plaintiffs have also annexed to the supporting affidavit in support of the originating summons a copy of letter of consent to transfer the suit land to their names dated the 27<sup>th</sup> January 2009 which has not been challenged.

e) That the 1<sup>st</sup> Defendant's Counsel did not offer submission in support of the grounds of oppositions filed in reply to the application.

f) That in view of the foregoing, the court finds merit in the Plaintiffs' application for temporary injunction and prohibition order. That the prayer for substituted service appear to have been abandoned as Counsel for the Plaintiffs did not submit on it. That the application did not seek for costs, and though Counsel submitted on it in the last sentence of their written submission, none will be awarded.

6. That flowing from the foregoing, the court finds merit in the Plaintiffs' application dated the 16<sup>th</sup> May 2016 and the same is granted in terms of three (3) and four (4) only.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF APRIL 2019

**In the presence of:**

Plaintiffs Absent

Defendants Absent

Counsel Mr. Yogo for the Plaintiff

Mr. Oluoma for Olel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**